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UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

Report of the Panel

The report of the Panel on United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 28 February 2001 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 18 November 1999, Japan requested consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article 17.2 of the Anti-Dumping Agreement and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").[1] The United States and Japan consulted on 13 January 2000, but failed to settle the dispute.

1.2 On 11 February 2000, Japan requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.[2]

1.3 At its meeting on 20 March 2000, the Dispute Settlement Body (DSB) established a Panel in accordance with the request made by Japan in document WT/DS184/2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS184/2, the matter referred to the DSB by Japan in document WT/DS184/2, 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 On 9 May 2000, Japan requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 24 May 2000, the Director-General composed the Panel as follows[3]:

Chairman: Mr. Harsha V. Singh

Members: Mr. Yanyong Phuangrach
Ms. Elena Lidia di Vico

1.5 Brazil, Canada, Chile, the European Communities and Korea reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 22-23 August 2000 and on 27 September 2000. It met with the third parties on 23 August 2000.

1.7 The Panel submitted its interim report to the parties on 22 January 2001.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by the United States of anti-dumping measures on imports of certain hot-rolled flat-rolled-carbon-quality steel products ("hot-rolled steel") from Japan.

2.2 On 30 September 1998, several US steel manufacturing companies, the United Steelworkers of America, and the Independent Steelworkers Union filed petitions for the imposition of anti-dumping duties on imports of certain hot-rolled steel products from Brazil, Japan, and Russia.[4] The

[1] WT/DS/184/1.
[2] WT/DS/184/2.
[3] WT/DS/184/3.
[4] Petition for the Imposition of Antidumping Duties: Certain Hot-Rolled Steel Flat Products From Japan, 30 Sept. 1998 ("Petition").

petitions also alleged that critical circumstances existed with regard to imports from Japan. Effective 30 September 1998, the United States International Trade Commission ("USITC") instituted its investigation to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports from the three countries of certain hot-rolled steel products that are alleged to be sold in the United States at less than fair value.[5]

2.3 After an examination of the information presented in the petition filed with respect to hot-rolled steel from Japan and the amendments thereto, the United States Department of Commerce ("USDOC") initiated an anti-dumping duty investigation on 15 October 1998.[6] USDOC determined that it was not practicable to examine all known producers/exporters and conducted its investigation on the basis of a sample of Japanese producers. Based on information concerning production volumes from all six Japanese producers, Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") were selected for individual investigation and calculation of a dumping margin (*i.e*, the "investigated respondents"), as these three companies accounted for more than 90 per cent of all known exports of the subject merchandise during the period of investigation.

2.4 Effective 16 November 1998, USITC issued an affirmative preliminary determination, finding a reasonable indication that the US industry was threatened with material injury by reason of hot-rolled steel imports from Brazil, Japan, and Russia.[7]

2.5 Effective 30 November 1998, USDOC issued its affirmative preliminary critical circumstances determination, finding that there is a reasonable basis to believe or suspect that critical circumstances exist for imports of hot-rolled steel from Japan and Russia. USDOC also determined not to make a preliminary determination of critical circumstances with respect to imports from Brazil. Based on its determination, USDOC stated that, upon issuance of an affirmative preliminary dumping determination, Commerce would direct the US Customs Service to suspend liquidation of all entries of Japanese hot-rolled steel for a period of ninety days prior to the preliminary dumping determination.[8] No specific measures were put into effect at this stage.

2.6 Effective 19 February 1999, USDOC issued a preliminary affirmative dumping determination, finding that hot-rolled steel from Japan was sold in the United States at dumped prices.[9] USDOC calculated the following preliminary margins of dumping:

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[5] Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, 63 Fed. Reg. 53926, 53927 (7 Oct. 1998) (instituting USITC investigations and scheduling preliminary phase investigations). Under US law, USITC "institutes" an investigation before the investigation is formally initiated, a decision which is made by USDOC.

[6] Initiation of Antidumping Duty Investigations: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Japan and the Russian Federation, 63 Fed. Reg. 56607, 56613 (22 Oct. 1998).

[7] Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, 63 Fed. Reg. 65221, 65221 (25 Nov. 1998); see also Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, Inv. Nos. 701-TA-384 and 731-TA-806-808 (Preliminary), USITC Pub. 3142 at 1 (Nov. 1998) ("USITC Preliminary Injury Determination").

[8] Preliminary Determinations of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation, 63 Fed. Reg. 65750, 65751 (30 Nov. 1998) ("USDOC Preliminary Critical Circumstances Determination") .

[9] Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 Fed. Reg. 8291, 8299 (19 Feb. 1999) ("USDOC Preliminary Dumping Determination").

KSC	67.59%
NSC	25.14%
NKK	30.63%
All Others Rate	35.06%.

The "All Others" rate, applicable to companies not investigated, was calculated as the weighted average of the margins calculated for the three investigated respondents. Pursuant to its earlier critical circumstances finding, USDOC ordered suspension of liquidation and posting of cash deposits or bonds for entries made 90 days prior to the 19 February 1999 effective date of the preliminary determination of dumping, that is, retroactive to 21 November 1998.[10]

2.7 Following its preliminary affirmative dumping determination, USDOC issued several more requests for information, conducted verification at the three investigated respondents' offices in Japan (and the US in some cases), received interested party comments, and held a public hearing on 21 April 1999. On 6 May 1999, USDOC published its final determination that respondents were selling hot-rolled steel in the United States at the following margins of dumping:

KSC	67.14%
NSC	19.65%
NKK	17.86%
All Others Rate	29.30%.[11]

USDOC also made a final negative determination of critical circumstances as to NSC and NKK based on the fact that they had final dumping margins below the 25 per cent threshold used to impute importer knowledge of dumping. However, USDOC continued to find that critical circumstances existed as to KSC and the "all others" companies.

2.8 Following USDOC's preliminary determination of dumping, and while USDOC was conducting the final dumping investigation, USITC instituted and conducted the final injury investigation. Following collection of information, submission of briefs by interested parties and a public hearing held on 4 May 1999, USITC voted unanimously on 11 June 1999, that the US industry was materially injured or threatened with material injury by reason of hot-rolled steel imports from Japan.[12] On 23 June 1999, USITC published its final affirmative determination of injury. USITC also made a negative determination with respect to critical circumstances, concluding that the increase in imports in a short period of time was not sufficient to warrant a finding that the imports would undermine the remedial effects of the anti-dumping duty order.[13]

[10] In US practice, duties are not actually collected as a provisional measure. Rather, the process of determining the exact amount of duties of all types owed on a specific import transaction, called "liquidation", is not carried out, *i.e.* is suspended, and a deposit or bond in the amount of the preliminary dumping margin is required on all imports.

[11] Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 Fed. Reg. 24329, 24370 (6 May 1999) ("USDOC Final Dumping Determination").

[12] In US practice the Commissioners on the USITC vote individually, but all affirmative determinations are counted together in assessing the ultimate outcome. In this case, all six Commissioners made affirmative determinations, but five found current material injury, while one found threat of material injury.

[13] Certain Hot-Rolled Steel Products From Japan, 64 Fed. Reg. 33514, 33514 (23 Jun. 1999); Certain Hot-Rolled Steel Products From Japan, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (Jun. 1999).

2.9 On 29 June 1999, USDOC published an anti-dumping duty order imposing estimated dumping duties on imports from Japan at the rates announced in its final determination.[14] Since USITC had not found critical circumstances to exist, USDOC ordered the refund of any cash deposits and/or release of any guarantees provided for the period of the preliminary critical circumstances finding, 21 November 1998 - 19 February 1999.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. JAPAN

3.1 Japan requests that the Panel:

(a) find that the specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are inconsistent with various provisions of the AD Agreement, as follows:

- USDOC's application of adverse facts available to KSC's dumping margin was inconsistent with Articles 2.3, 6.8, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NKK's dumping margin were inconsistent with Articles 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NSC's dumping margin were inconsistent with Articles 2.4, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's inclusion of margins based on partial facts available in the calculation of the "all others rate" was inconsistent with Article 9.4;
- USDOC's exclusion and replacement of certain home market sales in the calculation of normal value through use of the 99.5 per cent arm's length test was inconsistent with Articles 2.1, 2.2, and 2.4;
- USDOC's application of a new policy with respect to preliminary critical circumstances determinations was inconsistent with Articles 10.1, 10.6, and 10.7;
- USITC's application of the captive production provision was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1;
- USITC's finding of a causal connection between imports and the domestic industry's injury was inconsistent with Articles 3.1, 3.4, and 3.5;

and to recommend that the DSB request the United States to bring these measures into conformity with the AD Agreement.

(b) find that the following actions undertaken by the United States were inconsistent with GATT 1994 Article X:3, including:

- USDOC's accelerated proceeding;
- USDOC's application of a revised critical circumstances policy;
- USDOC's failure to correct, prior to the final determination, the clerical error committed in calculating NKK's preliminary margin;
- USDOC's resort to adverse facts available with respect to respondents, coupled with USDOC's and USITC's decisions against applying facts available with respect to petitioners;

[14] Antidumping Duty Order; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 Fed. Reg. 34778, 34780 (29 June 1999).

- USITC's limited analysis to two years of the three-year period of investigation, in abandonment of its normal policy to analyze all three years;

and to recommend that the DSB request the United States to bring these actions into conformity with the GATT 1994;

(c) find that the United States' anti-dumping laws, regulations, and administrative procedures governing:

- the use of adverse "facts available" are inconsistent with Article 6.8 and Annex II of the AD Agreement;
- the calculation of an "all others" rate based on partial facts available are inconsistent with Article 9.4 of the AD Agreement;
- the exclusion and replacement of certain home market sales in the calculation of normal value by the arm's length test are inconsistent with Articles 2.1, 2.2, and 2.4 of the AD Agreement;
- "critical circumstances," including the generally applicable interpretations reflected in the Policy Bulletin issued on 8 October 1998, are inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement;
- the focus on the merchant market sales to the exclusion of the remainder of the domestic industry when determining injury by reason of imports are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the AD Agreement;

and recommend that the DSB request the United States to ensure, as stipulated in Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, the conformity of the above-listed elements of its anti-dumping laws, regulations, and administrative procedures with its obligations under the AD Agreement;

(d) recommend that, if the Panel's findings result in a determination that the imported product was either not dumped or that it did not injure the domestic industry, the DSB further request that the United States revoke its anti-dumping duty order and reimburse any anti-dumping duties collected;[15]

(e) recommend that, if the Panel's findings result in a determination that the imported product was dumped to a lesser extent than the duties actually imposed, the DSB further request that the United States reimburse the duties collected to the extent of the difference.

B. UNITED STATES

3.2 The United States requests the Panel to find that:

- the information submitted to this Panel by Japan that was not made available to US authorities during the course of the anti-dumping investigation at issue will be disregarded in this proceeding;

[15] In its second submission, Japan clarified that it was "not requesting specific remedies in this case. Japan did not mean to imply … that the Panel itself must re-determine either the dumping margins in the case, or whether there was injury by reason of imports. Those tasks clearly belong to the US authorities." Second Submission of Japan, Annex C-1, footnote 391. However, Japan reiterated that "the Panel findings in this case should be quite specific and concrete. The Panel should not make general findings, noting violations without specifying precisely what the US authorities did incorrectly, and then leave it to the US authorities to decide what to do. … The Panel's duty is to provide a very clear and detailed roadmap for how the US authorities can fulfill their international obligations in this case." *Id*., para 293.

- Japan's claim concerning the United States' general practice with respect to "facts available" was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference;

- the specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are consistent with the provisions of the Anti-Dumping Agreement identified by Japan under point (a);

- none of the actions identified by Japan under point (b) was inconsistent with Article X:3 of the GATT 1994;

- the United States' anti-dumping laws, regulations, and administrative procedures governing the issues identified by Japan under point (c) are not inconsistent with the provisions of the Anti-Dumping Agreement identified in that paragraph.

- The specific remedies requested by Japan in its first submission, reproduced at points (d) and (e) above, are contrary to established practice and the DSU.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel (see Annexes, as listed above).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Brazil, Canada, Chile, the European Communities and Korea, are set out in their submissions to the Panel (see Annexes, as listed above).

VI. INTERIM REVIEW

6.1 Both parties filed comments on the interim report on 29 January 2001. The parties' comments were limited to the identification of clerical errors. Neither party requested an interim review meeting.

6.2 In response to the parties' comments, the Panel corrected typographical and other clerical errors throughout the Report, and also corrected typographical and other clerical errors it had itself identified, consistent with WTO editorial standards.

VII. FINDINGS

A. PRELIMINARY OBJECTIONS

7.1 The United States makes two preliminary objections.[16] The United States requests that certain evidence presented for the first time before this Panel be disregarded, and objects, as falling

[16] The United States requested a ruling on these preliminary objections at its first meeting with the parties, which we did not issue, as we concluded it was not appropriate at that time.

outside the Panel's terms of reference, to a claim made by Japan concerning the US "general practice", including statutory and regulatory provisions, regarding the use of adverse facts available.

1. Exclusion of certain evidence

(a) Arguments

7.2 The United States claims that evidence which was submitted by Japan during this proceeding, but which was **not** before the investigating authority during the anti-dumping investigation, may not be examined by the Panel. The United States, relying on Article 17.5(ii) of the AD Agreement, argues that we are to examine the decisions of the investigating authorities on the basis of the facts that were available to them and not on the basis of new facts revealed for the first time before the Panel. Consequently, the United States submits that we should disregard *in toto* four affidavits prepared for the purpose of these panel proceedings by the American attorneys of NSC, NKK, KSC and by one statistician, as well as numerous newspaper Articles that were not presented in the course of the investigation, or were presented to only one of the US authorities conducting the investigation.[17] In this latter regard, the United States argues that we should disregard documents submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record, even if those documents were put on the USITC administrative record.

7.3 The US argument is based in part on Article 17.5(ii) of the AD Agreement which provides that a panel shall examine the matter before it on the basis of "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" and the interpretation given to this provision by, *inter alia,* the Panel in *Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*[18] ("*Mexico-HFCS"*). The United States argues that by presenting new testimony that was not before the appropriate authority, Japan seeks to have the Panel go beyond its mission under Article 17.6(i) of the AD Agreement to determine whether the establishment of the facts by the investigating authority was proper and its evaluation of those facts unbiased and objective.[19] The United States further argues that the nature of the anti-dumping investigation itself directs that the Panel not consider extra-record evidence. Moreover, the United States submits, to allow only Japanese producers an opportunity to present new evidence would go against the guarantee expressed in Article 6.1 of the AD Agreement that all interested parties may present evidence.

7.4 Japan submits that the United States has failed to provide adequate justification for the Panel to reject the challenged evidence and arguments. First, Japan disagrees with the US interpretation of Article 17.5 of the AD Agreement. Japan submits that Article 17.5(ii) provides that a panel shall base

[17] The United States specified the exhibits to Japan's submissions which it asserted should not be considered by the Panel in its answer to the Panel's question number 25 following the first meeting of the Panel with the parties. Responses of the United States to Questions from the Panel, Annex E-3, para. 7 – 13.

[18] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ("*Mexico – HFCS*"), WT/DS132/R, adopted 24 February 2000, para. 7.10. The United States also refers to *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States -- Shirts and Blouses*"), WT/DS33/R, adopted as modified (WT/DS33/AB/R) 23 May 1997, para. 7.21. This case involved the Agreement on Textiles and Clothing; however, the United States asserts that the language of Article 17.5(ii) is substantially the same as the corresponding ATC language. The United States further refers to *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, ("*Korea - Dairy Safeguard*") WT/DS98/R, adopted as modified (WT/DS98/AB/R) 12 January 2000, para. 7.30.

[19] The United States claims that this also applies to the two Exhibits JP-19 and JP-20 that Japan submitted in relation to its Article X claim and argues that these two exhibits which could have been submitted to the authority, but were not, should not be considered by the Panel. According to the United States, Article 17.5(ii) does not apply to Japan's on-its-face challenges, but asserts that no new evidence is submitted by Japan in relation to such claims.

its examination on the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member. However, in Japan's view, Article 17.5(ii) does not say anything about what was or was not on the "administrative record". Japan argues that inherent in Article 17.5(ii) is the possibility that facts were "made available" to the investigating authority, but were for one reason or another not placed on the administrative record. Japan notes that Article 17.5(ii) does not refer only to information accepted by the authorities, and thus recognizes that information might be offered to the authorities but then inappropriately rejected. In Japan's view, Members must be permitted to submit evidence that explains or demonstrates how the authority's investigating procedures or determinations were unfair, unreasonable or biased. Japan maintains that such information will, more often than not, be "extra-record" evidence, since it is the investigating authority itself that determines what evidence is placed on the record. Japan argues that an authority cannot be permitted to exclude evidence inappropriately and then take advantage of the incomplete record to defend itself in the examination of its action by a WTO panel. In this regard, Japan rejects the US reliance on the distinction between the administrative records of USDOC and the USITC, arguing that information on the record of either authority may be relied upon before the Panel to challenge the determination of either authority.

7.5 Japan also relies on statements made by the United States in other WTO proceedings concerning admissibility of *amicus curiae* briefs and other evidence which are contrary to its arguments in this case.[20] Japan submits that the Panel should exercise its substantial discretion to accept evidence. Japan argues that the Appellate Body has made it clear that, based on Articles 12 and 13 of the DSU, it is the responsibility of the panel to determine the admissibility and relevance of the evidence proffered by the parties to a dispute.[21] Japan submits that the Appellate Body statements on this matter are also valid with regard to this case since there is no conflict between Article 17.5(ii) of the AD Agreement and Articles 11 to 13 of the DSU and the provisions thus complement each other. Finally, Japan argues that the standard of Article 17.5(ii) of the AD Agreement only guides the Panel with regard to its review of actual investigations. Japan maintains that Article 17.5(ii) is not applicable to the evidence to be considered in connection with Japan's challenges to US statutory and regulatory provisions, that do not depend on the administrative record, and is also not applicable to the evidence to be considered in connection with Japan's claims under Article X:3 of GATT 1994.

(b) Finding

7.6 A panel is obligated by Article 11 of the DSU to conduct "an objective assessment of the matter before it". In this case, we must also consider the implications of Article 17.5(ii) of the AD Agreement as the basis of evidentiary rulings. That Article provides:

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[20] Japan refers to *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, para. 38; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, para. 79. Japan also points to a US statement in *Mexico - HFCS* where the United States argued that "it could attach as an Exhibit to its submission in an anti-dumping case the phone book of Mexico City. The issue would not be its admissibility, but rather what evidentiary weight the Panel should attach to the information in the phone book". See *Mexico - HFCS*, footnote 540. Japan maintains that the Panel in that dispute under the AD Agreement accepted extra-record evidence. *Id*., para. 7.34.

[21] Japan refers to the Appellate Body Report in *United States — Shrimp*, paras. 104-106. The Appellate Body stated:

> "The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements*". (Emphasis in original).

> "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: …
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement[22] in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation. Thus, for example, in examining the USITC's determination of injury under Article 3 of the AD Agreement, we would not consider any evidence concerning the price effects of imports that was not made available to the USITC under the appropriate US procedures. Japan acknowledges that Article 17.5(ii) must guide the Panel in this respect, but argues that it "complements" the provisions of the DSU which establish that it is the responsibility of the panel to determine the admissibility and relevance of evidence offered by parties to a dispute. We agree, to the extent that it is our responsibility to decide what evidence may be considered. However, that Article 17.5(ii) and the DSU provisions are complementary does not diminish the importance of Article 17.5(ii) in guiding our decisions in this regard. It is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.[23]

7.7 The conclusion that we will not consider new evidence with respect to claims under the AD Agreement flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities. We note that several panels have applied similar principles in reviewing determinations of national authorities in the context of safeguards under the Agreement on Safeguards and special safeguards under Article 6 of the Agreement on Textiles and Clothing. There is no corollary to Article 17.5(ii) in those agreements. Nonetheless, these panels have concluded that a *de novo* review of the determinations would be inappropriate, and have undertaken an assessment of, *inter alia*, whether all relevant facts were considered by the authorities.[24] In that context, the Panel in *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("United States – Wheat Gluten")* recently observed that it was not the panel's role to collect new data or to consider evidence which could have been presented to the decision maker but was not.[25]

7.8 Japan points out that it is the investigating authorities that control the receipt of information during the investigation, and thus could unjustly reject information submitted by a party, which a party might subsequently wish to present to a Panel reviewing the determination. This possibility raises an interesting question which is not really at issue before us. Japan has not made a claim that the anti-dumping measure is inconsistent with the provisions of the AD Agreement because the USITC or the USDOC wrongly rejected information submitted during the course of the

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[22] We note that there is no claim under Article VI of GATT 1994 in this case, so we need not consider whether Article 17.5(ii) has implications for the evidence a panel may consider in that context.

[23] See, for example, Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico ("Guatemala – Cement II")*, WT/DS156/R, adopted 17 November 2000, para. 8.19.

[24] Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("United States - Wheat Gluten")*, WT/DS166/R, para. 8.6, adopted as modified (WT/DS166/AB/R) 19 January 2001.; Panel Report, *Korea-Dairy Safeguard*, para. 7.30, Panel Report, *Argentina – Safeguard Measures on Imports of Footwear ("Argentina - Footwear Safeguard")*, WT/DS121/R, para. 8.117, adopted as modified (WT/DS121/AB/R) 12 January 2000.

[25] Panel Report, *United States - Wheat Gluten*, para. 8.6.

investigation.[26] Thus, the principal question presented by the United States' preliminary objection is whether we should exclude from our consideration in this dispute certain evidence that was not submitted to the US investigating authorities during the investigation.

7.9 It is important to note that, in this case, Japan's claims are not limited to challenges under the AD Agreement to the final anti-dumping measure imposed by the United States. Japan also claims that certain US statutory provisions are inconsistent with the AD Agreement on their face, and claims that the United States did not administer its anti-dumping laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner", in violation of Article X of GATT 1994. There is no claim that the challenged evidence is relevant to the claims of inconsistency of certain statutes on their face.[27] Japan does, however, argue that the challenged evidence is relevant to the claims under Article X of GATT 1994. In our view, the evidence to be considered in connection with Japan's Article X claim is not limited by the provisions of Article 17.5(ii) of the AD Agreement To the extent there are any limits to the evidence that may be considered in connection with Japan's claim under Article X of GATT 1994, these would derive from the provisions of the DSU itself, and not the AD Agreement.

7.10 Under Article 13.2 of the DSU, Panels have a general right to seek information "from any relevant source". We note that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement.[28] The DSU (as opposed to the AD Agreement) contains no rule that might be understood to restrict the evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:

> "The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the "evidence" with a wider scope in international proceedings…. Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case".[29]

It seems to us that, particularly in considering allegations under Article X of GATT 1994, we should exercise our discretion to allow the presentation of evidence concerning the administration of the defending Members' anti-dumping laws, which might in any event go beyond the specific facts made available to the administering authority in accordance with appropriate domestic procedures during the course of a single anti-dumping investigation.

7.11 This places us in the difficult situation of attempting to determine, at the outset, in the context of a preliminary objection, exactly which evidence is relevant to which of Japan's claims, and make exclusionary rulings *ab initio*. With respect to the newspaper articles the United States has challenged, we note that they may be relevant to Japan's claim of bias under Article X of GATT 1994, and therefore consider that it is not appropriate to exclude them at the outset. With respect to the attorneys' and statistician's affidavits, we note that while they contain certain factual statements, they also set out arguments and analysis in support of Japan's claims in this dispute, which may

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[26] Japan does assert that two of the affidavits challenged by the United States contain facts concerning the weight conversion factors that were not considered by the USDOC. However, as is clear from our decision regarding the issue of the application of facts available, the specific facts concerning the weight conversion factors are not relevant to our determination and were not considered.

[27] In this context, we note that we doubt whether the limitation in Article 17.5(ii) would affect a panel's ability to consider new evidence in the context of a challenge to a statute on its face.

[28] Appellate Body Report, *United States - Shrimp*, paras. 104-106.

[29] Kazazi, Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Malanczuk, Peter, ed. (The Hague, Kluwer Law International) at pp. 180, 184.

appropriately be brought before a panel. Thus, we have determined not to exclude the four affidavits, the newspaper articles, and the profit and web-site information contained in exhibits JP-16-23, 25-28, 32(a) - 32(f), 33, 34-38, 44, 46, 56, 105, and note 353 of Japan's second written submission. To the extent that these exhibits purport to present facts relating to the USDOC or USITC determinations different from or additional to those that were made available to those authorities in conformity with appropriate domestic procedures during the course of the investigation, we have not taken such facts into account in our review of those determinations.

7.12 There is, however, a significant distinction between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making our decisions. That we have concluded that it is not appropriate to exclude from this proceeding at the outset evidence put forward by Japan has no necessary implications concerning the relevance or weight of that evidence in our ultimate determinations on the substantive claims before us. Moreover, we wish to emphasize that we have conducted our examination of the challenged final anti-dumping measure and the underlying determinations of the USDOC and USITC in strict observance of the requirements of Article 17.5(ii).

2. Claim allegedly not within the Panel's terms of reference

(a) Arguments

7.13 The United States asserts that Japan's claim that the USDOC's "general practice" concerning adverse facts available violates the AD Agreement was not made in the request for establishment of a panel. The United States maintains that Japan did not refer USDOC's "general practice" regarding facts available, which is based on the US statute, to the DSB, but only referred the specific application of this practice to the companies involved in the investigation underlying this dispute. Thus, in the US view, the Japanese claim regarding the USDOC's "general practice" on facts available falls outside the Panel's terms of reference.

7.14 The United States notes that Japan made clear in its request for establishment of a panel those instances in which it challenged both the law on its face and the specific application of statutory provisions in the underlying investigation. The United States asserts that the broad counts of conformity under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the AD Agreement set out in section E of the request for establishment do not lead to the conclusion that USDOC's general practice on facts available, which was not mentioned in the panel request, may now be challenged. The United States finds support for its claim in the Appellate Body's statement in *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*[30] *("Korea-Dairy Safeguard")* that "any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request" and similar statements in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*[31] (*"Guatemala – Cement I").*

7.15 Japan maintains that it properly made a claim concerning USDOC's general practice regarding adverse facts available. Japan explains that it did not challenge US statutory provisions in this respect but rather the manner in which these provisions have been applied in practice by USDOC.[32] Japan submits that its claim is based on Article XVI:4 of the WTO Agreement, and is clearly set out in section "E. CONFORMITY" of the request for establishment.[33] Japan argues that by

[30] Appellate Body Report, *Korea – Dairy Safeguard,* para. 139.

[31] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, paras. 72 and 77.

[32] Japan argues that this is also evident from its arguments in this regard in paragraph 60 of its first submission.

[33] Japan argues that the specific determination challenged in this dispute reflected the specific decision to apply adverse facts available in this case as well as the general policy on adverse facts available. Japan further

including in this section of its panel request a reference to all “above-detailed laws, regulations, and administrative rulings” and explicitly claiming them to be inconsistent with Article XVI:4 of the WTO Agreement, it made it perfectly clear to both the United States and interested third countries that the matter it was submitting to the DSB comprised not only the actions taken in the specific case but also the US anti-dumping law on which these actions were based, including the law governing the application of facts available as interpreted and applied by USDOC, which constitutes the "general practice" on facts available. Finally, Japan argues that the United States failed to demonstrate how Japan's panel request has prejudiced the United States' ability to defend itself.[34] Japan therefore requests the Panel to reject the US preliminary objections.

(b) Finding

7.16 We consider that the United States' preliminary objection raises two separate but related issues. First, has Japan identified as a measure at issue in this dispute the US "general practice" concerning facts available ? Second, and assuming that Japan has not identified the US "general practice" in this regard as a separate measure in dispute, has Japan, in the context of its challenge to the definitive anti-dumping measure, stated a claim regarding the "general practice" concerning facts available with sufficient clarity, consistent with Article 6.2 of the DSU.

7.17 The Appellate Body has made it clear that a matter referred to the DSB consists of a measure and the claims concerning that measure.[35] In this dispute, it is clear that Japan has raised the final anti-dumping measure as a measure at issue. Japan has also identified certain provisions of US laws and regulations as measures at issue -- these provisions are specifically identified in paragraphs A.3 (law governing calculation of the all others rate), A.5 (law governing preliminary critical circumstances determinations), and B.2 (law regarding treatment of captive production in injury analysis) of its request for establishment. However, based on our review of the request for establishment, we do not see that Japan has raised the US "general practice" regarding facts available as a measure at issue in this dispute .

7.18 The "general practice" regarding which Japan asserts it has raised a claim is the USDOC's practice of, when applying adverse facts available, looking for facts that are "sufficiently adverse" to accomplish the goal of inducing respondents to provide complete and accurate information. This practice, while it is based on the US statute, is not explicitly set out in either the US statute, regulation, or any other binding policy statement of USDOC. Rather, it has been set out in the determination in this and other investigations to explain the USDOC's choice regarding the particular facts available it will consider in making its determination. Even assuming that a claim regarding the consistency of a "general practice" can be made in the WTO dispute settlement system, we are of the opinion that the request for establishment in such a case must identify such practice with sufficient clarity.[36]

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argues that Section A and Section E of the request for establishment, which relate to these two claims respectively, must be read together.

[34] Japan argues that the Appellate Body has placed the burden on the responding country to demonstrate how it was prejudiced by the method of listing violations in the panel request. Japan refers in this respect to the Appellate Body Report, *Korea – Dairy Safeguard*, para. 129-131.

[35] Appellate Body Report, *Guatemala – Cement I*, para. 73.

[36] Japan has relied on the Panel's decision in *United States - Sections 301-310 of the Trade Act of 1974* (*"United States – Section 301"*), WT/DS152/R, adopted 27 January 2000, paras. 7.24 – 7.27, in support of its contention that a "general practice" can be challenged directly. First Written Submission of Japan, Annex A-1, para. 60. However, we note that in that case, the measure in dispute was the statutory provisions, unlike here. The Panel in that decision explained that in deciding whether those statutory provisions were or were not consistent with the relevant WTO obligations, it was necessary to consider the internal criteria or administrative procedures of the agency administering the law, *i.e.*, "practice" to reach a conclusion. In our view, this is very different from a conclusion that a particular "general practice" can be the subject of a claim in a dispute

7.19 The US "general practice" concerning facts available is not identified on the face of the request for establishment as a measure in dispute. Japan has explicitly acknowledged that it has not challenged the US statute governing the application of facts available.[37] Japan argues that its claim concerning the conformity of the US anti-dumping laws, regulations, and administrative rulings, set out in paragraph E of its request for establishment, necessarily must be understood to include a challenge to the "general practice" in question.[38]

7.20 Japan did not separately set forth in the request for establishment an assertion specifically with respect to USDOC's general practice on facts available (or the statutory and regulatory provisions underlying that practice). Indeed, the phrase "general practice" does not appear in the request for establishment at all. Nor is there mention of the USDOC's interpretation or application of the statutory provisions regarding facts available in general, as opposed to its decision to apply facts available in this case. Moreover, the very fact that the other aspects of US law which are challenged on their face are spelled out in the request for establishment, as set out in paragraph 7.17 above, would lead the reader to conclude that there is no such challenge to the general practice regarding application of adverse facts available. Thus, in our view, the request for establishment does not identify USDOC's "general practice" regarding application of facts available as a measure in dispute.

7.21 Nor can we conclude, as Japan would apparently have us do, that the general claim regarding "Conformity" set out in paragraph E of the request for establishment is sufficient to bring the "general practice" on facts available before us. That claim asserts that, by maintaining "the above-detailed laws, regulations and administrative rulings of general application" which are allegedly not in conformity with its obligations under the WTO Agreements, the United States has acted inconsistently with Article XVI:4 of the Marrakesh Agreement, as well as Article 18.4 of the AD Agreement. These two provisions generally require that Members bring their laws and regulations into conformity with the WTO Agreements. The "general practice" regarding application of facts available is **not** identified among the "laws, regulations and administrative rulings of general application" detailed in preceding sections of the request for establishment. The specific section of the request for establishment addressing the application of facts available, paragraph A.2, does not refer to an inconsistency in the statute, regulations, policy or "general practice" regarding application of facts available, but to the **determination** regarding the application of facts available under the applicable statute. We do not find that this statement is sufficient to bring into this dispute USDOC's "general practice" regarding the application of facts available. To conclude otherwise would effectively allow a Member to challenge all statutes, regulations, and "general practices" in the context of a challenge to a measure imposed pursuant to such provisions or a challenge to any one of such provisions. Such a ruling would eviscerate the obligation to set forth, in the request for establishment, with sufficient specificity, the challenged measure or measures, and the claims regarding such measure or measures.

7.22 The Appellate Body has noted

> "As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel **very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU**. It is important that a panel request be sufficiently precise for two reasons: **first, it often forms the basis for the terms of reference of the panel**

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challenging a measure simply because that measure was adopted based in part on the application of that practice. Such a claim must itself be set forth in the request for establishment with sufficient clarity.

[37] See above, para. 7.15.

[38] Japan has not argued, and we therefore do not address whether, the US "general practice" in question is "sufficiently related" to the anti-dumping measure or statutes at issue in this dispute, within the meaning of the Panel's decision in *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.8.

> **pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint**." (emphasis added) [39]

In this case, we conclude that Japan has failed to state a claim at all with respect to the "general practice" of the USDOC concerning application of facts available. Assuming such practice could be challenged separately from a challenge to the statutory provision on which it is based, Japan has failed to present this problem in the request for establishment in this dispute. Thus, we conclude that the USDOC "general practice" regarding application of facts available is not within our terms of reference. Given that we find no claim was stated in this respect in the request for establishment at all, we consider that neither the United States nor potential third parties were informed of the legal basis of a complaint in this respect.

7.23 As a consequence of our ruling in this regard, we will assess the consistency with the AD Agreement of the USDOC's decision to apply facts available in the investigation underlying this dispute, but will not make a general ruling as to the consistency, on its face, of the USDOC's "general practice" in the application of adverse facts available.

B. STANDARD OF REVIEW

1. Arguments

7.24 Japan argues that Article 17.6(i) of the AD Agreement, which sets forth the standard of review to be applied to the case at hand, is a two part standard of review. In Japan's view, it requires that the Panel determine, firstly, whether the authorities' establishment of the facts was proper, which includes an assessment of whether all relevant facts were considered including those that might detract from an affirmative determination, and secondly, whether their evaluation of those facts was unbiased and objective. Japan asserts that the factual arguments in this case go directly to the US government's improper establishment of the facts and the non-objective and biased evaluation of the facts so as to favour the interest of the domestic industry. Japan also contends that Article 17.6(ii), which guides the Panel's interpretation of the AD Agreement, implicitly refers to the customary rules of interpretation of Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Japan submits that these rules assume that at the end of the interpretation process the interpreter will craft one unambiguous interpretation of the provision in question. Finally, Japan claims that the general standard of review of Article 11 of the DSU applies to its challenge of the US laws and practice under Article X:3 of GATT 1994. This standard requires the Panel to make "an objective assessment of the matter before it including an objective assessment of the facts of the case and the applicability of and conformity with the covered agreements".

7.25 The United States considers that under Article 17.6(i) of the AD Agreement, the task of the Panel is not to conduct a *de novo* evaluation of the facts if the authority's establishment of the facts is proper and its evaluation unbiased and objective, even though the Panel might have reached a different conclusion. The United States asserts that the role of the Panel is to examine whether the evidence before the investigating authority was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination. The scope of the Panel's review is limited by Article 17.5(ii) of the AD Agreement to the facts that were before the investigating authority when it made its determination, *i.e.* the evidence contained in the administrative record. With respect to Article 17.6(ii), the United States asserts that this provision requires panels to respect multiple permissible interpretations in their review of the legal interpretation by an investigating authority of the AD Agreement. The United States submits that Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. The United States rejects Japan's argument that Articles 31 and 32 of the Vienna Convention require a

[39] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"), WT/DS27/AB/R, adopted 25 September 1997, para. 142.

panel to choose one interpretation of ambiguous language in the AD Agreement. Customary rules of interpretation, applied to Article 17.6(ii), prohibit an understanding of that provision under which the express language allowing for multiple permissible interpretations would be rendered a nullity. The United States further argues that in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties, where the AD Agreement is ambiguous or silent with respect to a particular methodology, but that methodology has been subsequently adopted as standard practice by a number of signatories to the Agreement, the practice of those signatories must be taken into account with regard to determining whether that methodology constitutes a "permissible interpretation" of the Agreement. The United States therefore considers that the relevant question in every case is not whether the challenged determination rests upon the best or "correct" interpretation of the AD Agreement but whether it rests upon a "permissible interpretation" (of which there may be many). The United States finally submits that actions that are reviewed under the applicable deferential standard of review of the AD Agreement cannot also be reviewed under a different standard of review as Japan is suggesting merely because the claim has been phrased differently.

2. Finding

7.26 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:

> "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;"

The question of whether the establishment of facts was proper does not, in our view, involve the question whether all relevant facts were considered including those that might detract from an affirmative determination. Whether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided - it essentially goes to the investigative process. Then, assuming that the establishment of the facts with regard to a particular claim was proper, we consider whether, based on the evidence before the US investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US investigating authorities reached on the matter in question.[40] In this context, we consider whether all the evidence was considered, including facts which might detract from the decision actually reached by the investigating authorities.

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

> "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."

[40] We note that this is the same standard as that applied by the Panel in *Mexico - HFCS*, 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: "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." Panel Report, *Mexico - HFCS*, para. 7.95.

Thus, in considering those aspects of the US determination 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 of 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 (the "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 US interpretation is one that is "permissible" in light of the customary rules of interpretation of international law. If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

7.28 While the parties have not raised any issues about burden of proof, we note that in WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defence rests with the party that asserts such claim or defence.[41] The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".[42] In the context of the present dispute, which is concerned with the assessment of the WTO consistency of a definitive anti-dumping measure imposed by the United States, Japan 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".[43] Thus, where Japan presents a *prima facie* case in respect of a claim, it is for the United States to provide an "effective refutation" of Japan's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that the United States 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 Japan has established that the United States acted inconsistently with its obligations under the AD Agreement.

C. OVERVIEW OF JAPAN'S CLAIMS

7.29 Japan submits that the United States violated various provisions of the AD Agreement in its imposition of anti-dumping duties on imports of certain hot-rolled steel products from Japan. Japan claims that the use of adverse facts available to determine the dumping margin for the three investigated respondents is inconsistent with Articles 2.3, 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II of the AD Agreement. Japan claims that the US statute, on its face and as applied in this case, requiring the inclusion of margins calculated based on facts available in the determination of a dumping margin for all other non-investigated producers is inconsistent with Article 9.4 of the AD Agreement. Japan further considers the exclusion of certain home-market sales to affiliates from the normal value calculation on the basis of the application of the "arm's length" test, and their replacement with downstream sales, is inconsistent with Articles 2.1, 2.2, and 2.4 of the AD Agreement. Japan claims that the US preliminary determination of critical circumstances is inconsistent with Articles 10.1, 10.6, and 10.7 of the AD Agreement. Japan further claims that US "captive production" provision on its face, and as applied in this case, is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the AD Agreement, and that the USITC's analysis of injury and causation were inconsistent with Articles 3.1, 3.4, and 3.5 of the AD Agreement. Japan claims that certain actions undertaken by the

[41] Appellate Body Report, *United States – Shirts and Blouses*, page 14.

[42] Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 198.

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

United States were inconsistent with its obligations under Article X:3 of GATT 1994. Finally, Japan claims that certain laws, regulations, and administrative procedures governing various aspects of the investigations and determination in the underlying anti-dumping proceeding are not in conformity with its obligations, and thus that the United States has acted inconsistently with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the WTO Agreement.

7.30 We note that we need not reach conclusions on all of these claims in order to resolve the dispute before us. The Appellate Body has observed that a "panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[44] We keep in mind, however, the Appellate Body's further injunction that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members"".[45]

D. ALLEGED VIOLATIONS IN THE CALCULATION OF DUMPING MARGINS

1. Alleged violations of Articles 2, 6, and 9 and Annex II of the AD Agreement in the use of facts available in calculating dumping margins

7.31 Japan claims that the use of facts available by USDOC in the case of sales by the investigated respondents was inconsistent with, *inter alia*, Article 6.8 and Annex II of the AD Agreement since the requirements for the use of facts available were not met. Secondly, Japan claims that USDOC 's choice of facts available of an adverse nature, based on the application of the US statute which provides that adverse inferences may be drawn if a party fails to cooperate with the investigating authority, was inconsistent with those provisions of the AD Agreement. Third, Japan argues that the specific application of facts available in this case was inconsistent with Articles 2.3 and 2.4 of the AD Agreement, and that the consequent application of the dumping margin thus calculated was inconsistent with Article 9.3 of the AD Agreement.

(a) NSC and NKK

7.32 The price per ton of steel in coils is sometimes based on the actual weight of the coil, and sometimes on the "theoretical weight" of the coil, which is an estimated weight based on the dimensions of the product. All three investigated Japanese respondents made sales on both bases during the period of investigation. In order to be able to calculate the dumping margins in this case on the basis of a consistent unit of measurement, in the original questionnaire, USDOC requested the investigated Japanese respondents to provide a weight-conversion factor between sales made on an actual weight basis and sales made on a theoretical weight basis.

(i) Arguments

7.33 Japan argues that NSC originally replied in good faith to the request for a weight conversion factor that "lacking an actual weight, NSC has no way of calculating the requested theoretical–to-actual weight conversion factor".[46] After the preliminary determination of USDOC and while preparing for verification, NSC discovered information in its records that actual weights for sales made on a theoretical weight basis did in fact exist and were kept in a production database separate from the main sales database maintained at corporate headquarters. Thereupon, NSC submitted a conversion factor based on this information 14 days before verification.

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[44] Appellate Body Report, *United States – Shirts and Blouses*, page 20.

[45] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 223.

[46] NSC Supplemental Section B Questionnaire Response, at Supp. B-24 (Exh. JP-29); First Written Submission of Japan, Annex A-1, para. 95.

7.34 With respect to NKK, Japan asserts that NKK responded to the USDOC request for a conversion factor for sales made on the basis of theoretical weight that it was impracticable or impossible to provide a conversion factor with regard to such sales. After the preliminary determination, NKK discovered that KSC had used a "best estimate" as a surrogate for a weight conversion factor and that this approach had been accepted by USDOC. NKK submitted its own weight conversion factor based on the same best estimate methodology, 9 days before the commencement of verification.

7.35 Japan claims that USDOC acted inconsistently with the AD Agreement in refusing to accept the information provided by each company. Japan maintains that USDOC erred in concluding that these companies had failed to cooperate in the investigation to the best of their ability, and therefore erred in concluding that the application of adverse facts available was appropriate. Japan submits that the issue is not whether the deadline established for responses to questionnaires by USDOC was reasonable, but whether NSC and NKK submitted the information within a reasonable period. Japan argues that flexibility when the circumstances warrant is the hallmark of reasonableness. According to Japan, USDOC should have accepted the information, which was submitted before verification, allowing USDOC and petitioners time to review the information and comment on it.

7.36 Japan argues USDOC could have used the submitted conversion factors without undue difficulty, referring to paragraph 3 of Annex II. Japan submits that the United States failed to demonstrate that it was prejudiced in any way by the late submission of the information, which could have been verified.[47] Moreover, Japan argues, USDOC violated paragraph 5 of Annex II in disregarding and rejecting information provided by the party acting to the best of its ability. Japan asserts that the United States violated paragraph 7 of Annex II by applying facts available in spite of the fact that both companies cooperated as set forth in that paragraph. In Japan's view, neither company withheld information and both cooperated with the authority so that the basic conditions for a facts available determination were not fulfilled.

7.37 Japan also claims that NKK was not given proper notice of the need to supply a conversion factor or a proper opportunity to respond and defend itself, which Japan asserts was required by Article 6.1 of the AD Agreement, contending that USDOC officials instructed that NKK need not submit any conversion factor. Japan argues that USDOC failed to properly verify the information on weight conversion factors provided by NKK and NSC, as required by Article 6.6 of the AD Agreement. Japan also submits that USDOC failed to take into account difficulties faced by NSC and NKK as required by Article 6.13 and did not provide assistance to the companies as required by that provision.

7.38 Japan objects to the choice of facts available used in both cases. Japan asserts that the United States, in accordance with its general practice in this regard, drew an adverse inference based on the alleged failure of the companies to cooperate, and deliberately applied the highest margin calculated as the margin for the sales of both companies made in theoretical weight. Japan submits that the use of adverse facts available in the determination of margins for the theoretical weight sales of NSC and NKK was inconsistent with the AD Agreement.

7.39 Japan also asserts the USDOC's rejection of evidence and application of adverse facts available with regard to NSC and NKK was inconsistent with Article 2.4 of the AD Agreement, which requires that the investigating authorities make a “fair comparison . . . between the export price

[47] Indeed, Japan asserts that the information about weight conversion factors was included in the schedule for verification, and was in fact verified in the case of NKK, but that the information and the verification of that information was expunged from the administrative record after USDOC decided to reject the submissions as untimely and to apply facts available. We note that the specific facts regarding the weight conversion factors, or their impact on the calculation of the dumping margins, are not relevant to our determination, and we have not taken into consideration the evidence proffered by Japan in this regard.

and the normal value." Japan asserts that for NSC's theoretical weight export sales, USDOC did not calculate an export price, but instead assigned the highest margin determined for that product type to those sales. Japan argues that USDOC could have used some form of conversion factor to generate surrogate export prices for those sales. Japan submits that the resort to facts available does not excuse authorities from their obligations, least of all from the obligation to make a fair comparison between export price and normal value. With regard to NKK, which had only made sales in theoretical weight in the home market, Japan submits that USDOC relied on isolated transactions with no relationship to NKK's overall average normal value as adverse facts available. Thus, Japan asserts, USDOC inflated the normal value on those sales. Finally, Japan maintains that USDOC's alleged failure to calculate the margins correctly under Article 2 in turn led to measures inconsistent with Article 9.3 of the Anti-Dumping Agreement, which requires that "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Japan asserts that USDOC's erroneous application of facts available led to inflated dumping margins, and therefore was inconsistent with Article 9.3 of the Anti-Dumping Agreement.

7.40 The United States submits that facts available were applied to sales of NSC and NKK in accordance with Article 6.8 of the AD Agreement since the information requested with regard to the weight conversion factor was not submitted within the reasonable deadlines set by USDOC. The United States acknowledges that USDOC Regulation section 351.301(b) provides a general rule that information submitted at least 7 days prior to verification is considered timely. However, the United States points out, an exception exists in section 351.301(c) for responses to questionnaires, which must be submitted within the deadline mentioned on the questionnaire (or any extended period granted). The requested information on weight conversion factors was not submitted within the time allowed for responses to the questionnaires. The United States argues that it is therefore clear that NSC and NKK failed to provide the information in accordance with the US regulatory deadlines, despite sufficient time to do so - including extensions, a total of 87 days was allowed for responses to the questionnaire.

7.41 The United States argues that Article 6.8 of the AD Agreement does not provide a definition of a "reasonable period", and neither does Annex II. According to the United States, the deadlines set by USDOC were reasonable and USDOC was therefore permitted to disregard information that was provided one month after the deadlines had expired. The United States points to paragraphs 1 and 3 of Annex II as establishing timeliness as an independent condition for acceptance of information. The United States argues that it would render the timeliness requirement of Annex II meaningless if Japan's argument were accepted that, so long as the information concerned is of minor importance, it has to be accepted if it is submitted before the verification takes place.

7.42 The United States submits that ample opportunity was given to furnish the information and present evidence as required by Article 6.1 of the AD Agreement. NSC and NKK ultimately had 87 days to respond to the questionnaires, far more than the 30 days required by Article 6.1.1 of the AD Agreement, but rather than providing the requested weight conversion factor, they merely repeatedly answered that it was either not possible or not necessary to provide the information.[48] The United States argues that although paragraph 6 of Annex II requires that an opportunity be given to present evidence and to give further explanations if the information is rejected, it also refers to the time constraints on the investigating authority and cannot be construed to provide an endless opportunity to submit new information.

7.43 The United States further argues that the application of adverse facts available in the case of NSC and NKK was permissible under paragraphs 5 and 7 of Annex II. Paragraph 5 requires the

[48] The United States objects to Japan's argument that some officials from USDOC misinformed NKK of the need to submit the information requested. As we do not reach Japan's claim under Article 6.1 in this regard, we do not address this question. We do note, however, that there is no dispute that USDOC notified the investigated respondents of the request for information on weight conversion in the original questionnaire.

authority to accept information even if it is not ideal if the company has acted to the best of its ability. But, the United States argues, NSC and NKK did not act to the best of their ability since they could have submitted the information well within the deadlines, as demonstrated by the fact that they did so ultimately. The United States argues that when a company fails to act to the best of its ability it is deemed uncooperative and USDOC was therefore permitted under paragraph 7 of Annex II to apply adverse facts available.

7.44 The United States argues that USDOC did not act inconsistently with Article 6.6 of the AD Agreement when it refused to verify the untimely submitted conversion factors of NSC and NKK. Article 6.6 of the AD Agreement provides clearly that the investigating authority is only required to verify the information, submitted in a timely manner, on which its findings are based. The United States argues that this was not the situation here, and consequently verification of the weight conversion factor information submitted was not required.[49] Finally, the United States asserts that USDOC provided all the assistance required by Article 6.13 of the AD Agreement.[50]

7.45 The United States maintains that USDOC's use of facts available, including its use of an adverse inference, for the sales affected by the weight conversion factor was fully consistent with Articles 2.4 and 9.3 of the Agreement. The United States submits that USDOC applied adverse facts available to sales of NSC and NKK made on the basis of theoretical weight in accordance with Article 2.4 of the AD Agreement. The United States explains that with regard to the theoretical weight sales of NKK, USDOC used the highest per-product weighted average price and averaged them together with the actual weight sales data, and then compared the product specific weighted average export price to those weighted average normal values which were most similar matches ensuring a fair comparison under Article 2.4 of the AD Agreement. For NSC, USDOC immediately assigned a dumping margin based on actual weight sales of the same product since, in the view of the United States, nothing in Article 2.4 of the AD Agreement or Article 6.8 requires the authorities to first calculate an export price and only then to determine the appropriate margin of dumping. Since the margins of dumping in all three cases were established in accordance with Article 2 of the AD Agreement, the United States argues that Japan's claim of a violation of Article 9.3 of the AD Agreement must automatically fail as well.

7.46 Because NSC and NKK could have provided the information in a timely manner but did not do so, they failed to act to the best of their ability and did not cooperate with USDOC with respect to this information request. As a consequence, the United States maintains that USDOC was justified in rejecting the untimely data, and applying an adverse inference in its choice of facts available.

7.47 In the view of the United States, the facts available provisions of the Agreement, including paragraph 7 of Annex II, allow for an adverse inference to be taken when a party does not cooperate in providing the information at issue. The United States asserts that this possibility to take adverse inferences is important to provide an incentive for exporters to respond to the questionnaires in a complete and timely manner. The United States asserts that the principle at issue here is a simple one: the right, under the Agreement, for authorities to establish reasonable deadlines for submission of information and to use the facts available when a party does not provide a response to a questionnaire within those reasonable deadlines. Where, as here, a respondent first offers the requested data long after the reasonable deadlines have passed for its submission, the Agreement does not compel the

[49] The United States considers irrelevant the fact that the verification was originally scheduled to include the conversion factor. USDOC planned to verify information it would gather provisionally until a decision would have been taken on its acceptance. Once USDOC decided not to accept the weight conversion factor information on the basis of untimeliness, it was no longer obliged to verify it.

[50] The United States moreover argues that this provision requires the authorities to take due account of difficulties experienced in particular by small companies, which neither NSC nor NKK are, and maintains that no request for assistance was ever made.

investigating authority to accept and use the late-provided data.[51] Similarly, the United States argues, the Agreement permits authorities to use an adverse inference in selecting from the facts available when a party has failed to act to the best of its ability to timely supply the requested information. The Agreement thus leaves it to investigating authorities to set and enforce deadlines for receiving information in keeping with their judgment as to when they need it, so long as they provide interested parties with a reasonable period in which to make their submissions. The United States concludes that the interpretation proposed by Japan with respect to the use and selection of the facts available would render meaningless any Member's right to establish deadlines, which the United States considers unacceptable and not intended by the Agreement.

7.48 With regard to the specifics of this case, Brazil considers that NSC and NKK were punished for not respecting the deadlines in the submission of a minor piece of information. Korea considers that a punitive margin was applied in the case of NSC and NKK. Moreover, Korea submits, by applying a dumping margin as the facts available, rather than simply using secondary source information for the missing conversion factor, USDOC failed to make a fair comparison as required by the AD Agreement.[52]

(ii) Finding

7.49 Japan claims that USDOC acted inconsistently with the requirements of Article 6.8 and Annex II of the AD Agreement in resorting to facts available in the determination of the dumping margin for NSC and NKK.[53] The United States maintains that the use of facts available was based on a permissible interpretation of Article 6.8, and was justified in the circumstances of this case. Japan also asserts that the particular "adverse" facts available used were inappropriate, as they were chosen based on an unjustified determination that NSC and NKK had failed to cooperate to the best of their ability. The United States contends, on the other hand, that adverse inferences are permissible in the choice of facts available, and that the decision to apply such an inference in this case was fully justified.

7.50 The first question we must address in resolving this issue is under what circumstances does Article 6.8 of the AD Agreement allow an investigating authority to resort to the use of facts available. Article 6.8 provides:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

Annex II sets out additional conditions and considerations relevant to the application of facts available in a particular case.

7.51 The conditions for applying "facts available" under Article 6.8 seem fairly clear on the face of that provision. If an interested party "refuses access to" necessary information within a reasonable period, "otherwise does not provide" necessary information with a reasonable period, or "significantly

[51] The United States argues that USDOC's practice of accepting minor corrections to timely presented data does not constitute a blanket loophole covering data respondents have declined to submit at all in their questionnaire responses.

[52] As we do not address Japan's purported claim regarding USDOC's "general practice" concerning facts available, we have not summarised the parties' and third parties' arguments in this regard. They can be found in the Annexes to this report.

[53] As discussed above, we have concluded that the United States' "general practice" concerning facts available is not within our terms of reference. Therefore, we are limiting our analysis to the USDOC determination in this case.

impedes the investigation" the investigating authority may make determinations on the basis of the facts available. Thus, Article 6.8 ensures that an investigating authority will be able to complete an investigation and make determinations under the AD Agreement on the basis of **facts** even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period.

7.52 The question before us is whether the USDOC was justified in concluding that NKK and NSC refused access to or otherwise did not provide necessary information within a reasonable period.[54] Japan argues extensively that USDOC erred in applying "adverse" facts available in this case. However, before the question of applying "adverse" facts available need be addressed, we must first assess whether USDOC was justified under Article 6.8 AD Agreement to make its determination on the basis of facts available. If USDOC acted inconsistently with Article 6.8 in resorting to facts available at all, then the specific choice of which facts it applied is, in our view, moot.

7.53 The issue in the case of both NSC and NKK in the first instance is whether USDOC acted consistently with Article 6.8 and the provisions of Annex II in rejecting information that was actually submitted to it, and resorting to facts available instead. Both companies submitted the requested information concerning a weight conversion factor for their theoretical weight sales well after the deadlines for response to the questionnaires in which the information was requested had passed, but before verification.

7.54 The United States argues that these submissions were not in accordance with US regulatory provisions on the deadlines for submission of information, and thus that it was reasonable to return the information and refuse to verify it and consider it in making its determinations. However, these deadlines are not provided for in the AD Agreement itself. The AD Agreement establishes that facts available may be used if necessary information is not provided within a reasonable period. What is a "reasonable period" will not, in all instances be commensurate with pre-established deadlines set out in general regulations. We recognize that in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.[55]

7.55 In this regard, we note paragraph 3 of Annex II, which provides, in pertinent part "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, … should be taken into account when determinations are made." Particularly where information is actually submitted in time to be verified, and actually could be verified,[56] we consider that it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the Agreement. Such might be the case, for instance, if an entire questionnaire response were submitted only just before the time scheduled for verification. However, in this case, it seems clear that the information could have been verified and used, but was instead

[54] There is no assertion that the three investigated respondents significantly impeded the investigation.

[55] Japan asserts that the information was submitted as soon as the companies became aware of their ability to provide the information and before verification, and that the late submission was in accordance with certain provisions in the relevant US regulations. The United States argues that Japan misinterprets the relevant US regulations, and that the information was submitted one month after the expiration of the applicable deadline. We are not here concerned with interpreting US regulations or assessing whether NSC and NKK acted in accordance with US regulations in submitting the weight conversion factors. The question we are addressing is whether USDOC was entitled, under Article 6.8, to reject information it considered to have been submitted after the established USDOC deadlines, but still prior to verification, and to decide instead to apply facts available.

[56] It appears that NKK's weight conversion factor information was in fact verified, but was subsequently rejected as untimely and the relevant portions were expunged from the verification record. 64 Fed. Reg. 24363 (6 May 1999), Exh. JP-12.

rejected as untimely. One of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts. This does not, however, justify refusing to consider information simply because it is submitted outside a pre-determined time-period, if it is submitted within a period that is reasonable under the circumstances - that is, a period that allows the information to be verified and used in the determination, due account being taken of the time limits in the AD Agreement for completing the investigation and the time needed for the investigating authority to do so. We consider it significant, in this case, that the information submitted past the deadline, but before verification, was not new information concerning such matters as prices, costs, or adjustments that had never previously been provided, and which would require extensive verification. It does not appear that any consideration was given to whether the weight conversion factor could have been taken into account in this case.

7.56 In its final determination, USDOC explained its decision with respect to NSC:

> "The evidence indicates that the requested information was routinely maintained by NSC in the normal course of business, but that obtaining it was simply not a priority. Regardless of who specifically knew about this information, the sales department or the production department, the data existed and could have easily been obtained. The fact that NSC was able to provide this information shortly after the preliminary determination also supports the conclusion that it could have done so within the time requested. Moreover, it is impossible for the Department to determine whether NSC's claims of inadvertent error are valid or merely self-serving. Thus, they are insufficient to rebut the evidence establishing that the requested information was readily available. …
>
> Because NSC's conversion data was untimely and did not constitute a minor correction the Department informed NSC at verification that it would not accept the theoretical to actual weight conversion factors and returned the data on April 12, 1999. …
>
> Because NSC failed to timely provide requested information, …, the Department has made its determination with respect to the theoretical weight sales on the basis of the facts available. Further, the Department finds that NSC, by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, failed to cooperate by not acting to the best of its ability…The fact that NSC ultimately did provide such a factor is proof that it could have done so much earlier…."[57]

7.57 It is thus clear to us that in the case of NSC the USDOC rejected information that was actually submitted to it, albeit not by the deadline specified, despite the fact that the information was available in sufficient time to allow its verification and use in the calculation of NSC's dumping margin. In our view, based on the evidence before the USDOC at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that NSC had failed to provide necessary information within a reasonable period. Thus, we conclude that USDOC acted inconsistently with Article 6.8 in applying facts available in making its determination of NSC's dumping margin.

7.58 With regard to NKK, USDOC stated in its final determination:

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[57] 64 Fed. Reg. 24361-362 (6 May 1999), Exh. JP-12.

> "Because NKK's conversion factor data were not timely submitted, the Department rejected these factors in a letter dated April 12, 1999. The Department, therefore, has not considered these data or retained them in the official record of the proceeding. … The Department does not agree with NKK's assertion that these data were verified. Rather, at verification, the Department specifically informed NKK and its counsel that the Department would not accept the conversion factor and would specifically instruct NKK to submit this information on the record if the Department determined that it was timely. However, any arguments as to the accuracy of these data are moot because the data in question are no longer part of the record before the Department…
>
> Further the Department finds that NKK, by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, failed to cooperate by not acting to the best of its ability. NKK's claims that it could calculate a conversion factor in February of 1999 but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NKK argues that it did not understand what the Department wanted when it originally requested a "conversion factor", although this was not stated at the time, and that it lacked the data necessary to calculate one,… it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NKK merely dismissed the Department's repeated requests. The fact that NKK ultimately did provide such a factor is the proof that they could have done so much earlier."[58]

7.59 It is thus clear to us that in the case of NKK as well, USDOC rejected information that was actually submitted to it, albeit not by the deadline specified, despite the fact that the information was available in sufficient time to allow its verification and use in the calculation of NKK's dumping margin. In our view, based on the evidence before USDOC at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that NKK had failed to provide necessary information within a reasonable period. Thus, we conclude that USDOC acted inconsistently with Article 6.8 in applying facts available in making its determination of NKK's dumping margin.

7.60 Having determined that an objective and unbiased investigating authority could not, on the basis of the evidence in this dispute, have reached the conclusion that NKK and NSC failed to provide necessary information within a reasonable period, we do not consider it necessary or appropriate to address Japan's additional claims and arguments regarding the application of adverse facts available in the underlying investigation, or the consistency of USDOC's actions with Articles 2.4, 6.1, 6.6, 6.13, and 9.3 and Annex II of the AD Agreement.

(b) KSC

7.61 In its original questionnaire, USDOC requested Japanese producers who sold the subject steel products to affiliated purchasers in the United States to provide information concerning resale prices and further manufacturing costs to be used in the calculation of a constructed export price pursuant to Article 2.3 of the AD Agreement. KSC makes a substantial portion of its sales to the United States to California Steel Industries ("CSI"), a company of which it owns 50 per cent, in a joint venture with a Brazilian company Companhia Vale de Rio Doce ("CVRD"). Although CSI is an affiliate of KSC, it was itself a petitioner in the anti-dumping investigation. KSC originally requested to be excused from responding to this section of the questionnaire, asserting that it was unable to provide the requested information. USDOC continued to require KSC to provide the requested information. KSC

[58] 64 Fed. Reg. 24363 (6 May 1999), Exh. JP-12.

responded that it was unable to provide the requested information. KSC maintained that it did not control CSI, and could not obtain the necessary information from CSI. USDOC concluded that KSC had failed to act to the best of its ability in seeking the requested data from CSI, and therefore determined to apply adverse facts available in determining the dumping margin attributable to sales to CSI. USDOC used the second highest product-specific dumping margin calculated for KSC's sales to unaffiliated customers in the United States as the dumping margin for the sales through CSI.

(i) Arguments

7.62 Japan argues that USDOC violated Article 6.8 and Annex II of the AD Agreement in determining that KSC had failed to cooperate or withheld information, and that the use of adverse facts available was therefore justified. Japan notes that CSI was not merely an affiliated customer of KSC, it was itself a petitioner in the anti-dumping investigation of hot-rolled steel imports from Japan. Japan argues that KSC did not withhold any information from USDOC since the information requested was never in its possession but was kept by CSI. Japan points out that USDOC treated KSC and CSI as a single entity, thus assuming that KSC had sufficient control over CSI to compel its cooperation. Japan maintains that despite its efforts, KSC was unable to convince CSI to hand over the requested information. Japan argues that without the voluntary cooperation of the co-owner CVRD, KSC was powerless to compel CSI to provide the requested information. Japan submits that the Shareholders Agreement, which the United States asserts gave KSC certain power to obtain the requested information does not, in fact, reflect how the company operated in practice.[59] Japan further emphasises that KSC did attempt to exercise its rights under the Shareholders Agreement**,** but was nonetheless unable to obtain the requested information.

7.63 Moreover, Japan submits, USDOC failed to provide any assistance as required by Article 6.13 of the AD Agreement and paragraph 7 of Annex II. KSC invested substantial resources attempting to convince CSI and CVRD to help KSC to respond to USDOC's request.[60] KSC explained and documented that it had no way in which to force CSI to share its further manufacturing and resale data due to the structure and management of the joint venture. Japan argues that KSC explained to USDOC that the Shareholders Agreement did not operate to allow either KSC or CVRD any real control of CSI's day-to-day operations.[61] Japan submits that only one person controlled the day-to-day conduct of CSI, its President Mr Gonçalves as evidenced by the decision of CSI to become a petitioner in this case.[62] Japan submits that the USDOC failed to properly establish the facts by ignoring the evidence that CSI was unwilling to provide the requested information and CVRD, KSC's joint venture partner, was a competitor of KSC in the US market and thus did not have an interest in assisting KSC in the US AD investigation either. KSC therefore did not possess the information requested and did not have the power to obtain this information. Consequently, Japan maintains that the USDOC acted inconsistently with Article 6.8 of the AD Agreement in concluding that resort to adverse facts available was appropriate.

7.64 Japan asserts that USDOC's use of the second-highest margin from KSC's sales as facts available for the CSI transactions was inconsistent with Article 2.3 of the Anti-Dumping Agreement governing the calculation of export price. Japan argues that USDOC did not have any specific concerns regarding the unreliability of KSC's export price to CSI, but proceeded to calculate an export

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[59] According to Japan, the letters on CSI's letterhead from Mr. Gonçalves, CSI's President and CEO, provide objective evidence of how CSI operated. *See* Mr. Gonçalves Letter to KSC of 29 Oct. 1998 (Exh. JP-42(f)); Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (Exh. JP-42(h)); Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (Exh. JP-42(m)). Japan points to additional information demonstrating how the Shareholders' Agreement was regularly ignored by the company and its shareholders at Exh. JP-93(d).

[60] See timeline of events and letters of KSC allegedly requesting assistance in Exh. JP-42.

[61] KSC Sales Verification Report, at 21-22 (excerpts in US/B-21 and Exh. JP-42(y)); Shareholders' Agreement, annexed to Exh. JP-42.

[62] In Japan's view, this is one among many ways in which the actual operation of CSI failed to comply with the apparent intent of the Shareholders Agreement. Exhibit JP-93(d) provides a complete list.

price, necessitating the resale and further manufacturing information, based on the assumption that because KSC and CSI were affiliated, CSI's resale prices were necessary. When those prices were not provided, Japan asserts that USDOC did not determine an export price for KSC's sales to CSI, and instead applied a margin from other sales. Japan maintains that this was inconsistent with Article 2.3, which permits the calculation of a constructed export *price*, not the imposition of a *margin*. Finally, Japan maintains that by wrongly applying adverse facts available, the United States ultimately applied an anti-dumping duty higher than the margin of dumping, inconsistent with Article 9.3 of the AD Agreement.

7.65 The United States argues that the application of adverse facts available to a part of KSC's sales was permitted under the AD Agreement, since KSC failed to act to the best of its ability with regard to submitting the requested data concerning its sales through CSI, its US affiliate. The United States points out that USDOC requested the information three times, and that KSC twice requested to be excused from giving the information and on the third occasion alleged that it was not possible to submit the data due to the unwillingness of CSI. However, the United States maintains that KSC never even raised the issue before the Board of Directors of CSI, of whom two out of four are appointed by KSC, never tried to enforce certain rights under the Shareholders' Agreement in an effort to obtain the requested information, and never directly raised the issue with its joint venture partner CVRD.[63] The United States submits that even if cooperation was refused by CVRD, internal means of forcing the issue and obtaining the information were available to KSC under the Shareholders' Agreement. In the US view, KSC's failure to use these means indicates that it acquiesced in the refusal of CSI to submit the requested information. As a result, KSC failed to provide the requested information within a reasonable period, and therefore USDOC was fully entitled to apply adverse facts available to that part of KSC sales to the United States that entered the United States market through CSI.

7.66 The United States argues that the assistance requirement of Article 6.13 of the AD Agreement invoked by Japan relates in particular to small companies while KSC is one of Japan's largest corporations and one of the biggest steel producers in the world. The United States asserts that it was not USDOC's responsibility to advise KSC on the steps to take to respond to the questionnaire and argues that the information requested was clear and unambiguous. In any case, the United States submits, contrary to Japan's assertions, KSC never requested such assistance.

7.67 Finally, the United States maintains that it did not act inconsistently with the requirements of Article 2.3 in applying, as facts available, a margin based on other KSC sales as the margin for the sales to CSI, rather than seeking to calculate an export price based on facts available. The United States maintains that KSC's refusal to provide the information necessary to construct an export price, made it necessary for USDOC to use the margin information as it was impossible to construct an export price based on available facts. The United States rejects Japan's further argument that USDOC's determination was inconsistent with Article 9.3 of the Agreement, maintaining that USDOC correctly calculated KSC's margin, and was therefore entitled to impose a definitive measure in the amount of the margin calculated.

7.68 With regard to the specifics of this case, Brazil questions the use of facts available in light of the fact that KSC was confronted with the refusal of CSI, which was itself a petitioner in the case, to provide the information. Korea objects to the use of fact available to KSC since it was CSI and not KSC that failed to cooperate. Chile considers that the US acted inconsistently with the AD Agreement by punishing KSC for not providing the information that was held by CSI, a petitioner in this case. According to Chile, it was unreasonable for USDOC to require cooperation between two companies having such a clear conflict of interests. Chile asserts that in any case, Article 6.8 and Annex II do not permit the choice of the most adverse facts available when a party fails to cooperate

[63] KSC Sales Verification Report at 20-22 (Exh. JP-42 (y)); First Written Submission of the United States, Annex A-2, para.B-20.

and certain information is not provided. The EC disagrees with Japan that facts available may only be used as neutral gap fillers. When selecting facts available, the authorities may take into account the degree of cooperation of the party concerned. If an exporter refuses to provide certain information, a logical inference may be drawn that the information is adverse to his interests.

(ii) Finding

7.69 Pursuant to Article 6.8 of the AD Agreement, and as discussed above, where a party "otherwise does not provide" necessary information within a reasonable time, the investigating authorities may make their determination based on facts available. It is undisputed in this case that KSC did not provide the requested information regarding resale prices and further manufacturing costs with respect to its sales through its affiliate CSI. Thus, it appears that USDOC was justified in deciding to apply facts available with respect to the information not provided by KSC concerning CSI's further manufacturing costs, as this necessary information was not provided within a reasonable period.

7.70 Indeed, Japan's argument with respect to the application of facts available concerning KSC focuses not on the application of facts available *per se*, but rather on the "adverse" nature of the facts available actually used. The parties' argument in this regard focuses on paragraph 7 of Annex II of the AD Agreement, which provides in relevant part:

> "It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate".

The parties have argued extensively concerning whether this provision allows an investigating authority to conclude that a party has failed to cooperate and therefore resort to the application of "adverse" facts available**.** Japan maintains that this provision merely recognizes the possibility that a failure to cooperate might result in a less favourable result for the non-cooperating party, but does not allow for any deliberate action on the part of investigating authorities to ensure such a less favourable result. The United States, on the other hand, argues that the entire purpose of allowing investigating authorities to resort to facts available would be defeated if, regardless of the failure of a party to cooperate, investigating authorities were obliged in all circumstances to seek out "neutral" facts available.

7.71 As discussed earlier, we have concluded that Japan did not set out a claim with respect to USDOC's general practice in applying adverse facts available in its request for establishment. Therefore, we will limit our analysis to the application of facts available in the particular circumstances of this case. We consider the question whether paragraph 7 of Annex II, together with the remainder of Annex II and Article 6.8, allow for a deliberate application of facts available with the intent of obtaining a result less favourable for a particular respondent to be a question that implicates the US statute and regulations, which are not within our terms of reference in this dispute. However, it seems clear to us that any "less favourable" result under paragraph 7 of Annex II may only be appropriate in the case of an interested party who does not cooperate. The USDOC decision to apply adverse facts available in the case of KSC was based on the underlying determination that KSC had failed to cooperate by failing to act to the best of its ability to comply with the USDOC request for information concerning resale prices and further manufacturing costs. Therefore, we consider first whether an objective and unbiased investigating authority could reasonably have concluded, based on the facts before the USDOC, that KSC had failed to cooperate and that relevant information was being withheld.

7.72 In its final determination, USDOC found, in pertinent part:

"In essence, for purposes of the [constructed export price] calculation, the [US] statute treats the exporter and the US affiliate collectively, rather than independently, regardless of whether the exporter controls the affiliate. Accordingly, KSC's argument that it does not "control" CSI is misplaced and irrelevant.

Because the statute requires that the Department base its margin calculations for the CSI sales on record information concerning the CSI sales themselves, the Department required that KSC and CSI, collectively, provide the necessary price and cost data for KSC's US sales through CSI. It is also undisputed that KSC and CSI failed to provide this necessary information….KSC and CSI have neither provided the data on CSI's sales, as requested by the Department, nor demonstrated to the Department's satisfaction that this is not possible. Therefore, the Department finds that KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information with respect to the CSI sales. Therefore, we have used an adverse inference in selecting the facts available with respect to the CSI sales.

Allowing a producer and its US affiliate to decline to provide US cost and sales data on a large portion of their US sales would create considerable opportunities for such parties to mask future sales at less than fair value through the US affiliate. The fact that the affiliate is a petitioner does not allay such concerns. Thus, this fact does not constitute an exception to the principle that the Department may make an adverse inference with respect to sales for which data is not provided unless the foreign exporter and its US affiliate have acted to the best of their ability to provide such data.

While it is clear that KSC and CSI collectively have not acted to the best of their ability, we also disagree with KSC's claim that it alone acted to the best of its ability. … After careful consideration of all of the evidence on the record, the Department finds that KSC did not act to the best of its ability with respect to the requested CSI data.

CSI is a joint venture between KSC and a large Brazilian mining operation, Companhia Valle do Rio Doce ("CVRD"). Through their respective US affiliates, KSC and CVRD each own 50 per cent of CSI. KSC's claim that it acted to the best of its ability with respect to this issue rests on its assertion that it was powerless to compel CSI to provide the Department with this data, given that CSI as a petitioner in this case, refused to cooperated. Some of the most important evidence contradicting KSC on this issue, including information pertaining to the board and the Shareholders' Agreement, constitutes business proprietary information, and are discussed only in our proprietary *Analysis Memorandum*, which is hereby incorporated by reference. Generally, however, the record shows that, although KSC could have been much more active in obtaining the cooperation of CSI in this investigation, it limited its efforts to merely requesting the required data and otherwise took a "hands-off" approach with respect to CSI's alleged decision not to provide this data. For example, KSC officials stated that KSC did not instruct its members of the CSI board to address the issue, did not invoke the Shareholder's Agreement, and did not discuss this issue with its joint venture partner. This does not reach the "best efforts" threshold embodied in § 776(b). Furthermore, the fact that KSC has provided a great deal of information and has substantially cooperated with respect to other issues does not relieve it of the requirement to act to the best of its ability to provide the requested CSI information. With respect to the CSI sales, KSC has provided only minimal volume and value information and has not acted to the best of its ability to obtain further information. Thus, as to the missing CSI data, it

> cannot be said that KSC was fully cooperative and made every effort to obtain and provide the information requested by the Department. Therefore, even though full cooperation by KSC would not constrain the Department from using adverse facts available specifically with respect to the CSI sales, we do not agree with KSC's argument that it has "substantially cooperated" during this investigation….
>
> While the Department has considered that the record supports KSC's claim that it did make some effort to obtain the data and the CSI's management rebuffed these efforts, the record also shows that KSC essentially acquiesced in CSI's decision not to provide this data. Given KSC's relationship with this 50/50 joint venture, as detailed in the *Home Market Sales Verification Report*, dated 26 March 1999, this did not constitute making its best efforts to obtain the data."[64]

7.73 Our review of the facts on which USDOC based this conclusion, including confidential information, leads us to the conclusion that an unbiased and objective investigating authority evaluating the evidence that was before the USDOC could not reasonably have reached the conclusion that KSC had failed to cooperate and that relevant information was thus being withheld. "Cooperate" has been defined as "work together for the same purpose or in the same task."[65] In our view, USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for information in this case went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II. CSI was a petitioner in the investigation of hot-rolled steel imports from Japan, and thus had interests directly opposed to those of KSC. Indeed, this very fact suggests that KSC lacked the ability to control such important decisions of policy by CSI. USDOC's own conclusion that KSC "acquiesced" in CSI's refusal to provide the requested information itself suggests that KSC was not able to direct CSI's actions in this regard. CVRD, KSC's joint venture partner in CSI, was itself KSC's competitor in the US market for the steel products under investigation, and thus also had interests adverse to those of KSC. While it is conceivable that KSC could have undertaken certain measures under the Shareholders' Agreement with the possible result of forcing CSI to provide the requested information, such actions would have inevitably disrupted the on-going business relationships of the three companies. We do not consider that USDOC's conclusion that KSC's not having taken such measures justified the conclusion that it had failed to cooperate was a decision that could properly be made by an unbiased and objective investigating authority on the basis of the evidence before USDOC. In the absence of a justified conclusion that there was a lack of cooperation, there is no basis under paragraph 7 of Annex II for a result which is less favourable than would have been the case had the party cooperated.

7.74 We therefore conclude that USDOC acted inconsistently with Article 6.8 and Annex II paragraph 7 of the AD Agreement in applying adverse facts available in making its determination of KSC's dumping margin. We therefore do not consider it necessary or appropriate to address Japan's additional claims and arguments under Articles 2.3 and 9.3 regarding the application of adverse facts available in the determination of KSC's dumping margin in the underlying investigation.

2. Alleged violations of Article 9.4 of the AD Agreement on the face of US law and in the calculation of an "all others" rate including margins established on the basis of facts available

(a) Arguments

7.75 Japan argues that Article 9.4 of the AD Agreement provides in clear and mandatory terms that any margins based on facts available shall be disregarded for the purposes of determining an all others rate. Japan submits that the US statute, section 735(c)(5) of the Tariff Act of 1930 (as amended),

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[64] 64 Fed. Reg. 24367-68 (6 May 199), Exh. JP-12.
[65] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

impermissibly limits the exclusion provided for under Article 9.4 to only margins based entirely on facts available. Japan argues that the statutory distinction between margins based entirely on facts available, which are excluded, and margins based only partially on facts available, which can still form the basis for an "all others" rate, is, on its face, inconsistent with the AD Agreement In Japan's view, Article 9.4 is clear and explicit in prohibiting the inclusion of any margins based even in part on facts available in the calculation of the all others rate, and the US interpretation of Article 9.4 is impermissible. Japan notes that facts available may be used in determining a company's dumping margin under Article 6.8 of the AD Agreement due to a particular action or inaction of that particular company, and asserts that Article 9.4 of the AD Agreement establishes that other non-investigated companies should not be punished for the lack of cooperation of another company.

7.76 Second, Japan argues that, applying the statute in its determination of an all others rate, USDOC violated Article 9.4 of the AD Agreement since it used as the basis for the calculation of the all others rate the margins calculated for the three investigated respondents, each of which was based in part on facts available. Japan submits that the USDOC determination of an "all others" rate on the basis of margins that were calculated based in part on facts available was inconsistent with Article 9.4 of the AD Agreement.

7.77 The United States argues that Article 9.4 of the AD Agreement permits the inclusion of margins **partially** based on facts available in establishing an all others rate. Likewise, the United States argues, merely because a factor in the calculation of the overall margin for each of certain investigated producers is *de minimis* or zero does not mean that such margins cannot be used in the determination of an all others rate under Article 9.4 of the AD Agreement. The United States argues that margins are only "established under the circumstances referred to in paragraph 8 of Article 6", and to be disregarded in the determination of a margin of dumping for non-investigated producers or exporters as provided for in Article 9.4, if they are **entirely** based on facts available. Thus, when only an element included in the overall calculation of the margin is determined in this manner, as was the case in the investigation on imports of hot-rolled steel products from Japan, the United States maintains that such margins may be included in the calculation of the all others rate.

7.78 The United States argues that the term "margin" is used throughout the AD Agreement as referring to the overall margin for a producer or exporter, and not just to portions of it. In this regard, the United States notes that Article 5.8 of the AD Agreement, which provides that an investigation is to be terminated immediately when the margin of dumping is *de minimis*, is generally understood not to require termination merely because one transaction of a producer shows a *de minimis* margin. Thus, the United States maintains that only if the overall margin for the producer is *de minimis* does Article 5.8 require termination of the investigation. The United States refers to the customary rule of interpretation that the terms of an Agreement be given the same meaning throughout the Agreement to argue that the same meaning should apply in Article 9.4, and therefore only if the overall margin was based on facts available does Article 9.4 require its exclusion from the all others rate. The United States also argues that, to the extent the term margin might be ambiguous, it is clear that Members are free to adopt any permissible interpretation.

7.79 The United States also argues that the interpretation argued by Japan would be unworkable, since it is often the case that parts of the margin will be based on facts available. For instance, in this case, there were no margins calculated that did not rest, in part, on facts available, and thus Japan's interpretation of Article 9.4 would make it impossible to calculate an all others rate consistently with the AD Agreement. Moreover, this would undermine the purpose of Article 6.10 of the AD Agreement which explicitly allows the investigation of less than all exporters where a full investigation of all producers or exporters would be too burdensome for the investigating authority. The United States also rejects Japan's allegation that the non-investigated producers would be "punished" for the respondents' lack of cooperation if they were to receive an all others rate based in part on margins established on facts available. In the United States' view, Article 9.4 establishes a

neutral formula for the calculation of the all others rate, which the USDOC properly applied in this case.

7.80 Brazil considers that Article 9.4 of the AD Agreement provides in a clear and unequivocal manner that margins established on the basis of facts available are to be excluded in the determination of an all others rate. The distinction in US law between margins based entirely or only partially on facts available is not present in the AD Agreement and it cannot be argued that it is a permissible interpretation of the Agreement, Brazil submits, since it completely changes the meaning of the relevant provision in the AD Agreement.

7.81 Chile argues that the US practice to include margins partially based on facts available in the determination of an all others rate violates Article 6.13 of the AD Agreement and 9.4 of the AD Agreement and unduly inflates the margin for the non-investigated exporters or producers.

7.82 The EC agrees with Japan that by providing for the exclusion from the all others rate only of those dumping margins which are based entirely on facts available, US law is inconsistent with Article 9.4. The EC would nevertheless argue that Article 9.4 does not require investigating authorities to disregard the dumping margin in every instance where facts available have been used, as long as the resort to facts available was limited and no adverse inferences were drawn.

(b) Finding

7.83 Article 9.4 of the AD Agreement establishes a maximum level for anti-dumping duties to be applied to imports from exporters or producers not included in the investigation, as provided for in Article 6.10 of the AD Agreement. It provides:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> > (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
> >
> > (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> **provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.** The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6" (emphasis added).

7.84 Section 735(c)(5) of the Tariff Act of 1930, as amended, and the implementing regulations of the USDOC establish the method to be applied by USDOC in determining the estimated "all others" rate, which is the rate applicable to uninvestigated producers. US law generally provides that USDOC shall determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and then determine the estimated all-others rate for all exporters and

producers not individually investigated.[66] Section 735(c)(5) specifies, with respect to the all others rate:

> "(A) General rule
>
> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined **entirely** under section 1677e of this title [*i.e.*, any margins determined entirely on the basis of facts available].
>
> (B) Exception
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined **entirely** under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated".[67]

7.85 Thus, US law creates a distinction between rates based "entirely" on facts available, which are excluded from the calculation of an "all others" rate, and individual rates based on facts available in part, which, under the US law, can be used in the calculation of an "all others" rate. In this case, USDOC investigated three respondents and calculated an all others rate applicable to the remaining Japanese producers, by taking the weighted average of the margins calculated for the three investigated respondents.[68] USDOC relied on facts available with respect to some elements of the calculation in determining the overall margin for each of the three investigated respondents.

7.86 In order to resolve the issue that is before us, we must determine whether Article 9.4 "admits of" the interpretation put forward by the United States, and set out in the relevant US law. Specifically, we must consider whether the phrase "shall disregard…margins established under the circumstances referred to in paragraph 8 of Article 6" can, as United States contends, be understood to be limited to margins established **entirely** under the circumstances referred to in paragraph 8 of Article 6. In our view, it can not.

7.87 We note first that the exclusion provided for in Article 9.4 is mandatory - there are no exceptions provided for. Thus, any margins that fall within the categories established in Article 9.4 **must not be considered** in determining the maximum duty applicable to uninvestigated producers. Second, we note that the category of "margins established under the circumstances referred to in [Article 6.8]" is not qualified in any way. Thus, in our view, the provision is clear and explicit on its face. Any margin established under the circumstances referred to in Article 6.8 **must** be disregarded in determining the maximum anti-dumping duty applicable to uninvestigated producers.

7.88 The question then becomes when is a margin "established under the circumstances referred to in [Article 6.8]". In the United States' view, a dumping margin refers only to the overall margin established for a particular product from a particular source. Consequently, a margin is only "established" based on facts available if the overall margin attributed to a particular producer or exporter was determined on the basis of facts available. Any "interim" use of facts available on the

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[66] 19 U.S.C. § 1673d(c)(1)(B)(i) (Exh. JP-4).
[67] 19 U.S.C. § 1673d(c)(5) (emphasis added) (Exh. JP-4).
[68] USDOC Final Dumping Determination, 64 Fed. Reg. at 24370 (Exh. JP-12).

way to determining the margin does not, in the United States' view, result in a margin established under the circumstances referred to in Article 6.8

7.89 We note, however, that Article 6.8 itself does not refer to the establishment of margins *per se*, but rather specifies that in certain circumstances a determination may be made on the basis of facts available. We can perceive of no textual basis in Article 6.8 to suggest that a determination should be considered made under the circumstances referred to in that Article only if the determination is made **entirely** on the basis of facts available. We generally agree with the United States that a "margin" is the overall margin for a particular product from a particular source.[69] Where we part company from the United States is in our understanding of what it means to "establish a margin under the circumstances referred to in [Article 6.8]". The establishment of a dumping margin is a complex calculation comprising many elements. However, the "**determination"** with respect to the margin of dumping is the end result of all the calculation steps - the final margin that may be applied to the dumped products from the particular source. In our view, a margin determined under the circumstances referred to in Article 6.8 includes a margin determined on the basis of a calculation in which some element was established on the basis of facts available.[70]

7.90 We therefore conclude that the US statute governing the calculation of the all others rate, section 735(c)(5) of the Tariff Act of 1930, as amended, is, on its face, inconsistent with Article 9.4 of the AD Agreement insofar as it requires the consideration of margins based in part on facts available in the calculation of the all others rate.[71] Having found the statute governing the United States' actions in this regard inconsistent with the AD Agreement, and there being no dispute that the USDOC applied that statute in its determination in this case, we must perforce conclude that the calculation of the all others rate in this case was inconsistent with the United States' obligations under Article 9.4 of the AD Agreement. In addition, having determined that the statute is inconsistent on its face with the relevant specific provision of the AD Agreement, we consequently conclude that the United States acted inconsistently with Article 18.4 of the AD Agreement and Article XIV:4 of the Marrakesh Agreement in maintaining that provision after the entry into force of the AD Agreement.

3. Alleged violations of Article 2 of the AD Agreement in the exclusion of certain home market sales to affiliates and their replacement with downstream sales in USDOC's determination of normal value

(a) Arguments

7.91 Japan argues that USDOC's exclusion of certain home market sales to affiliates from the determination of normal value, based on the application of the "99.5 per cent" or "arm's length" test, and the replacement of such sales with re-sales by the affiliates to unaffiliated customers, is inconsistent with Articles 2.1, 2.2 and 2.4 of the AD Agreement. Japan challenges USDOC's established practice in this regard on its face, and USDOC's application of that practice in the investigation of imports of hot-rolled steel from Japan.

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[69] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India ("EC – Bed Linen"*), WT/DS141/R, para. 6.118 (presently under appeal).

[70] This does not require the conclusion that a zero or *de minimis* margin, which must also be disregarded under Article 9.4, relates to "portions" of margins or individual transactions having a zero or *de minimis* price difference. In this respect, we consider that Article 9.4 refers to overall margins that are zero or *de minimis*.

[71] We recognize that this conclusion has certain practical consequences, as it leaves it unclear how Members are to establish the maximum rate of duty applicable to uninvestigated producers or exporters in a case, such as this one, where there are no margins that were not established under the circumstances referred to in Article 6.8. However, this situation could also arise under the US interpretation. Merely because the AD Agreement does not explicitly address the question of how to resolve this situation does not mean that such a calculation cannot be made in a manner consistent with the requirements of the AD Agreement. Thus, our conclusion does not make it is impossible for Members to comply with the obligations of the AD Agreement.

7.92 Japan agrees with the general definition of the term "ordinary course of trade" used by the United States -- "the conditions and practices which, for a reasonable period of time prior to the exportation of the subject merchandise, have been normal" for sales of the foreign like product.[72] In addition, Japan appears to agree that sales to affiliated purchasers may not be in the ordinary course of trade. However, Japan argues that the "arm's length" test applied by the United States is an unreasonable basis for determining whether such sales are in the ordinary course of trade, and that Article 2 does not allow a Member to treat sales that fail the "arm's length" test as "outside the ordinary course of trade". Japan argues that there is nothing in the AD Agreement that supports the premises of the "arm's length" test - that sales made to affiliates[73] at average prices more than 0.5 per cent below the average prices for the same product sold to unaffiliated customers are outside the "ordinary course of trade". According to Japan, a 0.5 percentage point average price differential is too small a difference upon which to base a finding that sales to affiliates are not made in the ordinary course of trade. Japan submits that Article 2.2 of the AD Agreement makes clear that the exclusion of sales as outside the ordinary course of trade is a rigorous undertaking, and that the "arm's length" test is too mechanical and not consistent with the rigorous tests applicable to determining whether sales below cost may be considered outside the ordinary course of trade.

7.93 Second, Japan argues that Article 2.2 of the AD Agreement prescribes what an authority shall do if there are no home market sales in the ordinary course of trade. In Japan's view, Article 2.2 does not permit the replacement of home-market sales to an affiliate with the affiliate's re-sales.[74] Article 2.2 of the AD Agreement provides that in such a case, the authorities must compare export price either with sales to a third country or with a constructed value (cost of production plus a reasonable amount for administrative, selling and general costs and for profits). Japan submits that only Article 2.3 of the AD Agreement concerning export price expressly provides for the possibility that the investigating authority may construct a price on the basis of the price at which the product is first resold to an independent buyer. On the basis of the principle *"expressio unius est exclusio alterius*", Japan argues that the absence of such a power in Article 2.2 of the AD Agreement implies that the USDOC practice is not permitted in the context of a determination of normal value.

7.94 Finally, Japan asserts that USDOC practice to exclude sales that fail the "arm's length" test violates the requirement of Article 2.4 of the AD Agreement to make a "fair comparison" between normal value and export price. Japan argues that a "fair" comparison does not permit statistically arbitrary rules that reject low-priced sales from the calculation of normal value thereby artificially inflating the dumping margin. Japan submits that there are two main problems with the test, first that it tests only for lower prices and considers higher prices to be normal, and second that it fails to account for the degree of variability in prices, producing absurd outcomes. Japan submits that a standard deviation analysis that captures both the frequency and the magnitude of the variation or some other statistically valid test could ensure a fair comparison.[75]

7.95 Japan submits that the use of downstream sales to replace home market sales that failed the "arm's length" test, also violates the requirement of Article 2.4 that a fair comparison be made with the respondent's US sales. Japan argues that prices of downstream sales can only be higher than the

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[72] Section 771(15) of the Tariff Act of 1930, as amended. See also 19 CFR §351.102.

[73] Under US law and regulation, we understand that an investigated exporter or foreign producer may own as little as 5 per cent of another company for the sale to be considered as taking place between affiliated parties.

[74] Japan agrees that in this case there were home-market sales of hot-rolled steel in the ordinary course of trade and Article 2.2 therefore does not apply. Japan's Answers to Questions from the Panel, Annex E-1, para. 57.

[75] Japan submitted a statistician's affidavit concerning this issue, to which the United States objected as not among the "facts made available in conformity with appropriate domestic procedures to the [US authorities]". We did not consider these facts concerning the application of the "arm's length" test in reaching our conclusions in this dispute.

prices of a producer's own direct sales[76], and the downstream home-market sales are often made at a different level of trade and therefore cannot be compared in a fair manner to export sales made directly to unaffiliated customers.

7.96 The United States argues that Article 2.1 of the AD Agreement, which requires that normal value be based on sales made in the ordinary course of trade, allows for more than one permissible interpretation. The United States submits that the USDOC's "arm's length" test of sales to affiliates is one way of examining whether sales were made in the ordinary course of trade. The United States asserts that it is generally recognized that sales to affiliates are suspect and it is expressly recognized in Article 2.3 of the AD Agreement that association may lead to prices that are unreliable. The United States points out that other Members have a similar practice of doubting the reliability of prices of sales to affiliates.[77]

7.97 Since Article 2.1 of the AD Agreement does not specify how to determine whether sales are made in the ordinary course of trade, the United States asserts that the "arm's length" test is one permissible way of making this determination, on the basis of consideration whether sales to affiliates are made at prices that are comparable to those of sales to unaffiliated customers. In the United States view, in the absence of guidance in the AD Agreement on how to assess whether sales are outside the ordinary course of trade, it cannot be argued that a difference of 0.5 percentage points between the prices of sales to affiliated and unaffiliated customers is too small. The United States submits that the authority is free under the AD Agreement to consider a difference of 0.5 per cent significant.[78]

7.98 The United States considers that USDOC's "arm's length" test, which compares the average price of sales to each affiliated customer to the average price of sales of the same product by the same producer to all unaffiliated customers, is preferable to the alternative suggested by Japan, because it focuses on the relationship between the seller and the customer, not on a particular product. The United States believes that the standard deviation analysis suggested by Japan would lower the threshold and provide no certainty that sales included in the calculation of normal value are not affected by the relationship between the seller and the buyer. Moreover, USDOC's weighted average methodology is consistent with the way dumping margins are normally calculated under the AD Agreement.[79] The United States further asserts that USDOC may otherwise consider

[76] Japan argues that it is not fair to compare an export price, ex-factory, with normal value based on downstream sales without making any adjustments to address differences in price comparability due to the reseller's added costs and profit.

[77] First Written Submission of the United States, Annex A-2, section B, footnotes 265–269. The United States considers its own practice more transparent and concrete than that of some other Members and better suited for its own administration of the dumping law.

[78] The United States specifically argues that there is no reason to require a difference of at least 2 per cent merely because this is the *de minimis* dumping margin. Moreover, the United States points out that 0.5 per cent is the *de minimis* standard it applies in the context of administrative reviews, a practice the United States asserts was sanctioned by the Panel in *United States-DRAMs*. The United States asserts that the Panel held that, because the function of the 2 per cent *de minimis* standard in Article 5.8 was to determine "whether or not an exporter is subject to an anti-dumping order," it did not preclude Members from adjusting the threshold for other purposes. Specifically, the Panel found "logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures," and upheld the application of a 0.5 per cent *de minimis* test in administrative reviews. See *Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, ("*United States – DRAMs*") WT/DS99/R, adopted 19 March 1999, para. 6.90. Article 5.8 contains no *de minimis* standard for comparisons involved in determining whether sales have been made outside the "ordinary course of trade".

[79] The United States further argues that the Japanese producers could be glad that higher priced sales were included since it means that such sales would not be replaced with even higher priced downstream sales. The United States further asserts that it is logical that only lower prices are targeted by the test since it is through selling to their affiliates at lower prices that producers will try to manipulate normal value.

aberrationally high prices, as well as prices that fail the "arm's length" test, to be outside the ordinary course of trade - these are simply not what is being tested for by the "arm's length" test.[80]

7.99 The United States maintains that nothing in the AD Agreement precludes the replacement of sales excluded as a result of the application of the "arm's length" test with downstream sales to unaffiliated customers. The United States submits that Article 2.2 of the AD Agreement does not give a definition of the ordinary course of trade and only deals with the situation where there are **no** such sales or **insufficient** sales, which was not the case here. There is no provision that prescribes how sales to affiliates should be treated. Article 2.2.2 of the AD Agreement concerning sales below cost is merely one example of sales that are not considered to be made in the ordinary course of trade and does not determine the treatment of sales to affiliates. In sum, the United States considers that the use of downstream sales to replace sales to affiliates that failed the arm's length test falls within the definition of normal value of Article 2.1 of the AD Agreement.

7.100 The United States considers that Article 2.2 of the AD Agreement expresses a clear preference for actual home market sales over sales to a third country or a construction based on cost of production. In this context, the United States asserts that the downstream sales it uses to replace excluded sales to affiliates are, in fact, "sales in the ordinary course of trade" in the home market, and as such, are preferable to the alternatives provided for in Article 2.2. According to the United States, Japan's argument in fact leads to the absurd result that as soon as sales are made to affiliates, normal value would have to be either constructed based on cost of production or based on sales to third countries.

7.101 The United States submits that USDOC establishes normal value in a permissible way when it excludes sales to affiliates that fail the "arm's length" test, and when it replaces those sales with re-sales to unaffiliated customers, and then compares the determined normal value and export price in accordance with the requirements of Article 2.4, i.e. at the same level of trade, and making due allowance for differences that affect price comparability.[81] Therefore, the United States asserts that Japan's claim that USDOC's "arm's length" test and its use of downstream sales in certain circumstances violates the "fair comparison" requirement of Article 2.4 of the AD Agreement must fail.

7.102 Brazil submits that there is no legal basis in the AD Agreement for USDOC's "arm's length" test, and objects to the very low threshold of affiliation applied by the United States, which, in Brazil's view, will very often lead to the exclusion of perfectly normal sales under the "arm's length" test. It considers that Japan correctly presents the WTO inconsistencies of USDOC's "arm's length" test. Brazil submits that the test excludes prices that are clearly comparable under any reasonable standard. Moreover, Brazil argues, the averaging methodology used in the test removes prices that might be higher than most sales to unaffiliated customers and products that might prove to be a more appropriate match to export sales.

7.103 Brazil also argues that there is no textual basis for USDOC' s replacement of certain affiliated party sales with the resale price of the downstream sale. Brazil argues that the silence in Article 2.2 as to the use of resale prices in determining normal value is meaningful in light of the express provisions concerning the use of resale prices in determining export price under Article 2.3 of the AD Agreement. Brazil is of the opinion that the substitution of higher downstream resale prices increases the normal value so as to vitiate any fair comparison. Brazil concludes that the fact that

[80] Statement of Administrative Action (SAA), at 834 (stating that examples of sales made outside the ordinary course of trade include "merchandise sold at aberrational prices") (Exh. US/B-37).

[81] The United States points out that in this case USDOC did not receive any requests for level of trade adjustments but nevertheless conducted a level of trade analysis. Department's Memorandum on Level of Trade, (12 February 1999) (Exh. US/B-39); *see also* USDOC Preliminary Dumping Determination, 64 Fed. Reg. at 8297 (Exh. JP-11).

USDOC only disregards the lower priced sales that fall outside the "arm's length" test and replaces certain related-party sales with higher downstream prices demonstrates the bad faith in which the United States has implemented the AD Agreement.

7.104 Korea argues that the "arm's length" test is inconsistent with the AD Agreement. In Korea's view, the only basis for considering home market sales as outside the ordinary course of trade is set out in Article 2.2.1 concerning sales below cost, and even then only under certain conditions. In Korea's view, the "arm's length" test mixes together all models of subject merchandise sold to affiliated and unaffiliated parties, without taking into account differences in prices and/or product that existed independent of the factor of affiliation. Moreover, Korea considers the test biased since USDOC disregards only lower priced sales, guaranteeing that higher-priced sales remain in the database for the calculation of normal value.

7.105 Chile supports Japan's view that the "arm's length" test, because it excludes only lower priced sales to affiliated customers, does not allow for a fair comparison between normal value, which is artificially inflated as a result of the application of the test, and export price. Moreover, Chile considers that a difference of 0.5 per cent in price does not constitute a sufficiently significant price difference.

7.106 According to the EC, the "arm's length" test applied by the US authorities is not a "permissible" interpretation of the terms "in the ordinary course of trade" in Article 2.1. The EC considers that it is unreasonable and contrary to Article 2.1 for the US authorities to treat in all circumstances a 0.5 per cent difference in average prices as irrefutable evidence that sales are not made in the ordinary course of trade.

(b) Finding

7.107 The parties are in general agreement that sales between affiliated parties may not be in the ordinary course of trade, and therefore not included in the determination of normal value.[82] However, Japan disagrees with: (i) the "arm's-length" test applied by the USDOC in determining whether affiliated party sales are not in the ordinary course of trade, and (ii) the methodology applied by the USDOC in using the resale price of the affiliated purchaser as a substitute price for sales excluded from the calculation of normal value on the basis of the application of the "arm's length" test.[83]

(i) The use of the "arm's-length" test by USDOC in determining whether affiliated party sales are in the ordinary course of trade

7.108 Turning to the first issue, we note that Article 2.1 of the AD Agreement specifies that a product is to be considered as dumped if the export price is less than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." However, the AD Agreement does not define the concept of "ordinary course of trade", either in Article 2.1 or elsewhere, and establishes no general tests for determining whether sales are

[82] We do not address Korea's argument that only sales below the cost of production may be considered as not in the ordinary course of trade, as third parties may not raise claims before the Panel.

[83] We note in this regard that Japan purports to make a claim concerning the "general practice" of the United States with respect to the application of the "arm's length" test and the replacement of excluded sales. As with its purported claim concerning the "general practice" regarding facts available, we do not consider that Japan has stated a claim in this regard in the request for establishment. Although the United States has not raised a specific objection in this regard , we limit our ruling to the question whether the United States acted inconsistently with its obligations under the AD Agreement in applying that test in this case, and do not rule on the consistency of that test with the AD Agreement *per se*, as we consider that issue to be outside our terms of reference.

made in the ordinary course of trade, or not.[84] It seems clear to us, and the parties do not dispute, that investigating authorities must determine whether sales in the home market are made in the ordinary course of trade in order to determine which of these sales are to be considered in the determination of normal value. The parties also seem to be in general agreement that sales to affiliates may, in some circumstances, be made **not** in the ordinary course of trade. It thus seems indisputable that an investigating authority may "test" home market sales to affiliated customers to decide whether they are made in the ordinary course of trade and consequently are to be considered in determining normal value. The difference between the parties is in their position as to whether the USDOC's "arm's length" test is an appropriate basis for making this decision.

7.109 The "arm's length" test, as we understand it, is intended to test for differences in pricing to affiliated customers as compared with pricing to unaffiliated customers. In the United States' view, such differences demonstrate that sales to affiliated customers are not in the ordinary course of trade. We can certainly accept, as Japan appears to accept, that a pattern of prices to affiliated customers that is different from the pattern of prices to unaffiliated purchasers might support a conclusion that sales to affiliated customers are not in the ordinary course of trade. However, a test intended to distinguish sales that are "in the ordinary course of trade" from those that are not must be based on a permissible interpretation of that term as used in the Agreement.

7.110 Our concern with the "arm's length" test arises because it does not, in fact, test for differences in prices of sales to affiliated customers as compared with unaffiliated customers, which might indicate that sales are not made in the ordinary course of trade. Rather, the "arm's length" test only tests whether prices to affiliated customers are **lower**, on average, than prices to unaffiliated customers.[85] There is no reason to suppose, and the United States has not proposed any, that affiliation only results in sales that are outside the ordinary course of trade because they are lower priced on average than sales to unaffiliated customers. One example of prices to affiliated customers that are higher as a result of affiliation, and might be considered not in the ordinary course of trade, would be where prices between affiliates are established in order to allocate profits, and consequently tax burdens, among affiliates. These prices might, on average, be higher than prices to unaffiliated customers, but would not be caught by the USDOC's "arm's length" test.

7.111 The United States argues before us that it would, if the situation arose, test for "aberrationally high" prices to affiliated customers. However, merely that the United States might apply a different test in other circumstances does not mean that the "arm's length" test is based on a permissible interpretation of "sales in the ordinary course of trade". Moreover, it is clear that the "arm's length" test was applied in this case without consideration of any particular factual circumstances. USDOC stated, in the preliminary determination

> "Sales to affiliated customers in the home market not made at arm's length prices (if any) were excluded from our analysis because we considered them to be outside the

[84] Article 2.2.1 of the Agreement does provide that sales made below cost may be treated as not in the ordinary course of trade and disregarded in calculating normal value if certain conditions are satisfied. Thus, it implies that sales below cost are not in the ordinary course of trade. Further, Articles 2.2.1.1 and 2.2.2 contain detailed rules on the calculation of costs in assessing whether sales are made below cost. However, merely that one category of sales that may be considered not in the ordinary course of trade is set out in the Agreement does not illuminate how an investigating authority is to determine, with respect to sales other than sales below cost, whether such sales are in the ordinary course of trade. We note in this regard that although an illustrative list of sales outside the ordinary course of trade was the subject of discussion in the negotiation of the AD Agreement, no such list was ultimately agreed to. *See*, GATT Doc. MTN:GNG/NG8/15 (19 March 1990) at page 13.

[85] We note that we have doubts as to whether a price difference of, on average, 0.5 per cent, can reasonably be considered as sufficiently different so as to support the conclusion that the lower priced sales are not in the ordinary course of trade. However, we do not consider it necessary or appropriate to resolve this question, as our conclusion rests on the more basic problem that the "arm's length" test does not, in our view, reasonably relate to the question whether sales are in the ordinary course of trade.

> ordinary course of trade. *See* 19 CFR 351.102. To test whether these sales were made at arm's length, we compared on a model-specific basis the prices of sales to affiliated and unaffiliated customers net of all discounts, rebates, billing adjustments, movement charges, direct selling expenses, and packing. Where, for the tested models of subject merchandise, prices to the affiliated party were on average 99.5 per cent or more of the price to unaffiliated parties, we determined that sales made to the affiliated party were at arm's length and used those sales in determining [normal value]. …[86]

7.112 The result of application of the "arm's length" test, in this case and in general, is the exclusion from the determination of normal value of prices that are, on average, lower. As a result, the application of the "arm's length" test cannot but skew the normal value upward, thereby making a finding of dumping, or a higher margin of dumping, more likely.[87] This reinforces our view that the "arm's length" test does not rest on a permissible interpretation of the term "sales in the ordinary course of trade".

(ii) The replacement of excluded sales with sales by affiliated purchasers in the determination of normal value

7.113 Turning to the second issue, the replacement, in the calculation of normal value, of "excluded" sales by downstream sales, we note that Article 2.1 establishes that normal value is the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The United States argues that the downstream prices it uses as replacements for excluded home market sales to affiliated companies meet this definition, and that therefore, the USDOC decision to use these prices in establishing normal value is based on a permissible interpretation of the Agreement. We do not agree.

7.114 It is important to keep in mind the overall object and purpose of the AD Agreement, to establish rules for the imposition of anti-dumping duties. Among these is the obligation, set out in Article 6.10, to "as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". To this end, investigating authorities routinely collect information from the known exporters and producers concerned regarding their home market and export sales, in order to enable the calculation of a dumping margin. In our view, the "comparable price, in the ordinary course of trade" on the basis of which normal value is to be determined under Article 2.1 **must** be the price of the sales by each known exporter or producer for which a dumping margin is calculated. The "replacement" prices used in this case in the calculation of normal value for investigated Japanese producers were the prices of sales made by **affiliates** of the companies being investigated for purposes of determining whether dumping was occurring and if so, the margin of dumping. While it may be true that those sales were, in the broad sense, in the ordinary course of trade, in our view they are simply not sales which may be taken into account in determining normal value for the companies for which dumping margins were being established, as they are not sales in the ordinary course of trade **of those companies.**

7.115 We consider that the overall structure of Article 2 supports our conclusion in this regard. Article 2.1 defines dumping as a situation where export price is lower than normal value, which is the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2 then provides alternative methods for establishing normal value when there are no such sales, the volume of such sales is too low to permit a proper comparison, or the particular market situation does not permit a proper comparison. Article 2.3 next provides

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[86] USDOC Preliminary Dumping Determination, 64 Fed. Reg. 8295 (19 February 1999), Exh. JP-11

[87] This is particularly true when the application of the "arm's length" test is combined with the replacement of excluded sales with downstream sales to affiliates, which are more likely than not to be higher priced sales.

alternative methods for establishing export price in situations where there is no export price or the export price is deemed unreliable.

7.116 Once normal value and export price have been determined in accordance with the provisions of Articles 2.1 through 2.3, Article 2.4 then establishes rules governing the comparison of normal value and export price.[88] Thus, Article 2 as a whole sets out the basic rules for all aspects of the determination of dumping. Of course, investigating authorities will have to make numerous decisions along the way to determining a margin of dumping for each investigated company, not all of which are specifically addressed in Article 2 itself. However, these decisions must, in all cases, **not be inconsistent with** the specific requirements of Article 2, as well as the rest of the AD Agreement.

7.117 The alternative methods for the calculation of normal value and export price provided for in Articles 2.2 and 2.3 of the AD Agreement are not the same. We see no basis on which to conclude that because Article 2.3 allows for the construction of an export price on the basis of a first resale to an independent buyer, a similar action must be allowed for the determination of normal value. It is by no means clear to us that calculation of a constructed normal value by a method parallel to that provided for constructed export price would be acceptable under the AD Agreement.[89] In any event, however, that is not what USDOC did in this case. There was no attempt to make allowances for costs, including duties and taxes, incurred between the original sale to the affiliated purchaser and the first resale to an independent buyer, as is required when export price is constructed pursuant to Article 2.3. The consideration of level of trade does not compensate for this lack.[90] In our view, the replacement of excluded sales by investigated companies to affiliates with the downstream sales by those affiliates in the calculation of normal value is inconsistent with the AD Agreement.

7.118 There was no allegation in this case that there were no or insufficient sales in the ordinary course of trade by the investigated companies to allow for the calculation of normal value on the basis of those sales, as required by Article 2.1. Neither party contends that there was a need to calculate normal value according to one of the alternate methods provided for in Article 2.2. Thus, in our view, in order to be consistent with Article 2.1, normal value was to be determined on the basis of the prices of sales made **by the investigated companies themselves**, in the ordinary course of trade. We can see no basis in the AD Agreement for the replacement of certain excluded home market sales by downstream sales of the goods in the calculation of normal value for the investigated respondents in this case. We therefore conclude that the "replacement" of excluded sales to affiliates with the sales by those affiliates to downstream purchasers in this case was not consistent with Article 2.1 of the AD Agreement.

(iii) Additional findings

7.119 Having found that the "arm's length" test does not relate to a permissible interpretation of the term "sales in the ordinary course of trade", we conclude that its application in this case led to a determination as to whether certain sales were made in the ordinary course of trade inconsistent with Article 2.1 of the Agreement. As a consequence of our finding in this regard, we do not consider it

[88] Article 2.5 deals with the situation where the products are not imported from the country of origin directly, Article 2.6 defines like products, and Article 2.7 establishes that the foregoing rules are without prejudice to the second Supplementary Provision to paragraph 1 of Article VI of Annex I to GATT 1994.

[89] Indeed, it might be argued that because the negotiators of the AD Agreement provided for calculation of a constructed export price on the basis of first resale to an independent buyer in Article 2.3, that they did not provide a similar possibility for constructing a normal value on the same basis indicates that such a methodology is precluded.

[90] The parties both acknowledge that the downstream sales of the affiliated company are likely to be higher priced than the excluded sales to the affiliated company. First Written Submission of Japan, Annex A-1, para.170, Second Submission of the United States, Annex C-2, para 28. Thus, the use of downstream sales by affiliated companies to replace excluded sales to affiliated companies in calculating normal value is likely to skew normal value upward.

either necessary or appropriate to consider whether that test also is inconsistent with the more general obligation of fair comparison set out in Article 2.4 of the AD Agreement.

7.120 Similarly, having found that the USDOC acted inconsistently with Article 2.1 in replacing, in the determination of normal value, certain "excluded" sales by investigated companies with downstream sales made by purchasers affiliated with the investigated companies, we do not consider it necessary to go on to consider whether the replacement of excluded sales with sales by affiliates was consistent with Articles 2.2 and 2.4 of the AD Agreement.

E. ALLEGED VIOLATIONS IN THE PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES

1. Arguments

7.121 Japan claims that USDOC's preliminary critical circumstances finding is inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement because (i) USITC had preliminarily found only a threat of injury to the industry while Article 10.6 of the AD Agreement requires evidence of current injury; and (ii) the preliminary determination of critical circumstances was not supported by sufficient evidence as required by Article 10.7 of the AD Agreement. Japan moreover asserts that the evidentiary standard in the US statute governing preliminary critical circumstances findings on its face is inconsistent with the "sufficient evidence" standard of Article 10.7 of the AD Agreement. Finally, Japan argues that the US statute does not require evidence of all the conditions set forth in Article 10.6 of the AD Agreement.

7.122 Japan submits that the USDOC preliminary critical circumstances determination inevitably also is inconsistent with Article 10.1 of the AD Agreement since it allowed for the possibility that AD duties would be levied retroactively in spite of the fact that the requirements of Articles 10.6 and 10.7 of the AD Agreement had not been satisfied.

7.123 Japan asserts that the investigating authorities cannot predicate a finding of critical circumstances on a mere threat of injury. Japan therefore claims that USDOC's preliminary critical circumstances determination, which Japan asserts was based on a preliminary finding by the USITC of threat of injury, is inconsistent with Article 10.6 of the AD Agreement. Japan asserts, in support of its view, that Article 10.6 of the AD Agreement uses the term "injury", while Articles 10.2 and 10.4 of the AD Agreement contain a clear distinction between "injury" and "threat" thereof, and allows for retroactive imposition of duties only in the case of **current** material injury.

7.124 Second, Japan argues that USDOC's preliminary critical circumstances determination is inconsistent with Article 10.7 of the AD Agreement because it was not based on "sufficient evidence" that the requirements of Article 10.6 of the AD Agreement were satisfied. Japan claims that USDOC based its critical circumstances determination on information contained in the petition and in certain press reports. In Japan's view, such information is one-sided and necessarily biased and can therefore never constitute sufficient evidence as required by Article 10.7 of the AD Agreement. In particular, Japan asserts that USDOC lacked sufficient evidence of the existence of dumping as required by Article 10.6(ii) of the AD Agreement and the chapeau of Article 10.6, since it based its conclusion entirely on information contained in the petition. Japan further argues that USDOC did not have sufficient evidence of injury to the industry caused by dumped imports, since it relied on press reports and ignored the preliminary findings of the USITC which stated that the "industry was relatively healthy during much of the period examined". Japan finally argues that USDOC lacked sufficient evidence of "massive dumped imports over a relatively short period". Japan submits that USDOC departed from its normal practice of assessing the period before and immediately after the filing of a petition, and instead picked a period of five months preceding and following April 1998 as the basis for determining whether there were massive dumped imports over a relatively short period. Japan

argues that this date was arbitrarily chosen on the basis of press reports that allegedly announced the likely filing of a petition for anti-dumping measures by US producers.[91]

7.125 In addition, Japan alleges that the US statutory provision governing preliminary critical circumstances determinations, section 733(e) of the Tariff Act 1930, as amended, is inconsistent on its face with Article 10.7 of the AD Agreement. That Article requires that the authorities "have sufficient evidence" that the conditions set forth in paragraph 6 of Article 10 of the AD Agreement are satisfied. Japan argues that section 733(e) of the Tariff Act of 1930, as amended, sets a lower evidentiary standard by requiring only a "reasonable basis to believe or suspect" that certain conditions are satisfied, rather than "sufficient evidence" that those conditions are satisfied.[92] Moreover, Japan argues that the US statutory provisions governing critical circumstances determinations do not require all of the findings of fact required by Article 10.6 of the AD Agreement. Japan refers in particular to the absence in the US statute of a requirement to make a preliminary finding of dumping and of an assessment of whether the remedial effect of the AD duty is undermined by the dumped imports. Japan submits that the US statute also does not require sufficient evidence of the causal link between massive imports and injury.

7.126 The United States submits that neither the US statute nor USDOC's preliminary critical circumstances determination is inconsistent with Article 10 of the AD Agreement. The United States claims that, contrary to Japan's assertion, Article 10.6 of the AD Agreement and 10.7 of the AD Agreement expressly authorise that preliminary critical circumstances determinations be made based on a threat of material injury to the domestic industry.[93] The United States refers in this regard to the ordinary meaning of the word injury. The United States argues that the term "injury" is defined in footnote 9 of the AD Agreement as "material injury to a domestic industry or threat of material injury to a domestic industry, unless otherwise specified". The United States notes that Article 10.6 of the AD Agreement does not "otherwise specify". Thus, in the US view, "injury" in Article 10.6 of the AD Agreement includes both material injury and threat thereof.

7.127 The United States argues that Articles 10.6 and 10.7 of the AD Agreement permit "such measures be taken as may be necessary to collect AD duties retroactively" to be taken at any time after the initiation of the investigation.[94] The United States submits that, in accordance with Article 10.7 of the AD Agreement, USDOC made a preliminary critical circumstances determination on the basis of sufficient evidence that the conditions set forth in Article 10.6 of the AD Agreement were satisfied.[95] The United States asserts that USDOC had sufficient evidence that the importers

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[91] USDOC Preliminary Critical Circumstances Determination , 63 Fed. Reg. at 65751. (Exh. JP-9)

[92] Japan argues on the basis of the ordinary meaning of the words as found in the dictionary that what is "reasonable" is not "sufficient." According to Japan, "sufficient" is a standard: whatever is enough to satisfy a legal test. "Reasonable" is a range, which can be "less or more than might be thought likely or appropriate." And what one "believes or suspects" is not necessarily "evidence." "Evidence" is proof, Japan submits. "Believe or suspect" describes a range much less than proof. "Suspect" is in fact flatly incompatible with evidence, Japan argues; it is instructive that the definition of "suspect" includes "[i]magine something evil, wrong, or undesirable . . . on little or no evidence; believe to be guilty with insufficient proof or knowledge." "Believe" is mere trust or confidence. According to Japan, that does not reflect the factual inquiry required to establish "proof." Japan opines that USDOC is essentially directed by the statute to decide that critical circumstances exist on mere suspicion or belief, without any real evidence.

[93] Responses of the United States to Questions from the Panel, Annex E-3, para.18.

[94] The United States submits that section 733(e) of the Tariff Act of 1930, which provides that no action can be taken before a preliminary finding of dumping is made by USDOC, is more restrictive than Article 10.7 of the AD Agreement, which on its face allows action to secure potential retroactive duties at any time after initiation once there is sufficient evidence of critical circumstances.

[95] The United States asserts that the standard in the AD Agreement of "sufficient evidence" requires that an objective and unbiased Investigating Authority could properly have reached the conclusion that such evidence existed. The United States argues that the standard in case of preliminary determinations and provisional measures is necessarily lower than in case of a final determination.

knew or should have known that the exporter was practising dumping. The United States emphasises that the several hundreds of pages of exhibits to the petition are not "mere allegations" of dumping, but contain substantial factual information on the export price and normal value of the subject products and thus constitute evidence. On the basis of this information, knowledge of dumping was imputed to the importers on the basis of dumping margins in excess of 25 per cent.[96] The United States argues that since the AD Agreement does not dictate how to determine whether the importers were aware that products were being dumped, it is both reasonable and permissible to deduce such knowledge from the degree of the dumping margin as preliminary established.[97]

7.128 The United States asserts that USDOC also had sufficient evidence of massive imports over a short period of time. USDOC compared two six month periods and established that there was an increase in imports of 100 per cent. The United States asserts that nothing in the AD Agreement dictates which date to choose to assess whether there have been massive imports over a short period. Therefore, USDOC was permitted to choose the date on which it became common knowledge that anti-dumping proceedings would be initiated in the near future, and the date of April 1998 was therefore reasonable. The United States argues that because petitioners wait to submit their petition in order to gather more evidence does not mean that they should be deprived of their remedy against massive dumped imports that entered the country in anticipation of the anti-dumping investigation.[98]

7.129 The United States refutes Japan's challenge to the consistency of section 733(e) of the Tariff Act of 1930, as amended. First, the United States submits that it is clear that section 733(e) does not mandate any WTO inconsistent action and can therefore not be found to be inconsistent on its face with the AD Agreement. Moreover, the United States submits, the evidentiary standard of "a reasonable basis to believe or suspect" is similar to that of "sufficient evidence" and both are used interchangeably by USDOC.[99] The United States asserts that it is not a lower evidentiary standard. The United States further argues that it is general USDOC practice to make all the determinations as required by Article 10.6 of the AD Agreement concerning massive imports, knowledge of dumping and injury and the causal link between the dumping and the injury.

7.130 Brazil supports Japan's argument that the US critical circumstances determination was inconsistent with Article 10.6 of the AD Agreement, as in Brazil's view a preliminary finding of material injury to the industry and not just threat thereof is required. Brazil argues that the USDOC determination was not based on sufficient evidence as required by Article 10.7 of the AD Agreement but on mere allegations of the petitioners. Moreover, Brazil submits that the evidentiary standard in

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[96] Japan argues that knowledge of dumping cannot be determined without a preliminary dumping finding. The United States submits that Article 10.6 directs the administering authority to determine whether importers *should have known that dumping was occurring and that such dumping would cause injury*. The Agreement does *not* specify how to determine such awareness. The United States asserts that although Japan would prefer a requirement that there be a determined dumping margin, this is simply not necessary under the Agreement. The United States concludes therefore that if USDOC's method for determining importer knowledge is a permissible interpretation of the Agreement, and if it rests upon sufficient evidence, it must be upheld.

[97] The United States notes in this respect that Japan never alleged that the evidence contained in the petition of the US industry was not sufficient to initiate an investigation under Articles 5.2 and 5.3 of the AD Agreement.

[98] The United States stresses that Section 351.206(i) of USDOC's regulations provides that USDOC will "normally" compare the three months following initiation of an investigation to the three months preceding initiation in order to determine whether critical circumstances exist. These comparison periods are appropriate where companies learn of the investigation when it is initiated and then try to beat the preliminary determination with a surge of imports of the subject merchandise. However, the United States points out, Section 351.206(i) provides that if USDOC finds that importers, exporters, or producers had reason to believe, at some point prior to the beginning of the proceeding, that an investigation was likely (as it did in this case), USDOC may consider a period of not less than three months from that earlier time for comparison purposes.

[99] The United States provides examples in its answer to question 31 of the Panel, footnote 6. Responses of the United States to Questions from the Panel, Annex E-3, para. 24, footnote 6.

the US statutory provisions is lower than that set forth in the AD Agreement and that US law does not require a finding of all the elements of fact of Article 10.6 of the AD Agreement.

7.131 Korea agrees with Japan's view that USDOC's critical circumstances determination was not based on sufficient evidence of current injury, but only of threat of injury, and is therefore inconsistent with Articles 10.6 and 10.7 of the AD Agreement. Korea asserts that this interpretation, that evidence of current material injury is necessary, comports with the limited object and purpose of Article 10.6 of the AD Agreement which is to assure that the remedial effects of the final duties are not eviscerated. Korea argues that, if only threat of injury exists, the remedial effect will not be undermined since the prospective application of the duties will precisely prevent injury from occurring.

7.132 Chile is of the opinion that information from petitioners is not "sufficient evidence" and the USDOC critical circumstances determination therefore is inconsistent with Articles 10.7 of the AD Agreement.

2. Finding

7.133 We recall certain of the facts that are relevant to our examination of the matter before us. On 8 October 1998, USDOC issued a policy bulletin stating that the USDOC would, if adequate evidence of critical circumstances was available, issue preliminary critical circumstances determinations prior to preliminary dumping determinations.[100] On 30 November 1998, USDOC issued an affirmative preliminary critical circumstances determination regarding imports of hot-rolled steel from Japan.

7.134 Although USDOC made a preliminary determination of critical circumstances, no measures "necessary to collect anti-dumping duties retroactively" were actually taken until the preliminary determination of dumping by USDOC, effective 19 February 1999.[101] USDOC made a second and final critical circumstances determination as part of its final dumping determination on 6 May 1999. Under US law, however, it is the USITC, in its final determination of injury, which determines whether critical circumstances exist that warrant the retroactive application of duties to 90 days prior to the date of application of provisional measures. USITC in its final injury determination of 23 June 1999 made a negative critical circumstances finding. USITC concluded that "we do not find that the record evidence indicates that the subject imports from Japan would seriously undermine the remedial effects of the order".[102] Therefore, anti-dumping duties were ultimately not collected retroactively.

7.135 Japan is challenging the consistency of the USDOC preliminary critical circumstances determination with Articles 10.6 and 10.7 of the AD Agreement. Japan claims that by violating these two provisions, USDOC also acted inconsistently with Article 10.1 of the AD Agreement.

7.136 Article 10.1 of the AD Agreement reads as follows:

> "Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph

[100] Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations, 63 Fed. Reg. 55364 (15 October 1998) ("Policy Bulletin"), Exh. JP-3

[101] At that time, USDOC directed the US Customs Service to suspend liquidation and require the posting of bonds or cash deposits retroactively to 90 days prior to the date of publication of the preliminary dumping determination, *i.e.* 90 days prior to 19 February 1999. USDOC Preliminary Dumping Determination, 64 Fed. Reg. 8299. Exh. JP-11.

[102] Certain Hot-Rolled Steel Products From Japan, 64 Fed. Reg. 33514, 33514 (23 June 1999). Certain Hot-Rolled Steel Products From Japan, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (June 1999) ("USITC Report"), page 23.

1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article"

7.137 Articles 10.6 and 10.7 of the AD Agreement provide that:

"10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied".

7.138 Japan's claims concern **only** the US *preliminary* critical circumstances determination, which is governed by Article 10.7 of the AD Agreement, which authorizes preliminary measures necessary to collect duties retroactively. We will first address Japan's claims concerning the US statutory provisions on critical circumstances. Japan argues that the US statute does not require a finding of all the conditions necessary for the retroactive imposition of duties and sets an evidentiary standard which is lower than the "sufficient evidence" standard of the AD Agreement. Secondly, we will discuss Japan's claim that USDOC acted inconsistently with Article 10.6 of the AD Agreement by making an affirmative critical circumstances determination in the absence of a finding of current material injury to the industry. Finally, we will address Japan's claim that USDOC's preliminary critical circumstances determination was not supported by sufficient evidence of all the conditions of Article 10.6 of the AD Agreement and therefore was inconsistent with Article 10.7 of the AD Agreement.

(a) Are the US statutory provisions concerning critical circumstances consistent with the Agreement with respect to the evidentiary standard it sets forth and the conditions of application it requires?

7.139 Section 733(e)(1) of the Tariff Act of 1930, as amended, requires USDOC to make certain preliminary determinations in a case in which a petitioner requests the imposition of anti-dumping duties retroactively for 90 days prior to a preliminary determination of dumping. The statute provides:

"If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by [USDOC], then [USDOC] shall promptly (at any time after the initiation of the investigation under this part) determine, on the basis of the information available at that time, whether there is a reasonable basis to believe or suspect that—

> (A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
>
> (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and
>
> (B) there have been massive imports of the subject merchandise over a relatively short period".[103]

7.140 Japan argues that the evidentiary standard set forth in the statute is inconsistent with the requirements of Article 10.7, and also that the statute does not require all of the conditions of the AD Agreement for making a preliminary critical circumstances determination.

7.141 It is well established in GATT/WTO practice that a statute is inconsistent on its face with a Member's WTO obligations only if it is mandatory and requires WTO inconsistent action or prohibits WTO consistent action.[104] The Appellate Body recently stated, in *United States – Anti-Dumping Act of 1916* :

> "88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:
>
> > … panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (emphasis added)
>
> 89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government". (footnotes omitted)[105]

We therefore consider whether the statute in question requires USDOC to take action which contravenes the US obligations under the WTO AD Agreement.

7.142 The statute provides that if the petitioner alleges critical circumstances, USDOC shall promptly determine whether there is a reasonable basis to believe or suspect that critical circumstances exist. On the basis of this determination such measures may be taken as necessary to

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[103] Codified at 19 U.S.C. § 1673b(e)(1) (Exh. JP-4). The corresponding provision for final determinations of critical circumstances is section 735(a)(3), 19 U.S.C. § 1673d(a)(3).

[104] The Panel in *United States – Section 301* also recognized the "classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions". Panel Report, *United States – Section 301*, para. 7.54.

[105] Appellate Body Report, *United States – Anti-dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, paras 88 - 89.

collect anti-dumping duties retroactively. We do not believe that this provision of the US statute requires USDOC to take WTO inconsistent action. Nor does it preclude USDOC from acting consistently with the Agreement.

7.143 First, the evidentiary standard set forth in the US statute is "a reasonable basis to believe or suspect". Article 10.7 of the AD Agreement on the other hand uses the term "sufficient evidence". It is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact.[106] The analysis of the consistency of the US statute with Article 10.7 must take into account, therefore, its application in practice, as interpreted and applied by the administering and judicial authorities. We recognize that the actual terms used in the US statute differ from those of the Agreement. However, we believe that the consistency of this evidentiary standard is not determined by a semantic difference. Rather, we must examine how this standard has been applied in practice.

7.144 In our view, "sufficient evidence" refers to the quantum of evidence necessary to make a determination. "A reasonable basis to believe or suspect" on the other hand, seems to refer to the conclusion reached on the basis of evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented. It appears that in past cases the US authorities have applied the standard as set out in the statute interchangeably with a standard expressed as "sufficient evidence" and have made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied.[107] We therefore consider that the US statute, as it has been applied is not inconsistent with the requirement of the AD Agreement that the investigating authority must have sufficient evidence of the conditions of Article 10.6 before taking measures necessary to collect the duties retroactively.[108]

7.145 Japan further argues that the US statute does not require evidence that all the conditions of Article 10.6 of the AD Agreement are satisfied, as required by Article 10.7. Japan claims in particular that the statute does not require sufficient evidence of dumping, injury and causation, and that it does not require evidence that massive dumped imports are likely to seriously undermine the remedial effect of the duty. We recall that the question we must address in this regard is whether the statute requires action inconsistent with, or prevents actions consistent with, the requirements of the Agreement.

7.146 In our view, the US statute allows the investigating authority to make its determinations consistently with the AD Agreement in this respect. We recognise that the statute does not explicitly set out the same requirements as are set out in Article 10.6. However, this does not imply that USDOC is precluded from taking these elements into consideration, in so far as necessary. In our view, the text of the US statute in this regard does not preclude USDOC from determining whether there is sufficient evidence that the conditions set out in paragraph 10.6 are satisfied. The question then becomes whether USDOC did so in this case. We will discuss this question below.

7.147 We note that Article 10.7 requires that there be sufficient evidence that the conditions of Article 10.6 are satisfied. Article 10.6 of the AD Agreement of course presupposes a final dumping and injury determination, without which no definitive dumping duties may be applied in any case.

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[106] *Certain German Interests in Polish Upper Silesia*, 1926, PCIJ Rep., Series A, No. 7, p.19; See also Panel Report, *United States – Section 301*, para. 7.18.

[107] The United States refers to various instances in which the two standards have been used interchangeably by USDOC in anti-dumping and countervailing duty cases, See First Written Submission of the United States, Annex A-2, para 290 and footnote 405.

[108] We note that Japan made several claims concerning USDOC's preliminary critical circumstances determination arguing a lack of sufficient evidence in support of its determination. However, as we will discuss in detail below, Japan did not argue that the lack of sufficient evidence was somehow due to a flawed evidentiary standard, but instead pointed to the evidence actually relied upon, which Japan considers insufficiently reliable and probative.

Rather than being conditions set out in Article 10.6, we consider that findings of dumping and injury are a precondition for any *definitive* duty to be applied. Article 10.7 of the AD Agreement provides that certain *preliminary* measures may be taken "after initiation". This implies that at the time of the critical circumstances determination, the authority has already determined, under Article 5.3, that the petition contained sufficient information of dumping, injury, and a causal link to justify the initiation of the investigation. For a preliminary critical circumstances determination, Article 10.7 requires, in addition, sufficient evidence of the specific conditions of Article 10.6 as set forth in 10.6 (i) and (ii). It does not, however, in our view necessarily require additional or different evidence of dumping or injury from that on which the decision to initiate was based.

7.148 We note that the US statute governing preliminary critical circumstances determinations does not expressly refer to the question whether massive dumped imports seriously undermine the remedial effect of the duty. However, we do not consider that the Agreement requires that a separate determination be made with regard to this aspect of Article 10.6 at the preliminary stage of considering whether to take action under Article 10.7. Rather than a "condition" of Article 10.6 of which there must be sufficient evidence in order to act under Article 10.7, in our view, this requirement establishes the conclusion that must be reached in order to justify retroactive application of the anti-dumping duty under Article 10.6.[109] Consideration of this question at the preliminary stage of deciding whether to apply measures under Article 10.7 would, in our estimation, at best be speculative. Our view is reinforced by the fact that the possible undermining of the remedial effect of a definitive anti-dumping duty is not a question of which evidence would be available at the very early stages of an investigation, after initiation, when the determination under Article 10.7 may be made and authorized precautionary measures taken. The conclusion that the remedial effect of a definitive duty would be undermined by the effect of massive dumped imports can only meaningfully be addressed at the end of the investigation, when it has been determined that the imposition of a definitive anti-dumping measure is warranted, based on a final determination of dumping, injury, and causal link. To require investigating authorities to undertake what is likely to be an impossible, meaningless task under Article 10.7 is not, in our view, necessary or appropriate.

7.149 Moreover, in this respect, we note the US regulation set out in 19 CFR § 351.206 (h). It provides that, in assessing whether imports of the subject merchandise have been massive, USDOC is to examine the volume and value of the imports, the seasonal trends and the share of domestic consumption accounted for by the imports, and establishes that imports over a relatively short period of time may be determined based on the knowledge of exporters that an anti-dumping proceeding was likely or had been initiated. We recall that Article 10.6 (ii) of the AD Agreement provides that injury must be caused by massive dumped imports "which *in light of the timing and the volume of the dumped imports* and other circumstances (such as a rapid build-up of inventories) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied". Thus, the Agreement requires that the likelihood that the remedial effect of the duty will be undermined be assessed in light of timing and volume of the dumped imports. In our view, by requiring that the assessment of massive dumping in a relatively short period be made in light of the exporters' knowledge of an initiation or a likely initiation, USDOC addresses whether massive imports are likely to seriously undermine the remedial effect of the duty.

7.150 On the basis of the foregoing, we conclude that the US statute, section 733(e) of the Tariff Act of 1930, as amended, is not, on its face, inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement. Having reached this conclusion, we also find that the United States has not acted inconsistently with its obligations under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the AD Agreement in maintaining this statutory provision.

[109] In this respect, we note that the USITC, which makes the final determination establishing whether definitive duties will be collected retroactively, is required to consider this element under section 735(b)(4)(A) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1673d(b)(4).

(b) Is the USDOC preliminary critical circumstances determination concerning hot-rolled steel from Japan inconsistent with Articles 10.6 and 10.7 of the AD Agreement ?

7.151 Japan further challenges the specific preliminary critical circumstances determination made by USDOC in the investigation of imports of hot-rolled steel from Japan. As a preliminary matter, we note that we understand Japan to argue that a Member is precluded from making a preliminary determination of critical circumstances in the absence of a preliminary determination of material injury to the domestic industry. According to Japan, USDOC's preliminary determination of critical circumstances thus violated Article 10.6 of the AD Agreement since USITC had found threat of injury to the industry, but not current material injury, in its preliminary determination. However, Article 10.6 sets out the conditions for retroactive application of "**definitive** anti-dumping duties"(emphasis added). In the case of imports of hot-rolled steel products from Japan, no duties were actually levied retroactively, since USITC in its final determination of injury found that the conditions of Article 10.6 were not satisfied. In our view, Article 10.6 does not directly govern the determination at issue here – rather, USDOC's preliminary critical circumstances determination must be judged against the obligations set out in Article 10.7. Those obligations, while related to the obligations set out in Article 10.6, are not necessarily identical. This is not to say that the basis of the final injury determination is irrelevant to whether definitive duties may be levied retroactively under Article 10.6. It is only that in this case, since we are not considering whether there is a violation of Article 10.6, we need not determine whether, under Article 10.6, duties can only be levied retroactively if there is a final determination of material injury and not where there is a final determination of threat of injury. It is a different question, which we discuss below, whether a preliminary determination of critical circumstances under Article 10.7 requires sufficient evidence of current material injury to the domestic industry, or whether sufficient evidence of threat of injury may be enough.

7.152 We first address what constitutes "sufficient evidence" for the purposes of a determination under Article 10.7. Second, we must determine what are the conditions of paragraph 6 of Article 10 of which sufficient evidence is required by Article 10.7. Finally, we consider whether USDOC's determination that there was sufficient evidence of the required elements of Article 10.6 to make an affirmative preliminary critical circumstances determination is one that an objective and unbiased investigating authority could make on the basis of the evidence that was before USDOC in this case.

7.153 Article 10.7 of the AD Agreement does not define "sufficient evidence". However, Article 5.3 also reflects this standard, in requiring that the authorities examine the accuracy and adequacy of the evidence provided in the application "to determine whether there is sufficient evidence to justify the initiation of an investigation". The Article 5.3 requirement of "sufficient evidence to initiate an investigation" has been addressed by previous GATT and WTO panels. Their approach to understanding this standard has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination.[110] These Panels have noted that what will be sufficient evidence varies depending on the determination in question. The Panel in *Mexico – HFCS* quoted with approval from the Panel's report in the *Guatemala – Cement I* case that "the type of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less".[111]

[110] Panel Report, *Mexico – HFCS*, para 7.95. (referring to *Guatemala – Cement I*, para. 7.57 and *United States - Softwood Lumber*, SCM/162, BISD 40S/358, para. 335, (adopted 27 –28 October 1993)). The Panel in *Guatemala – Cement I* also stated that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury and causation. made after investigation", Panel Report, *Guatemala – Cement I*, para 7.57, referring to *United States – Softwood Lumber*, para 332.

[111] Panel Report, *Mexico – HFCS*, para. 7.97; Panel Report, *Guatemala – Cement I*, para 7.77

7.154 The question before us is whether USDOC had sufficient evidence of the conditions of Article 10.6 to entitle USDOC to take such measures as may be necessary to collect AD duties retroactively. We are of the view that what constitutes "sufficient evidence" must be addressed in light of the timing and effect of the measure imposed or the determination made. Evidence that is sufficient to warrant initiation of an investigation may not be sufficient to conclude that provisional measures may be imposed. In a similar vein, the possible effect of the measures an authority is entitled to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence. Whether evidence is sufficient or not is determined by what the evidence is used for. In sum, whether evidence is sufficient to justify initiation or to justify taking certain necessary precautionary measures under Article 10.7 is not a standard that can be determined in the abstract. We will therefore consider the impact of a finding of sufficient evidence for the purposes of Article 10.7 and examine the evidence on which USDOC relied in making the challenged preliminary critical circumstances determination.

7.155 Article 10.7 provides that once the authorities have sufficient evidence that the conditions of Article 10.6 are satisfied, they may take such measures as, for example, the withholding of appraisement or assessment, as may be necessary to collect anti-dumping duties retroactively. We read this provision as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter. Measures taken under Article 10.7 are not based on evaluation of the same criteria as final measures that may be imposed at the end of the investigation. They are of a different kind - they preserve the possibility of imposing anti-dumping duties retroactively, on the basis of a determination additional to the ultimate final determination.

7.156 Our understanding in this regard is confirmed by the fact that, unlike provisional measures, which can only be imposed after a preliminary affirmative determination of dumping and injury, Article 10.7 measures may be taken at any time "after initiating an investigation". In light of the timing and effect of the measures that are taken on the basis of Article 10.7, we consider that the Article 10.7 requirement of “sufficient evidence that the conditions of Article 10.6 are satisfied" does not require an authority to first make a preliminary affirmative determination within the meaning of Article 7 of the AD Agreement of dumping and consequent injury to a domestic industry. If it were necessary to wait until after such a preliminary determination, there would, in our view, be no purpose served by the Article 10.7 determination. The opportunity to preserve the possibility of applying duties to a period prior to the preliminary determination would be lost, and the provisional measure that could be applied on the basis of the preliminary affirmative determination under Article 7 would prevent further injury during the course of the investigation. Moreover, the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation cannot be reconciled with the right, under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed, if a preliminary affirmative determination is a prerequisite to the Article 10.7 measures which preserve the possibility of retroactive application of duties under Article 10.6.

7.157 The question that remains is whether USDOC had sufficient evidence that all the conditions of paragraph 6 of Article 10 of the AD Agreement were satisfied. Japan argues that USDOC did not have sufficient evidence of dumping and material injury caused by the dumped imports. Japan also submits that USDOC did not have sufficient evidence that massive dumped imports were likely to seriously undermine the remedial effect of the duty.

7.158 We note that Japan did not challenge the initiation of the investigation, which was, pursuant to Article 5.3, based on a determination that there was sufficient evidence of dumping, injury, and a causal link. We can perceive of no reason, given the precautionary nature of the measures that may

be taken under Article 10.7, why that same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7.

7.159 Turning to the conditions of which there must be sufficient evidence, we note that Article 10.6 requires authorities to determine that, for the dumped product in question,

> "(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
>
> (ii) the injury caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment".

7.160 USDOC determined that the importers knew or should have known that exporters were dumping and that such dumping would cause injury. USDOC normally considers dumping margins of 25 per cent or more and a USITC preliminary determination of material injury to impute knowledge of dumping and the likelihood of consequent material injury. USDOC determined that the information in the petition indicated that the estimated dumping margins were over 25 per cent for the Japanese respondents. The evidence of dumping in the petition was, in our view, sufficient for an unbiased and objective investigating authority to reach this conclusion. We note, in this regard, that Japan has not alleged that an imputed knowledge of dumping is, *per se*, inconsistent with Article 10.7, but rather argues that USDOC did not have sufficient evidence of dumping at all, for the purposes of Article 10.7.

7.161 In this case, USITC had made a preliminary determination of threat of material injury. Consequently, USDOC looked to the information regarding injury to the domestic industry in the petition, and considered press reports regarding increasing imports, declining prices, and shifts in purchasing to import sources, as well as the USITC preliminary determination. On this basis USDOC found sufficient evidence that importers knew or should have known that material injury caused by dumping was likely. In our view, the evidence relied on by USDOC in this regard was sufficient for an unbiased and objective investigating authority to reach this conclusion.

7.162 In any event, we note that Article 10.6 itself refers to a determination that an importer knew or should have known that there was dumping that would cause injury. The term "injury" is defined in footnote 9 to Article 3 of the Agreement to include threat of material injury or material retardation of the establishment of an industry, unless otherwise specified. Article 10.6 does not "otherwise specify". Consequently, in our view, sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7.

7.163 The role of Article 10.7 in the overall context of the AD Agreement confirms this interpretation. This provision is clearly aimed at preserving the possibility to impose and collect anti-dumping duties retroactively to 90 days prior to the date of application of provisional measures. Thus, Article 10.7 preserves the option provided in Article 10.6 to impose definitive duties even beyond the date of provisional measures. Assume *arguendo* Article 10.7 were understood to require sufficient evidence of actual material injury. In a situation in which, at the time Article 10.7 measures are being considered, there is evidence only of threat of material injury, no measures under Article 10.7 could be taken. Assume further that in this same investigation, there was a final determination of actual material injury caused by dumped imports. At that point, it would be impossible to apply definitive anti-dumping duties retroactively, even assuming the conditions set out in Article 10.6 were satisfied, as the necessary underlying Article 10.7 measures had not been

taken.[112] Thus, in a sense, Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* - they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant.

7.164 The third condition of Article 10.6 of which sufficient evidence is required by Article 10.7, is that the injury be caused by massive dumped imports in a relatively short period of time. In this case, USDOC assessed the question whether there were massive dumped imports in a relatively short time by comparing imports during a period of five months preceding and following April 1998. That date was established based on press reports which, USDOC concluded, established that importers, exporters, and producers knew or should have known that an anti-dumping investigation was likely.[113] USDOC found an increase of imports of hot-rolled steel of more than 100 per cent between the period December 1997-April 1998 and May-September 1998.[114]

7.165 The Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan asserts that the latter part of Article 10.6 (ii) of the AD Agreement, referring to whether the injury caused by massive imports is likely to seriously undermine the remedial effect of the duty, implies that the period for comparison is the months before and after the initiation of the investigation. Japan argues that since the duty cannot be imposed retroactively to the period before the initiation, the remedial effect of the duty cannot be undermined by massive imports before initiation.

7.166 We disagree with this conclusion. Article 10.7 allows for certain necessary measures to be taken **at any time after initiation of the investigation**. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is obviously necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter, the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in place. Moreover, as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.

7.167 Moreover, in our view, it is not unreasonable to conclude that the remedial effect of the definitive duty could be undermined by massive imports that entered the country before the initiation of the investigation but at a time at which it had become clear that an investigation was imminent. We consider that massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed. Again, we emphasize that we are not addressing the question whether this would be adequate for purposes of the final determination to apply duties retroactively under Article 10.6

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[112] We note that our findings concern the obligations regarding determinations of whether to apply "such measures … as may be necessary" under Article 10.7. We are not ruling on the obligations regarding retroactive application of final anti-dumping duties under Article 10.6.

[113] USDOC's selection of this period was made pursuant to 19 CFR §351.206(i) and the USDOC Policy Bulletin of 8 October 1998. The selection of a date before the date of initiation as the point around which the volume of imports would be compared is provided for in cases where USDOC considers that exporters, importers, and producers had reason to believe an investigation would be initiated before the actual initiation.

[114] We note that USITC in its final determination on injury and critical circumstances compared the volume of imports in the months preceding and following the initiation of the investigation and found on the basis of this comparison that imports declined following initiation, based on a comparison of data for 5 months prior to and following initiation, and increased slightly based on a comparison of data for 3 months prior to and following initiation. USITC found this increase not significant enough to warrant a finding that the imports would undermine seriously the remedial effect of the duty. USITC Report, page 22. (Exh. JP- 14)

7.168 We have carefully considered the information on which USDOC based its preliminary critical circumstances determination. We consider that an objective and unbiased investigating authority could, on the basis of the evidence before USDOC, determine that there was sufficient evidence that the conditions set forth in Article 10.6 were satisfied, and its preliminary critical circumstances determination is therefore consistent with Article 10.7. We therefore find that the preliminary critical circumstances determination was not inconsistent with Article 10.1 of the AD Agreement either since it complied with the conditions of Article 10.7 of the AD Agreement.

F. ALLEGED VIOLATIONS IN THE DETERMINATION OF INJURY AND CAUSATION

1. Alleged violations of Articles 3 and 4 of the AD Agreement on the face of the captive production provision and in its application by USITC in this case

7.169 Japan claims that the US captive production provision both on its face and as applied by USITC in the case of imports of hot-rolled steel from Japan violates Articles 3 and 4 of the AD Agreement. We will first consider the on-its-face challenge of the US statutory provision. If necessary we will thereafter consider Japan's arguments concerning the application of the provision in this case.

(a) Does the captive production provision on its face violate Articles 3 and 4 of the AD Agreement

(i) Arguments

7.170 Japan argues that the captive production provision of US law, section 771(7)(c)(iv) of the Tariff Act of 1930, on its face violates Articles 3 and 4 of the AD Agreement, which require that an authority consider a domestic industry in its entirety throughout its injury and causation analysis. Japan alleges that under the captive production provision, the USITC must focus its injury analysis on the merchant market and potentially may find material injury on the basis of the merchant market even if the industry as a whole is not experiencing material injury. Japan submits that given the mandatory nature of the captive production provision — and, therefore, the lack of discretion the USITC has in whether to apply the provision — it is inconsistent with Articles 3 and 4 on its face, regardless of its application in this case.

7.171 Japan submits that the US statute is inconsistent with Article 4.1 of the AD Agreement. In Japan's view, the definition of domestic industry in Article 4.1 requires authorities to consider domestic producers as a whole and their overall output. Japan argues that the captive production provision and its mandatory focus on merchant market data necessarily precludes any balanced assessment of the data of an industry as a whole and more specifically ignores the attenuated nature of import competition in the captive market.[115]

7.172 Japan argues that the captive production provision exaggerates the market share of imports relative to all domestic production and thus is inconsistent with Article 3.2 of the AD Agreement. Japan argues that the captive production provision narrows the analysis to the merchant market.[116] Japan claims that the captive production provision also violates Article 3.4 of the AD Agreement since it requires the authority to evaluate the key factors mentioned in Article 3.4 based on a narrow

[115] Japan asserts that the captive production provision forces the USITC to ignore the economic reality that the greater the importance of the captive market, i.e. the higher the proportion of domestic production of the like product consumed in downstream captive production, the less likelihood there is that imports that compete only on the merchant market could possibly affect the industry's overall performance.

[116] Japan argues that in this narrow analysis apparent consumption inevitably decreases and the imports' market share increases, since the volume of subject imports remains unchanged, but the volume of domestic shipments shrinks because the authority focuses primarily on the merchant market instead of examining the industry as a whole.

segment of the industry, rather than the industry as a whole as provided for in that provision. Japan argues that the statutory provision leaves no discretion to consider fully both the merchant market and the overall industry, nor does it require an explanation of how the merchant market relates to the industry as a whole or is representative of it.

7.173 Japan claims that the captive production provision is also inconsistent with Article 3.5 of the AD Agreement, which requires the establishment of a causal link between dumped imports and injury to the industry, because it requires the USITC to ignore the "shielding" effect of captive production and to focus instead on the injury to that portion of the industry serving the merchant market. Japan submits that the provision thus makes it impossible for USITC to consider fully "all relevant evidence before the authorities" as Article 3.5 of the AD Agreement requires.

7.174 Japan further submits that the captive production provision violates the requirement in Article 3.6 of the AD Agreement to analyse the effect of imports on **all** domestic production. In sum, Japan claims that the captive production provision does not allow for an objective examination as required by Article 3.1 since an examination can only be objective if it takes into consideration all information concerning the industry as a whole. Finally, Japan alleges that the captive production provision violates Article XVI:4 of the Marrakesh Agreement since it mandates an analytic approach that focuses on one segment of the industry in violation of Articles 3 and 4 of the AD Agreement.

7.175 The United States argues that the captive production provision, which requires USITC to, in certain circumstances, focus primarily on the merchant market, is consistent with the AD Agreement. The US emphasises that in all cases, including in the case at hand, USITC must render a determination with regard to injury to the industry as a whole, and cannot ignore the captive segment of the domestic industry.

7.176 The United States argues that the US statute explicitly requires that the USITC examine the industry as a whole. The definition given in the US statute of the domestic industry is similar to that of Article 4.1 of the AD Agreement. The captive production provision does **not** require the exclusion of any other segments of the market. Nor does it require that emphasis be placed on some factors more than on others. The United States submits that the refined analysis suggested by the captive production provision is consistent with Articles 3.1 and 3.4 of the AD Agreement. It only operates as an analytical tool to reveal the impact of imports on a segment of the industry when this segment is a significant indicator of the state of the industry as a whole, and it thus improves the required overall industry analysis.

7.177 The United States further argues that the captive production provision is consistent with Articles 3.4, 3.5 and 3.6 of the AD Agreement. Article 3.4 of the AD Agreement distinguishes between the effect of imports on sales and their effect on output, which is precisely the sort of distinction made by the captive production provision. The United States rejects Japan's argument that the captive production focus violates Articles 3.5 and 3.6 of the AD Agreement, which require consideration of the effect of dumped imports on domestic production as a whole, since the US statutory provisions also require such an overall industry analysis.

7.178 In sum, the United States claims that the captive production provision is consistent with the AD Agreement and therefore does not violate Article XVI:4 of the Marrakesh Agreement either.

7.179 Canada submits that failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Antidumping Agreement of its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

7.180 The EC agrees with the US that, where a significant portion of domestic output of the like product is for captive use, it is not inconsistent with the AD Agreement to focus the injury analysis on the "merchant" or "free market", since it is there that the immediate injurious effects of the dumped imports takes place. The EC considers that such a focus is even needed in order to avoid that the effects of dumped imports become obscured through the use of aggregate data.

7.181 Chile considers that Articles 3 and 4 of the AD Agreement clearly support Japan's claim that an authority is to examine injury with regard to the industry as a whole.

7.182 Brazil supports Japan's claim that an authority is required to examine the domestic industry as a whole, not merely part of it, when determining injury and causation. Brazil considers that consideration of only one segment of an industry is simply not permitted under the AD Agreement. Brazil is therefore of the view that the US captive production provision, which requires the authority to ignore the captive portion of the industry, is inconsistent with the AD Agreement.

7.183 Korea asserts that Article 3.4 of the AD Agreement requires an analysis of "all relevant economic factors and indices bearing on the state of the domestic industry", *i.e.* the industry as a whole. It considers that an authority may not unduly emphasize a particular segment of the industry at the expense of the industry as a whole.

(ii) Finding

7.184 Section 771(7)(c)(iv) of the Tariff Act of 1930 provides that, in a case in which domestic producers internally transfer significant production of the domestic like product for the production of a downstream article, and under certain specified circumstances, the USITC, in its injury analysis shall **focus primarily** on the merchant market for the domestic like product in determining market share and factors affecting financial performance.[117] This provision is commonly referred to as the captive production provision since it distinguishes between the merchant market, the segment of the market consisting of commercial shipments on the open market, and the captive segment of the market - production which is internally consumed by the producer in the production of downstream products. In the investigation underlying this dispute, the USITC found that the domestic industry comprised US producers of hot-rolled carbon steel flat products. The USITC further found that these same producers used hot-rolled steel they had produced in the manufacture of downstream products such as cut to length, tubular, cold-rolled, and plated or galvanized steel. This "captive" consumption of hot-rolled steel by the domestic producers thereof was the subject of substantial argument by the parties to the investigation. In particular, its effect on the domestic industry underlies the dispute regarding the US captive production provision and its application in this case.

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[117] Section 771(7)(c)(iv) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(7)(C)(iv)) provides as follows:

> "If domestic producers internally transfer significant production of the domestic like product for the production of a downstream Article and sell significant production of the like product in the merchant market, and the Commission finds that —
>
> (i) the domestic like product produced that is internally transferred for processing in other downstream Article does not enter the merchant market for the domestic like product,
>
> (ii) the domestic like product is the predominant material input in the production of that downstream product, and
>
> (iii) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article
>
> then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii)[of section 771(7)(c)], shall focus primarily on the merchant market for the domestic like product".

7.185 Japan alleges that the US captive production provision violates Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement concerning the determination of injury to the domestic industry. The thrust of Japan's argument is that the captive production provision's "primary focus" on the merchant market is inconsistent with the Agreement's requirement to determine injury to the "domestic industry" which is defined in Article 4 as domestic producers as a whole of the like products.

7.186 In relevant part, Article 3 provides as follows:

"Determination of Injury[9]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the

> effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.
>
> [9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

7.187 In relevant part, Article 4.1 of the AD Agreement provides as follows:

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products,"

7.188 In addressing Japan's claim that the US statute is inconsistent with the AD Agreement on its face, we must resolve two questions. First, we must determine what is required by the AD Agreement, that is, whether the investigating authority is in all cases required to make a determination of injury to the domestic industry as a whole. If so, we must then consider whether the primary focus on the merchant market with respect to market share and financial performance set out in the "captive production" provision of the US statute is inconsistent, on its face, with this requirement?

7.189 We consider that the definition of the domestic industry of Article 4.1 of the AD Agreement provides a clear answer to the first question. The domestic industry consists of the domestic producers as a whole of the like products, or of those producers whose collective output constitutes a major proportion of the total domestic production of those products. The terms "domestic industry" and domestic producers are also used interchangeably in Articles 3.1 and 3.4 of the Agreement. Article 3.1 of the AD Agreement provides that a determination of injury has to involve *inter alia* an objective examination of the "impact of these imports *on domestic producers of such like products*". Article 3.4 of the AD Agreement expands on this obligation and provides that the "examination of the impact of the dumped imports *on the domestic industry concerned*" shall include an evaluation of all relevant economic factors having a bearing on the state of the industry. Article 3.5 of the AD Agreement requires that a causal relationship be demonstrated "between the dumped imports and the injury to *the domestic industry*". We conclude that the requirement to make a determination of injury to the domestic industry read in light of the definition of the domestic industry of Article 4.1 of the AD Agreement, implies that the injury must be analysed with regard to domestic producers as a whole of the like product or to those whose collective output constitutes a major proportion of the total domestic production of those products.

7.190 In our view, the AD Agreement thus clearly requires an investigating authority to make a final determination as to "injury" as defined in the Agreement to the industry as a whole. However, the Agreement does not prescribe a particular method of analysis. Specific circumstances might well call for specific attention to be given to various aspects of the industry's performance or to specific segments of the industry, as long as the end-result of this analysis is consistent with the Agreement's requirement to examine and evaluate all relevant factors having a bearing on the state of the industry and demonstrate a causal relationship between the dumped imports and the injury to the domestic industry.[118]

[118] We recall that in the case of *Mexico - HFCS*, the Panel emphasised that the definition of the domestic industry in an anti-dumping investigation has unavoidable consequences for the conduct of the

7.191 We thus must examine whether the US "captive production" provision is on its face inconsistent with the established requirement of the Agreement to determine injury for the industry as a whole, as Japan is alleging. We note that the United States agrees with Japan that the AD Agreement requires a determination concerning injury with respect to the industry as a whole. According to the United States, the US statute is fully consistent with this obligation as it requires USITC to consider the industry as a whole. The United States asserts that the captive production provision, on its face, only affects some statutory factors required to be considered under 19 U.S.C. § 1677(7)(C)(iii) and does not affect the general requirement to determine injury for the domestic industry as a whole, which is set forth in 19 U.S.C. § 1677(4)(A) and which governs the entire determination of injury.

7.192 The question before us is whether the captive production provision and the required "primary focus" on one segment of the market, the merchant market, with respect to market share and financial performance of the industry, is inconsistent with the obligations imposed on WTO Members in conducting an injury analysis for the purpose of an anti-dumping investigation. It is established GATT/WTO practice that the consistency of a law on its face may be challenged independently from any application thereof only in so far as the law is mandatory and not discretionary in nature. In other words, only if a law mandates WTO inconsistent action or prohibits WTO consistent action can the legislation be challenged on its face in a dispute settlement proceeding.[119]

7.193 We do not doubt that the captive production of the US statute is mandatory in nature and may thus be challenged before a panel. The language of the provision ("*shall* focus primarily") makes it clear that USITC is required by statute to focus primarily on the merchant market in certain circumstances and under certain conditions. The question remains however whether the statute mandates action that is **inconsistent with the United States' obligations under the AD Agreement**.

7.194 We recall that in relevant part, the captive production provision provides that "the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product". The key to answering the question posed lies in the ordinary meaning of the words "focus primarily". Japan argues that the use of the word "focus" skews the analysis to the merchant market at the expense of the rest of the domestic industry and the modifier "primarily" narrows the focus even more.

7.195 The verb "to focus" is defined as "to concentrate"[120] on something. "Primary" is defined as "of the first importance, chief"[121]. Literally, the captive production provision thus requires USITC to concentrate in chief on the merchant market when considering market share and financial performance of the industry. Such a specific direction to focus the analysis of certain factors with

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investigation and the determination that must be made. Panel Report, *Mexico – HFCS*, para. 7.147. In relevant part, the Panel found that:

> "7.154 It is important to differentiate the consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the **determination** of injury or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production. There is certainly nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. Indeed, in many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion. However, this does not mean that an analysis limited to that portion of the domestic industry's production sold in one market sector is sufficient for establishing injury or threat of injury to the domestic industry, consistently with the AD Agreement".

[119] See discussion above, para. 7.141.

[120] Concise Oxford Dictionary, ninth edition, Clarendon Press, Oxford, 1995.

[121] Concise Oxford Dictionary, ninth edition, Clarendon Press, Oxford, 1995.

attention for a particular segment of the domestic market does not, in our view, necessarily imply that the overall injury analysis is not performed with respect to the industry as a whole. The statute does not require a general and exclusive focus on the merchant market when considering market share and industry performance, but only a "primary" focus.[122] It certainly does not require a determination of injury based only on consideration of the merchant market.

7.196 We believe that the context of the captive production provision confirms our view. The general obligation for injury determinations is set out in section 735(b)(1)(A) of the Tariff Act of 1930, as amended. That provision requires USITC to make a final determination of whether "an industry in the United States is materially injured or is threatened with material injury by reason of imports". Section 771(4)(A) of the Tariff Act of 1930, as amended, defines the relevant industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product".[123] US law specifically requires USITC, in making this determination, to consider "the impact of imports of such merchandise on domestic producers of domestic like products".[124] In addition to the volume of imports and the effect of imports on prices, which the statute provides "**shall** be considered",[125] the statute further provides that "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of dumped imports **may** be considered".[126] The statute also sets out, in subsection C, entitled "Evaluation of Relevant Factors", specific elements to be considered when evaluating the volume of imports, the effects of imports on prices and their impact on the affected domestic industry, thus expanding on the more general obligation set out in subsection (B)(i) to consider the volume of imports and their effect on prices and impact on domestic producers.[127] The captive production provision is set forth in section 771(7)(C)(iv) of the Tariff Act of 1930, and is thus an additional instruction with respect to the "Evaluation of Relevant Factors". We do not agree with Japan's position that the captive production provision constitutes an exception to the obligation to make a determination of material injury to the domestic industry as a whole. In our view, it is an instruction to "focus primarily" on certain "other economic factors as are relevant", and defines the circumstances in which such factors are relevant. Those factors are the market share and factors affecting financial performance in the merchant market, and the circumstances are the factual situation of the industry with regard to captive production. However, we can find no basis in the text of the US law to conclude that the captive production provision eliminates the general obligation on USITC to make a determination regarding material injury to the domestic industry. Nor does it, in our view, diminish the obligation to examine all relevant economic factors having a bearing on the state of the industry as a whole in making a final determination of injury caused by dumped imports. Finally, we note that US law explicitly provides that "The presence or absence of any factor which the [USITC] is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the [USITC] of material injury."[128] The captive production provision, being set out in subparagraph (C) would thus fall within the scope of this instruction.

7.197 Thus, we understand US law to require USITC to make a determination whether there is material injury to the domestic industry, and to provide guidance on the analysis to be undertaken in making that determination. The captive production provision is one of these latter sections, and thus defines an analytic step that must, in certain circumstances, be undertaken along the way to making

[122] Contrary to Japan's argument, we believe this modifier does not further narrow the focus. On the contrary, we believe it implies that after having primarily focused on the merchant market, the authority is to focus also on the industry as a whole. We consider that the modifier makes it clear that the focus is neither general nor exclusive but only primary.

[123] 19 U.S.C. § 1677(4)(A).

[124] 19 U.S.C. § 1677(7)(B)(i)(III).

[125] 19 U.S.C. § 1677(7)(B)(i).

[126] 19 U.S.C. § 1677(7)(B)(ii).

[127] 19 U.S.C. § 1677(7)(C)(i) – (iii).

[128] 19 U.S.C. § 1677(7)(E)(ii).

the statutorily required determination of material injury to the domestic industry as a whole. It does not affect the nature of the determination of injury that must be made, only the analysis underlying that determination. While there is no guarantee that this analysis will result in a determination consistent with US obligations under the AD Agreement, it does not require any action inconsistent with those obligations.

7.198 This is our reading of the statutory captive production provision. Equally important, this is our understanding of how the relevant US authorities have interpreted and applied this provision. We recall that, for the purposes of international law, domestic legislation is to be considered as a fact.[129] In this respect, we believe it is of great importance that the Statement of Administrative Action notes that "the captive production provision does not require USITC to focus exclusively on the merchant market".[130] The SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law … it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement".[131] In this case, the SAA confirms our conclusion based on the text and context of the captive production provision that the primary focus on the merchant market does not imply an exclusive focus on the merchant market in determining injury, and therefore does not mandate USITC to act in violation of the Agreement's established obligation to assess injury for the industry as a whole.[132] As the Panel noted in *United States - Sections 301 - 310 of the Trade Act of 1974*, "The SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely."[133] Moreover, this is the interpretation applied by the USITC itself, as set out in its decision in this investigation.[134]

7.199 We therefore find that the captive production provision is not on its face inconsistent with Articles 3 and 4 of the AD Agreement. Having reached that conclusion, we also conclude that the United States did not act inconsistently with its obligations under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the AD Agreement in maintaining this statutory provision. We next turn to the question whether the USITC, in applying that provision in the investigation underlying this dispute, acted inconsistently with Articles 3 and 4 of the AD Agreement.

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[129] See above, para. 7.143.

[130] SAA, at 852.

[131] SAA, p. 1. We note that US law, 19 U.S.C. §3512(d), provides that "[t]he statement of administrative action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application".

[132] We note that the three Commissioners who applied the captive production provision in their *Views* concluded, with regard to the effect of applying the captive production provision, that "[T]he SAA makes clear, however, that we are not to focus exclusively on the merchant market. We read the statute as requiring in all cases that the Commission determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production". USITC Report, *Views of Vice Chairman E. Miller, Commissioner Jennifer A. Hillman, and Commissioner Stephen Koplan Concerning Captive Production*, page 35.

[133] Panel Report, *United States - Section 301,* para. 7.111.

[134] It is an established principle of US statutory construction that the administering agency's interpretation of a statute is entitled to deference if the statute is "silent or ambiguous with respect to [a] specific issue". *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842-43.

(b) Was USITC's application of the captive production provision in this case consistent with Articles 3 and 4 of the AD Agreement?

(i) Arguments

7.200 Japan claims that the application of the captive production provision in this case violated various provisions of Articles 3 and 4 of the AD Agreement. Japan argues that three Commissioners considered the captive production provision applicable and focused primarily on the merchant market in their analysis. Japan asserts that a fourth Commissioner *de facto* considered the merchant market data in parallel with data on the industry as a whole. Japan claims that this focus on the merchant market fundamentally altered the results of the investigation and distorted the Commissioners' judgement.[135]

7.201 Japan claims that the specific determination in this case based on the captive production provision violates Articles 3 and 4 of the AD Agreement. Japan asserts that the USITC did not make an objective examination as required by Article 3.1 of the AD Agreement since it did not focus on domestic producers as a whole. The USITC's focused analysis of injury also violated Articles 3.2, 3.4, 3.5 and 3.6 of the AD Agreement since it failed to examine all relevant evidence concerning the industry as a whole.

7.202 Japan submits that although USITC mentioned both merchant market data and overall industry data, this in no way diminishes USITC's impermissible emphasis on merchant market data and it asserts that under a balanced analysis, USITC would have considered both the merchant and captive segments of the industry. This, according to Japan, would be the only way in which USITC could relate its segmented approach to the industry as a whole.

7.203 The United States submits that the USITC analysis in this case was not inconsistent with the AD Agreement by virtue of the application of the captive production provision by three of the six Commissioners. The United States notes that all six Commissioners made affirmative determinations, five of current material injury and one of threat of material injury, while only three applied the captive production provision. This implies, according to the United States, that the application of the provision in this case did not change the outcome, which was in any case affirmative. Moreover, the United States maintains that USITC did not fail to make its determination on the basis of the domestic industry as a whole - indeed, information on the relevant economic factors was considered with respect to both the merchant market (the primary focus under the provision) and the industry as a whole. The United States asserts that USITC found that, both in the merchant market and with regard to the industry overall, consumption rose as did the volume of imports. The United States further notes that the declining financial trends that the USITC established in the merchant market also appeared in the overall industry analysis. Contrary to Japan's claim that USITC did not "relate its merchant market findings to producers as a whole," the United States argues that the USITC determination shows how a primary focus on the merchant market for certain factors is consistent with such an analysis of the industry as a whole. The United States further submits that USITC compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition and USITC found their operating income to be falling both from merchant market sales and overall.[136] In sum, the United States claims that the captive production provision was irrelevant to the affirmative finding of USITC.

[135] Japan does not dispute the fact that USITC collected information concerning the industry as a whole, but argues that merely citing overall industry data is not enough and it does not, in Japan's view diminish USITC's impermissible emphasis on merchant market data. Second Submission of Japan, Annex C-1, para. 231.

[136] USITC Report, page 19.

(ii) Finding

7.204 The question before us is whether the USITC's determination of injury is consistent with the requirements of Articles 3 and 4 of the AD Agreement, in light of the focus on the merchant market by some Commissioners with respect to some factors examined, or whether that focus so taints the determination that we cannot conclude that an objective and unbiased investigating authority could make the determination the USITC made, on the basis of the facts on the record and in light of the explanations given. Under the applicable standard of review, we are not to overturn the evaluation of the administering authority if the establishment of the facts was proper and the evaluation unbiased and objective, even though we might have reached a different conclusion.

7.205 The USITC report forms the basis for our examination of the consistency of the USITC's injury analysis with the requirements of the WTO AD Agreement concerning injury to the industry as a whole. We consider that the definition of the domestic industry used for the purposes of the investigation is a first important indicator of the scope of the investigation. The USITC report explains that

> "[I]n defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed or sold in the domestic merchant market. Based on our finding that the domestic like product consists of all hot-rolled steel, we define the corresponding domestic industry as **all producers of hot-rolled steel in the United States**, as we did in the preliminary determination"[137]. (emphasis added)

7.206 USITC examined whether the domestic industry so defined was injured or threatened with material injury by reason of imports of hot-rolled steel from Japan. The report discusses various conditions of competition before entering into the examination of the volume of the imports, their effect on prices and the overall impact of the dumped imports on the domestic industry. USITC considered captive production to be one of the relevant conditions of competition. It stated that "the domestic industry captively consumes the majority, i.e. over 60 per cent of its production of the domestic like product in the manufacture of downstream articles".[138] Based in part on this conclusion, Vice Chairman Miller and Commissioners Hillman and Koplan found that the captive production provision was applicable, and applied it in making their affirmative determination of material injury to the domestic injury producing hot-rolled steel caused by dumped imports. The three other Commissioners considered that not all of the statutory conditions for applying the captive production provision were fulfilled and thus did not find the provision applicable. Nonetheless, two of these Commissioners made an affirmative determination of material injury to the domestic injury producing hot-rolled steel caused by dumped imports, and the third made an affirmative determination of threat of material injury to that industry caused by dumped imports.

7.207 The report contains data concerning both the industry as a whole and the merchant market in particular. USITC appears to have discussed these data independently from the application of the captive production provision, which in any case only requires a focus on the merchant market with regard to market share and factors affecting financial performance. As Chairman Bragg, Commissioner Crawford and Commissioner Askey, who did not apply the captive production provision, note in their *Views Regarding The Captive Production Provision:*

> "even in circumstances in which the captive production provision does not apply, the Commission has the discretion to consider the significant volume of captive production as a condition of competition. Accordingly, we have examined data both for the

[137] USITC Report, page 5.
[138] USITC Report, page 9.

> domestic industry as whole and for merchant market operations for purposes of our determination".[139]

7.208 We believe that the alleged distorting effect of the captive production provision should be examined in particular with regard to the USITC's analysis of market share and factors affecting financial performance, since these are the factors with respect to which a primary focus on the merchant market is required. The relevant section of the USITC report on market share discusses market share held by imports in the merchant market as well as in the overall US market and concludes that in both cases market share held by subject imports more than doubled from 1996 to 1997 and again from 1997 to 1998. In relevant part, USITC concluded as follows:

> "In the merchant market, the share held by subject imports increased from 5.0 per cent of apparent US consumption as measured by volume sold in 1996, to 10.2 per cent in 1997, and then increased again to 21.0 per cent in 1998. For the industry as a whole, the share held by subject imports increased from 2.0 per cent of apparent US consumption, as measured by volume sold in 1996, to 4.2 per cent in 1997, and then increased again to 9.3 per cent in 1998".[140]

7.209 The section in the report dealing with "impact of the subject imports on the domestic industry" discusses various economic factors having a bearing on the state of the industry. The report notes for example that capacity increased, while capacity utilization declined from 94.5 per cent in 1996 to 87.5 per cent in 1998. With regard to production and sales, USITC concludes that both merchant market data and overall industry data show a decline from 1997 to 1998. With regard to the domestic industry's financial performance indicators, USITC made the following analysis:

> "From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half. On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998 and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998".[141]

7.210 The USITC conclusion on material injury by reason of imports of hot-rolled steel products from Japan was as follows:

> "Accordingly, in light of the domestic industry's declining production, shipments, market share, prices, capacity utilization, and financial condition, in the face of increasing subject import volume and market share and declining subject import prices, we determine that the domestic industry producing hot-rolled steel is materially injured by reason of LTFV imports from Japan".[142]

7.211 It is clear that USITC considered data for the domestic industry as a whole as well as merchant market data. On its face, the report sets out a complete and substantially motivated analysis of the state of the domestic industry as a whole. The report discusses data for the industry as a whole with regard to all relevant factors, including market share and financial perfomance of the industry, the two factors to which the captive production provision applies.

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[139] USITC Report, page 29. We note, that in a footnote, Commissioner Askey clarifies that she believes that it is inappropriate to focus on the merchant market if the captive production provision does not apply.

[140] USITC Report, page 12. The report also discusses trends in consumption in the merchant market alongside data for the industry as a whole.

[141] USITC Report, page 18.

[142] USITC Report, page 21.

7.212 We considered the data contained in the report in order to assess whether the evaluation of the USITC of the facts and data concerning market share and financial performance was that of an unbiased and objective investigating authority. We note that the USITC report includes two tables detailing the same sort of information for the industry as a whole and for the merchant market.[143] These tables appear to support the conclusions of the report that the trends that are apparent in the merchant market also appear in the overall US market, albeit sometimes less pronounced.

7.213 Japan asserts that the application of the captive production provision's primary focus for certain factors on the merchant market by three of the Commissioners so influenced their overall evaluation that it cannot be said with certainty what their conclusion would have been had they not applied the captive production provision. We do not consider it appropriate to engage in speculations about what could have or might have been. Upon careful examination, we consider that the USITC determined that the domestic industry producing hot-rolled steel as a whole, defined in the report as the domestic producers as a whole of hot-rolled steel in the United States, was materially injured, or threatened with material injury. We further consider that the determination was one that could properly be reached by an objective and unbiased investigating authority on the basis of the information before the USITC, and in light of the explanations given in its analysis. The mere fact that the analysis also included a discussion with regard to a certain segment of the industry most affected by the subject imports, in our view, does not at all necessarily imply that the analysis was faulty. Quite the contrary is true. As the Panel in *Mexico – HFCS* stated:

> "There is certainly nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. Indeed, in many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion".[144]

Again, however, such an analysis does not excuse the investigating authority from making the determination required by the AD Agreement concerning injury to the domestic industry as a whole.

7.214 We conclude that the analysis performed by USITC established injury with regard to the industry as a whole, in spite of, or regardless of, the application of the captive production provision by three of the Commissioners. We note that in any case all six commissioners made an affirmative injury or threat of injury determination whether they applied the captive production provision or not. This to us confirms our view that the application of the captive production provision did not undermine the examination of injury to the industry as a whole which is required under the AD Agreement.

7.215 We therefore find that the USITC's analysis was consistent with the obligations of the United States under Articles 3.1, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement in so far as it examined and determined injury to the domestic industry as a whole.

2. Alleged violations of Article 3 of the AD Agreement in the USITC's injury and causation analysis.

(a) Arguments

7.216 Japan submits that the USITC injury and causation analysis is inconsistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement since it focused on data for only two years of the normal three-year period of investigation and ignored or marginalized alternative causes of injury.

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[143] USITC Report, Tables C-1 and C-2, pages C-3-6
[144] Panel Report, *Mexico – HFCS*, para. 7.154.

7.217 First, Japan submits that the USITC eschewed its traditional three-year analysis and instead compared industry data for 1998 with those for 1997.[145] Japan points to a recommendation of the AD Committee to argue that an investigating authority is to examine imports, prices and the industry performance over a three-year period of investigation, and asserts that this was the USITC's longstanding practice. Japan alleges that if applied in the hot-rolled steel case, a three-year analysis would have revealed that virtually all the major domestic industry performance indices improved between 1996 and 1998. According to Japan, the base year 1997, which Japan asserts was used by USITC in this investigation, happened to be the best year the industry had experienced in a decade and any comparison with this record-breaking year almost guaranteed an affirmative determination of injury. Japan asserts in particular that the USITC's analysis reveals an unexplained shift from a three-year to a two-year analysis for financial performance.[146] In support of its argument, Japan refers to the views of Commissioner Askey who considered the entire three-year period of investigation in her analysis, and found no material injury to the domestic industry by reason of imports, but only threat of injury.

7.218 Japan submits that by manipulating the period of investigation, USITC violated Article 3.1 by failing to base its material injury determination upon "positive evidence" and an "objective examination". Moreover, Japan argues that USITC violated Article 3.4 of the AD Agreement by failing to consider and to "make apparent" its consideration of the Article 3.4 factors for the first year of the period.[147] Japan further alleges that the USITC determination was also inconsistent with Article 3.5 of the AD Agreement by failing to conduct a proper causation analysis that covered the full three years period and took into account the injury trends for this three year period.

7.219 Japan also claims that USITC acted inconsistently with Article 3.5 of the AD Agreement by inadequately analyzing "other" causes of injury. Japan refers in particular to the strike at General Motors (the largest steel consumer in the US) in 1998, the increased capacity of and production by low-cost mini-mills, and faltering demand for pipe and tube due to collapsing oil prices. According to Japan, USITC did not consider the price effects of non-subject imports, as explicitly required by Article 3.5 of the AD Agreement. Japan asserts that the USITC mentions certain other relevant causal factors but fails to reconcile the facts and arguments presented by the parties.

7.220 Japan further submits that USITC failed to isolate the injury caused by these alternative factors in order to ensure that such injury is not attributed to dumped imports. According to Japan, the *United States – Wheat Gluten* case made it clear that an anti-dumping investigating authority must ensure that when injury caused by alternative factors is subtracted, the remaining injury still rises to the level of "material injury".[148]

7.221 The United States asserts that the USITC conducted an objective examination of data covering a period of investigation of three years and thoroughly examined possible known alternative causes of injury. USITC based its causal analysis on an evaluation of the changes in all relevant

[145] Japan argues that this case was the only case out of 133 final determinations issued from January 1990 in which the first year of the period of investigation was ignored.

[146] USITC Report, page 18.

[147] According to Japan, it is immaterial that the omitted data appear in an appendix to the determination, as USITC declined to factor them into its analysis or even mentions them. Japan submits that USITC nowhere in its discussion of impact even mention that shipments and profits increased between 1996 and 1998. This leads Japan to the conclusion that USITC examined certain factors over three years and others over two years, depending on which trends best supported an affirmative determination.

[148] Japan considers that this Panel report concerning the application of the Safeguards Agreement is very relevant to this case since the standards concerning causality are almost identical in Article 3.5 of the AD Agreement and 4.2(b) Safeguards Agreement.

factors over a period of three years and the data used also covered three years.[149] The United States disagrees with Japan's assertion that 1997 was an exceptionally good year for the US industry which would preclude any fair comparison with information for that year. According to the United States, many factors started to decline in 1996 and continued to decline in 1997 and 1998. Moreover, the United States argues, in 1998 productivity was higher and costs lower than in 1997, but nevertheless domestic industry performance indicators indicated a sharp decline in 1998. The United States submits that USITC reliance on recent trends is not unique but rather customary[150] since the most recent data are in general more relevant and probative for the state of the industry. The United States asserts that it was appropriate for the USITC to place more weight on the most recent trends. The United States argues that the USITC's comparison of 1997 and 1998 data reflected its evaluation of the probative value of the 1996 – 1998 data in view of the changes in demand in the market that occurred since 1996.

7.222 Second, the United States argues that, in accordance with Article 3.5 of the AD Agreement, the USITC examined all relevant factors and ensured that injury caused by other factors was not attributed to dumped imports. The United States asserts that Article 3.5 of the AD Agreement does not, however, require that a separate determination be made of the effects of the alternative causes. Nor, in the US view, is it required to quantify injury from other causes. According to the United States, the *United States - Wheat Gluten* Panel report is not relevant to this case since it was not concerned with the application of the AD Agreement but rather provided what the United States considers to be an incorrect interpretation of the Safeguards Agreement. The report of the Panel in *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon for Norway ("United States - Atlantic Salmon")*, which according to the United States should guide the Panel in its interpretation of the non-attribution provision of the AD Agreement, found that the authority is not required to demonstrate that dumped imports are the sole cause of material injury to an industry. Neither is an authority required to identify the extent of the injury caused by alternative factors.[151] The USITC examined other known alternative causes and thus complied with the requirement of Article 3.5 of the AD Agreement. The United States submits that all known alternative causes suggested by Japan were extensively discussed by USITC and USITC did not attribute to the dumped imports the effects of other known factors.

7.223 According to Brazil it must be demonstrated that imports in and of themselves were a cause of material injury to the industry, otherwise, the prohibition against attribution to dumped imports of injury caused by other factors in Article 3.5 of the AD Agreement would be meaningless. Brazil submits that USITC did not ensure against the attribution to imports of the effects of other factors as it made no efforts to isolate the effects of the other factors affecting the industry.

7.224 Chile argues that USITC acted inconsistently with the AD Agreement and failed to conduct an objective examination by analyzing data from the most recent two years only and by not examining possible alternative causes of injury more thoroughly.

(b) Finding

7.225 We will first consider Japan's claims concerning the allegedly WTO inconsistent focus of USITC on data for two years of the three-year period of investigation. We will then consider the

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[149] The United States argues that the USITC explicitly evaluated capacity, capacity utilization, productivity, unit costs of goods sold, unit values, employment, wages, and capital expenditures from 1996 to 1998, referring to USITC Report, pages 17 - 18.

[150] The United States mentions several cases in support of this statement in its first written submission. First Written Submission of the United States, Annex A-2, para. C-108.

[151] *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon for Norway* ("*United States – Atlantic Salmon*"), ADP/87 (27 April 1994), at 555; See Responses of the United States to Questions from the Panel, Annex E-3, paras. 58 – 69.

USITC treatment of alternative causes of injury in light of the requirements of Article 3.5 of the AD Agreement.

(i) Did USITC properly discuss and evaluate data covering the whole period of investigation ?

7.226 We note with regard to Japan's claim concerning USITC's alleged focus on two years of the three-year period of investigation that the AD Agreement does not specify the period of investigation and thus does not prescribe that the data used in the injury analysis have to cover three years.[152] While the United States does not dispute that a three-year period of investigation should be considered for the purpose of making an injury determination, it asserts that the USITC in this case **did** consider a three-year period of investigation (1996 – 1998) and analysed all relevant economic factors having a bearing on the state of the industry on the basis of data covering this three-year period. Japan acknowledges that the USITC gathered data for the entire three-year period and that those data are mentioned in the USITC report in various tables and annexes. However, Japan argues, USITC failed to adequately factor this information into its determination and failed to compare the state of the industry at the end of the period of investigation in 1998 with the state of the industry in 1996.

7.227 We note that throughout the USITC report there are various instances in which USITC does discuss trends in the data for the three-year period. For example, the USITC report discusses data from three years when examining the conditions of competition[153] and the evolution in the volume of imports and the market share held by imports.[154] The price effects of subject imports are also evaluated over the entire period of investigation 1996 – 1998.[155] In the section of the report concerning impact of the subject imports on the domestic industry, the factors regarding capacity and capacity utilization are likewise discussed for the entire three-year period of investigation.[156]

7.228 Japan's argument thus appears mainly based on the section of the USITC report that examines the impact of the subject imports on the domestic industry, and in particular, the data concerning financial performance of the industry.[157] We note that the USITC report discusses production and sales as well as financial performance of the industry by comparing data for 1998 with data from 1997, without explicitly mentioning the 1996 values. In relevant part, the USITC report reads as follows:

> "The domestic producers' production and shipments declined from 1997 to 1998, both on a merchant market and overall basis.[98] The domestic industry's financial performance likewise deteriorated significantly. From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half.[99]

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[152] We note that the Committee on Anti-Dumping Practices recently adopted a recommendation which provides that "the period of data collection for injury investigation normally should be at least three years". Committee on Anti-Dumping Practices, Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the Committee on 5 May 2000, G/ADP/6. We note, however, that this recommendation was adopted after the investigation at issue in this dispute had been completed. Moreover, the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para 40, G/ADP/AHG/R/7 at para. 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself.

[153] USITC Report, pages 10 – 11.

[154] USITC Report, pages 12 – 13.

[155] USITC Report, pages 13 – 16.

[156] USITC Report, pages 17 – 18.

[157] This is apparent from Japan's answer to Panel question 18: "The contrast between the bottom of page 17 and the top of page 18 of the USITC decision is quite dramatic. The USITC inexplicably shifts from a three-year analysis to a two-year analysis. This unexplained shift for financial performance – one of the most important factors to be considered – does not constitute "an objective examination" as required by Article 3.1". Japan's Answers to questions from the Panel, Annex E-1, para. 64.

> On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998, and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998.[100] [101] This decline was due largely to declines in unit values of the industry's hot-rolled steel shipments and sales. As described above, unit values fell significantly in 1998 as subject imports increased in volume and market share".

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[98] CR & PR at Tables C-1 and C-2

[99] CR & PR at Tables C-1 and C-2

[100] CR & PR at Tables C-1 and C-2. In addition the domestic industry's productivity improved and COG's declined from 1997 to 1998. The domestic industry's productivity (measured in short tons per 1,000 hours worked) increased from 864.8 in 1996, to 905.3 in 1997 and to 938.7 in 1998. As discussed in our analysis of the price effects of the subject imports, the domestic industry's unit COG's declined from 1996 to 1998, but not by as much as the decline in the industry's unit values. CR & PR at Table C-1.

[101] CR & PR at Table C-1. Aside from productivity, which increased during the investigation period, a number of the industry's other employment indicators declined somewhat during the period of investigation. CR & PR at Table III-5 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998; hours worked declined from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998; wages paid were essentially flat from 1996 to 1998; hourly wages increased somewhat from $23.04 in 1996 to $24.13 in 1997, to $24.46 in 1998; unit production costs were $26.65 in 1996 and 1997 and declines somewhat to $26.06 in 1998). US producers' inventories were also relatively stable during the investigation period, both on an absolute basis and relative to production and shipments. CR & PR at Table III-4. Capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and to $715 million in 1998. CR & PR at Table VI-7. We also note that one firm filed for bankruptcy protection in September 1998 and another in February 1999. See CR & PR at Table III-1 nn.1 & 3; Petitioners' Prehearing brief at 51-52, 54; Respondents' Joint Prehearing Brief at 143. Both firms ***. See Questionnaire Responses of Geneva and Acme Metals, Inc." (footnotes in original) [158]

7.229 The USITC report contains the following explanation for comparing 1998 data with data for 1997 and omitting to discuss 1996 data:

> "The respondents have argued that 1997 was a banner year for the domestic industry and, hence, is not an appropriate year with which to compare the domestic industry's results in 1998. However, US apparent consumption increased throughout the period of investigation, both from 1996 to 1997 and from 1997 to 1998, reaching record levels. Accordingly, we disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which US consumption reached record levels, and the US industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry. Instead, the domestic industry, although it maintained an operating profit, performed consistently worse".[159] (footnotes omitted)

7.230 We turn to the question whether the USITC failed to properly establish the facts or to make an unbiased and objective evaluation because it did not explicitly discuss the data for the first year of the period of investigation with regard to certain factors examined and failed to compare the data at the

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[158] USITC Report, page 18.
[159] USITC Report, page 18.

end of the period of investigation with those gathered for the first year of this period. We note that Japan admits that USITC gathered data for the entire period of investigation for all factors of Article 3.4 of the AD Agreement. Japan also agrees that the data for the three years of the period of investigation are reported in various tables in the report. As noted above, with regard to most factors these data are explicitly discussed and evaluated in the determination for all three years, 1996, 1997 and 1998. With regard to production, sales and certain factors affecting financial performance, USITC discusses and compares data for the years 1997 and 1998 only.

7.231 Article 3.4 of the AD Agreement, provides in pertinent part that "the examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including …". The clear requirement for the investigating authority under this provision is "**to evaluate** all relevant factors having a bearing on the state of the industry" (emphasis added).[160] There is no disagreement among the parties that USITC mentioned and discussed, to a certain extent, the challenged factors. Japan's claim is that the USITC discussion did not sufficiently evaluate certain factors by failing to discuss data for the year 1996 and to compare the industry performance in 1996 with the situation in 1998.

7.232 We believe it would not be sufficient if the investigating authority merely mentioned data for certain of the Article 3.4 factors without undertaking an evaluation of that factor. An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined. Only on the basis of the evaluation of data in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority.[161]

7.233 In this case, USITC did not explicitly discuss data for production, sales and financial performance of the industry for the first year of the period of investigation, 1996, although it is clear that the data were before the USITC at the time it made its determination. It did evaluate and assess the declining trend for these factors from 1997 to 1998. USITC explained why it focused on 1997-1998 in its evaluation of these factors. The United States argued before us that the reason USITC did not compare data for 1996 with those for 1998 was because "changes created a new economic context for the performance of the industry".[162] We do not find a similar explanation in the USITC report. Indeed, we regret that, with regard to these specific factors, USITC did not even mention data for 1996 in its discussion and did not explain why it considered those data no longer relevant in light of the changed economic circumstances, although it explained why it focused on the comparison between 1997 and 1998.

7.234 We are of the view that in this case it was not improper of USITC to focus on the sudden and dramatic decline in industry performance from 1997 to 1998, at a time when demand was still increasing. The period USITC considered explicitly (1997 – 1998) is the most recent period, and is the period that coincides with the period of the alleged dumped imports. In our view, to the extent that Japan is suggesting that USITC should have made a static end-point-to-end point comparison, comparing 1996 levels to 1998 levels, we note that such a comparison, by ignoring intervening changes in circumstances and conditions in which the industry is operating, would present a less complete picture of the impact of dumped imports.[163] In our view, a proper evaluation of the impact

[160] We agree with the view of the panel in *Mexico – HFCS* that "consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination". Panel Report, *Mexico – HFCS*, para. 7.128.

[161] Panel Report, *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and -Beams from Poland*, WT/DS122/R (circulated 28 September 2000, appeal pending), para. 7.236.

[162] First Written Submission of the United States, Annex A-2, para. C – 105.

[163] In this regard, we share the views of the Panel in *Argentina – Footwear*: "An end-point-to-end-point analysis, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant

of dumped imports on the domestic industry is dynamic in nature and takes account of changes in the market that determine the current state of the industry. USITC gathered the information and discussed in some detail developments in the performance of the domestic industry over the entire period of investigation. Against this background, it discussed the impact of imports both over the period of investigation, and with specific reference to the period 1997-1998, a period when demand continued to increase, but the performance of the domestic industry worsened. We believe USITC thus performed a dynamic analysis for all relevant factors. Merely that it did not explicitly address production, sales, and financial performance during 1996 does not, in our view, undermine the adequacy of the USITC's evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement.

7.235 It is another question whether the evaluation and the conclusion with regard to these factors is supported by the facts. It is important in this respect to keep in mind that we are bound in our analysis by the standard of review set forth in Article 17.6 of the AD Agreement. The question we face in this respect is whether the USITC failed to conduct an objective and unbiased evaluation because it did not explicitly compare production, sales and financial performance of the industry in 1998 with the situation in 1996. We do not find this to be the case. USITC provided a reasoned and reasonable explanation of why it compared data for 1998 with data for 1997. Although it might have been preferable for USITC to have acknowledged the fact that these factors did not decline if one compares 1996 to 1998 in an end-point-to-end-point comparison, this lack is not sufficient in and of itself to conclude that the investigating authority failed to evaluate all relevant factors objectively and in an unbiased manner. We note that Commissioner Askey, who found threat of injury, in her separate views emphasised that the industry in 1998 "remained profitable and its profitability generally exceeded 1996 levels".[164] Based partly on this observation, Commissioner Askey concluded that the industry was not presently injured by the subject imports and she went on to find threat of injury. We believe this statement by Commissioner Askey supports the view that these data could be weighed and assessed differently. It is however, not for us to reweigh and re-evaluate the data that were before the USITC.

7.236 In sum, we find that USITC properly evaluated all relevant factors over the period investigated and in this respect therefore did not violate Article 3.4 of the AD Agreement. We find that USITC conducted an objective examination of the impact of the imports on the domestic industry, consistent with Article 3.1 of the AD Agreement.

(ii) Did USITC examine all known factors other than dumped imports and ensure that injuries caused by these factors were not attributed to the dumped imports ?

7.237 We turn next to the question whether USITC established a causal relationship between the dumped imports and the injury to the domestic industry consistently with Article 3.5 of the AD Agreement.

7.238 There are two aspects to Japan's argument in this regard. Both relate to the way USITC dealt with possible alternative causes of injury to the domestic industry. First, Japan alleges that USITC inadequately analysed other factors affecting the industry. Second, Japan submits that USITC failed to ensure that injury caused by these other factors was not attributed to the dumped imports. The United States, in response to these arguments, points to the various paragraphs in the USITC report in which other factors affecting the industry are discussed. The United States further argues that the USITC was not required under the AD Agreement to establish that dumped imports are the sole cause

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factors as required". Panel Report, *Argentina – Footwear*, para. 8.217. This statement was of course made in the context of the Agreement on Safeguards, but the relevant provision in the Safeguards Agreement, Article 4.2(a) is very similar to Article 3.4 of the AD Agreement.

[164] USITC Report, Additional and Dissenting Views of Commissioner Thelma J. Askey, page 52.

of injury and that its analysis did ensure that any injuries that were caused by other factors were not attributed to dumped imports.

7.239 We will first consider the factors that Japan alleges were ignored or marginalized by USITC in order to assess whether the statement in the USITC report, "[I]n assessing whether the domestic industry is materially injured by reason of subject imports, USITC considered all relevant economic factors that bear on the state of the industry in the United States" is justified.[165]

7.240 Japan alleges that USITC ignored the impact of the increase in capacity of mini-mills and the ensuing expansion of US steel supply.[166] We note however that the USITC, in discussing the capacity of the domestic industry observed that

> "the domestic industry increased its capacity from 67.3 million short tons in 1996, to 70.0 million short tons in 1997, and to 73.5 million short tons in 1998, at a rate largely commensurate with the increasing US consumption from 1996 to 1998".[167]

The USITC further observed that "there were some additional increases in capacity from 1997 to 1998 by EAF producers, but as discussed below, these increases were not as great as the increases in capacity by EAF producers from 1996 to 1997".[168] USITC thus considered increased capacity, and increased mini-mill capacity in particular, but found that it was largely commensurate with increases in demand and that most of the increased capacity was in place by 1997, when the industry was performing well.

7.241 Moreover, the report goes on to discuss Japan's argument that the industry's poor performance in 1998 reflects increased competition within the domestic industry, particularly from EAF producers:

> "Minimill competition was an important condition of competition in 1997, yet the domestic industry performed well that year. The incremental increase in mini-mill capacity from 1997 to 1998, particularly in light of the substantially larger increase in minimill capacity from 1996 to 1997, does not account for the bulk of the downturn in the domestic industry's financial indicators from 1997 to 1998".[169]

We therefore consider that USITC discussed the increased capacity as well as intra-industry competition and recognised that increased competition within the domestic industry contributed to the domestic industry's poorer performance in 1998. USITC however found that "it only partially explains the substantial declines in the domestic industry's performance in 1998".[170] We consider that USITC appropriately examined this factor.

7.242 Japan also argues that the USITC did not properly examine the effect on the industry of the strike at General Motors. In particular, Japan faults USITC for failing to distinguish the effects of the General Motors strike from the effects of the subject imports and for not considering the impact of the strike on the industry during the second half of 1998 in the proper context, which in Japan's view required considering the effect of the strike on merchant market demand, rather than on overall consumption.

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[165] USITC Report, page 9.

[166] We note that respondents before the USITC argued that imports were drawn into the US market due to *a shortage of domestic supply* of hot-rolled steel in early 1998. USITC Report, page 13, footnote 71.

[167] USITC Report, page 17.

[168] USITC Report, page 18, footnote 102. EAF, or "electric arc furnace" producers, are the mini-mills at issue. The terms are used interchangeably in this report.

[169] USITC Report, page 19.

[170] USITC Report, page 19.

7.243 We note that USITC explicitly addressed the 1998 General Motors strike in its report, considering it as a condition of competition. The strike lasted five weeks in June and July of 1998. The total amount of **all** flat-rolled steel (including hot-rolled, cold-rolled and corrosion resistant steels) that was not purchased was about 685,000 tons.[171] USITC concluded in this respect that

> "the GM strike had some effect on overall demand in 1998 and hence played some role in contributing to declining domestic prices. However, the strike lasted only five weeks and the total quantity of material not purchased during the GM strike (no more than 685,000 tons of all types of flat-rolled steel) was not large enough to explain the kind of price declines that occurred in 1998. Indeed, despite the GM strike, merchant market and overall consumption of hot-rolled steel were at an all-time high in 1998. Thus, at most, we consider the GM strike to be only a partial explanation for declining prices in 1998".[172]

7.244 This statement, in our view, demonstrates that USITC did not ignore the General Motors strike as an alternative factor, and did indeed examine its effect on the industry, finding that despite the strike, consumption increased in 1998. It is true that USITC did not consider the effect of the strike on merchant market consumption as opposed to overall consumption, but we do not find that this is required under the AD Agreement. While this might have been an interesting additional point to address, as we discussed above, it is the impact of imports on the domestic industry **as a whole** that needs to be examined and assessed in light of other causal factors. This, we consider, USITC has done with respect to the General Motors strike.

7.245 Japan asserts that declining demand for hot-rolled steel from the pipe and tube industry was an important alternative causal factor that was not addressed in the USITC report. Japan argues that the US argument before the Panel regarding why USITC failed to discuss this element is nothing more than a *post hoc* rationalization. Japan submits that this omission is a plain violation of the requirement of Article 3.5 of the AD Agreement to examine all relevant evidence and any known factors other than dumped imports which at the same time are injuring the domestic industry.

7.246 We agree with Japan that errors made during the investigation cannot be rectified in subsequent submissions before a WTO panel. However, in this case, it seems clear to us that the factor allegedly not examined, a decline in demand by pipe and tube producers, is merely a subset of a factor that **was** explicitly examined at length by USITC -- overall consumption or demand for hot-rolled steel. While there may have been a decline in demand from this particular user industry, USITC determined that both for the hot-rolled steel industry as a whole and in the merchant market, demand increased substantially throughout the period of investigation. As discussed previously, the investigating authority is obliged to consider the impact of imports on the industry as a whole, which the USITC did with respect to changes in demand. We do not agree with Japan that a failure on the part of USITC to discuss a decline in one particular aspect of demand, in a case in which the overall increase in demand for the product was thoroughly examined and discussed in examining the impact of imports, constitutes a violation of Article 3.5 of the AD Agreement.

7.247 Finally, Japan argues that USITC failed to examine the prices of non-dumped imports and only collected information on the volume of non-subject imports. Japan submits that Article 3.5 requires consideration of the volume *and prices* of imports not sold at dumping prices. USITC examined non-subject imports and found that they maintained a stable presence in the US market throughout the period of investigation.[173] We disagree with Japan that Article 3.5 of the AD Agreement **requires** that the investigating authority explicitly examine the volume and price

[171] It is noteworthy that General Motors did not provide a figure limited to hot-rolled steel, the domestic like product.

[172] USITC Report, page 16.

[173] USITC Report , page 10.

effects of non-subject imports. Article 3.5 provides in relevant part that "factors which **may** be relevant in this respect include *inter alia*, the volume and prices of imports not sold at dumping prices" (emphasis added). The obligation imposed by Article 3.5 in this respect is to examine any **known** factors which at the same time are injuring the industry, and includes volume and prices of imports not sold at dumped prices among the examples of potential other factors injuring the industry. Japan did not present a *prima facie* case that the prices of the non-dumped imports were a known factor injuring the industry or that they were otherwise relevant to USITC's examination of the effects of other known factors that might be causing injury.

7.248 We now turn to the second aspect of Japan's claim concerning the causal analysis performed by USITC, concerning the "non-attribution" requirement of Article 3.5 of the AD Agreement. Japan argues that USITC failed to ensure that injury caused by other known factors was not attributed to the dumped imports.

7.249 Article 3.5 of the AD Agreement provides:

> "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry".

7.250 Article 3.5 of the AD Agreement thus requires the investigating authority to demonstrate that dumped imports are, through the effects of dumping, as set forth in Article 3.2 and 3.4, causing injury within the meaning of the Agreement.[174] The following sentences of this provision clarify how this causal link is to be established. First, Article 3.5 requires that the demonstration of a causal relationship be based on an examination of all relevant evidence. Second, Article 3.5 provides that the authorities shall examine any known factors other than the dumped imports which are at the same time injuring the domestic industry. Third, the authorities are to make sure that injuries caused by these other factors are not attributed to the dumped imports.

7.251 Article 3.5 thus seems to warn against quick and overly simplistic conclusions by requiring the investigating authorities to consider and examine other known factors that are at the same time injuring the domestic industry before determining that dumped imports are causing material injury within the meaning of Articles 3.2 and 3.4. It does not suffice to merely consider these other factors. The authorities must also make sure that imports are not regarded as causing injuries that are in fact caused by these other factors. We note that the Agreement uses the plural "injuries". This to us indicates that many factors may be injuring the industry in various ways. We consider that the authority is to examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of the dumped imports under Articles 3.2 and 3.4 of the AD Agreement.

[174] This is, in our view, clearly a reference to footnote 9 to Article 3 of the AD Agreement, which defines "injury" as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".

7.252 The AD requirement requires that "a causal relationship" between dumped imports and material injury to the industry be demonstrated and that authorities in their examination of other factors causing injuries make sure that they do not mistake coincidence in time for a causal relationship. In this context, we consider the decision of the Panel in *United States – Atlantic Salmon*, a decision under the Tokyo Round AD Code, to be useful and persuasive on this issue. We note that the relevant language addressed by that Panel, concerning non-attribution of injuries caused by other factors to the dumped imports, is identical in Article 3:4 of the Tokyo Round Anti-Dumping Code to that in Article 3.5 of the AD Agreement.

7.253 Japan argues that the addition of the explicit requirement to "examine any known factors other than the dumped imports" which are injuring the domestic industry, as opposed to the recognition of the possibility that other factors are injuring the domestic industry, constitutes "a significant substantive change in the underlying treaty text [which] renders *United States - Atlantic Salmon* totally inapposite".[175] We do not agree. In our view, the operative language at issue is the injunction that "the injuries caused by other factors **must not be attributed** to the dumped imports" (emphasis added). This language is unchanged in Article 3.5 of the AD Agreement from Article 3:4 of the Tokyo Round Code. The specific requirement that the authorities "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", as opposed to the Tokyo Round Code language which recognized that "There may be other factors which at the same time are injuring the industry", clarifies the investigative obligation of the authority, but does not change the standard of non-attribution. We consider the decision of the Panel in *United States - Atlantic Salmon* remains relevant and persuasive on this latter point.

7.254 The panel in *United States - Atlantic Salmon* observed that:

> "the primary focus of the requirement in Article 3:4 of a demonstration of a causal relationship between imports under investigation and material injury to a domestic industry was on the analysis of the factors set forth in Articles 3:2 and 3:3, i.e. the volume and price effects of the imports, and their consequent impact on the domestic industry. In this connection, the Panel recalled its conclusions regarding the findings made by the USITC with respect to these factors. Under Article 3:4 the USITC was required not to attribute injuries caused by other factors to the imports from Norway. In the view of the Panel this did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports…"[176]

7.255 We have above concluded that USITC did examine other known factors that were at the same time causing injuries to the industry, such as the GM strike and intra-industry competition. We consider that the conclusion that the effects of the strike can only have been minimal is supported by the facts since both on a merchant market basis and overall, demand was still increasing and the amount of hot-rolled steel affected by the strike was relatively small. USITC also recognised, as we have discussed above, that "increased competition within the domestic industry has contributed to the

[175] Second Submission of Japan, Annex C-1, para. 256.
[176] *United States – Atlantic Salmon*, para 555.

domestic industry's poorer performance in 1998", but concluded that "it only partially explains the substantial declines in the domestic industry's performance in 1998".[177]

7.256 We note that USITC concluded its analysis as follows:

> "In sum, the domestic industry's performance was substantially poorer than what would be expected given record levels of demand in 1998. We recognize that other economic factors – especially increased intra-industry competition – have contributed to the industry's poorer performance in 1998. Having taken these factors into account however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance, as reflected in nearly all economic indicators. Accordingly, in light of the domestic industry's declining production, shipments, market share, prices, capacity utilization and financial condition, in the face of increasing subject import volume and market share and declining subject import prices, we determine that the domestic industry producing hot-rolled steel is materially injured by reason of LTFV imports from Japan".[178]

7.257 We find that the USITC's analysis of the effects of the dumped imports on the domestic industry, in light of, and taking into account the impact of other factors on the state of the industry, is consistent with the requirement of Article 3.5 of the AD Agreement to demonstrate a causal relationship between dumped imports and material injury without attributing injuries caused by other factors to the dumped imports.

7.258 Japan argues, on the basis of the Panel report in *United States - Wheat Gluten*, that it needs to be demonstrated that dumped imports alone have caused material injury and that the injury caused by other factors must somehow be deducted from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury. After these arguments were made, but before we had completed our consideration of the interim report, the Appellate Body issued its decision in the appeal of *United States - Wheat Gluten.*[179] As that decision bears directly and substantially on our analysis in this regard, and in particular on Japan's argument, we considered it appropriate to take the Appellate Body's decision into account, and delayed issuance of the interim report to do so.

7.259 The Appellate Body found that the Panel had concluded that increased imports must, themselves, be capable of causing injury that is "serious", and explained its view of the Panel's reasoning leading to this interpretation as comprising the following steps:

> "first, under the first sentence of Article 4.2(b), there must be a "causal link" between increased imports and serious injury; second, the non-"attribution" language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to ensure that these effects are not "attributed" to the increased imports; fourth, the effects caused by increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.[63]

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[177] USITC Report, page 19.
[178] USITC Report, pages 20-21.
[179] Appellate Body Report, *United States - Wheat Gluten*, WT/DS166/AB/R, adopted 19 January 2001.

> [63] We base our understanding of the Panel's reasoning on paragraphs 8.138, 8.139, 8.140 and 8.143 of the Panel Report."[180]

The Appellate Body agreed with the first and second steps, but found no support in the text of the Safeguards Agreement for the latter two steps, and therefore "reversed the Panel's interpretation of Article 4.2(b) of the *Agreement on Safeguards* that increased imports "alone", "in and of themselves", or "*per se*", must be capable of causing injury that is "serious".[181]

7.260 The Appellate Body was considering the language of Article 4.2(b) of the Safeguards Agreement, which provides in pertinent part that "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Japan's argument relied on the similarity of this language to the language of the AD Agreement to argue that the standard set forth by the Panel in *United States - Wheat Gluten* should also apply in the anti-dumping context. In light of the decision of the Appellate Body, which reversed the decision of the Panel on this very point, we reject Japan's argument that the USITC was obligated under the AD Agreement to demonstrate that dumped imports alone have caused material injury by deducting the injury caused by other factors from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury. The AD Agreement requires that the investigating authority demonstrate that dumped imports are causing material injury.[182] The USITC determined that the domestic industry "is materially injured by reason of" the dumped imports. We consider that the USITC's consideration of the alternative causes of injury, as discussed above, was consistent with its obligations under the AD Agreement, and that the USITC did not attribute to dumped imports injury caused by other factors.

7.261 We therefore find that the USITC demonstrated the existence of a causal relationship between dumped imports and material injury to the industry consistently with the requirements of Article 3.5 of the AD Agreement.

G. ALLEGED VIOLATIONS OF ARTICLE X OF GATT 1994

1. Arguments

7.262 Japan claims that the United States violated the obligation of Article X:3(a) of GATT 1994 to administer its measures in a uniform, impartial and reasonable manner by (i) accelarating all aspects of the proceedings, (ii) revising its policy concerning critical circumstances during the proceeding, (iii) failing to immediately correct a calculation error in NKK's preliminary dumping margin, (iv) not taking any adverse action against US steel companies that refused to provide highly material information while applying adverse facts available to Japanese producers, and (v) deviating from its practice and considering data from only two years when examining the state of the industry.[183]

7.263 Japan argues that the standards contained in Article X:3 represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process". Japan submits that Article X of GATT 1994 goes beyond the elements of due process established in the AD Agreement and is in essence a comparative provision that ensures that certain parties are not afforded less due process rights than others. According to Japan, when parties are treated differently in different cases or in a single investigation, based simply upon differences in the administration of anti-dumping rules (which may or may not be consistent with the AD Agreement), these fundamental principles are

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[180] *Id*., para. 66.
[181] *Id*., para 79 (footnote omitted).
[182] We note that the term "material injury" is not defined in the AD Agreement.
[183] Japan is not arguing that a change in policy applicable to subsequent cases automatically demonstrates biased administration of one's laws, but that in this case, the United States changed its policy or refused to carry out longstanding rules and practices in a non-uniform, biased and unreasonable manner.

violated. Japan claims that in its investigation into imports of hot-rolled steel from Japan, the United States ignored the principle of good faith and did not act in a reasonable and equitable manner.

7.264 The United States argues that it administered its laws and regulations in a perfectly uniform, impartial and reasonable way. The United States first points out that Article X:3 only refers to the **administration** of a Member's laws, and not to the law itself. Secondly, the United States claims that since the AD Agreement is the more specific relevant rule, containing both procedural and substantive provisions, its provisions should prevail in case of conflict over the general rule of Article X:3. This also implies that if the measure is consistent with the AD Agreement, no claim can be brought under Article X:3, since this general provision cannot be used to undercut the specific disciplines of the AD Agreement. The United States also warns that a distinction must be made between the way one specific case was dealt with and the overall administration of laws and regulations envisaged in Article X:3. The United States stresses the fact that Japan is not arguing that the overall AD practice of the United States is arbitrary or does not ensure the necessary due process rights, but only challenges the way this case has been dealt with.

2. Finding

7.265 In considering these claims, we first consider the scope and applicability of Article X:3 of GATT 1994 to this case. Article X:3(a) of GATT 1994, which is at issue here, provides:

> "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."

7.266 In considering the applicability of Article X:3(a) in this case, we look to decisions of the Appellate Body which address this question. The Appellate Body, in considering Article X:3(a), has made it clear that the provision does not apply to laws, regulations, decisions and rulings in themselves, but applies "rather to the *administration* of those 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."[184] Moreover, the Appellate Body has held that where another WTO Agreement deals specifically and in detail with the issue in question, panels should apply the provisions of such agreement first, after which there would be "no need … to address the alleged inconsistency with Article X:3(a) of the GATT 1994"[185] in the event that the Panel finds a violation of the more specific provision.[186] As to the scope of Article X, the Panel in *EC-Poultry Products* observed that "Article X is applicable only to laws, regulations, judicial decisions and administrative rulings of general application."[187] The Panel considered that an import license issued to a specific company or applied to a specific shipment did not meet this criterion. The Appellate Body upheld the Panel's finding, noting that it agreed with the Panel that "licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X."[188]

7.267 Based on these previous decisions, we consider that certain principles are clear. First, we consider that Article X:3(a) addressed the **administration** of a Members laws, regulations, decisions and rulings. In this case, it is not at all clear to us that Japan has presented such a challenge. In essence we understand Japan to argue that five separate actions or categories of action taken by the

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[184] Appellate Body Report, *EC - Bananas*, para 200 (emphasis in original).

[185] *Id*., para. 204.

[186] *Japan - Measures on Imports of Leather*, BISD 31S/94, adopted 15 May 1984; *EEC-Regulation on Imports of Parts and Components*, BISD 37S/132, adopted 16 May 1990; *United States-DRAMs*, para. 6.92.

[187] Panel Report, *European Communities - Measures Affecting the Importation of Certain Poultry Products* ("*EC – Poultry Products*"), WT/DS69/R, adopted as modified (WT/DS69/AB/R) 13 July 1998, paras. 269-270.

[188] Appellate Body Report, *EC-Poultry Products*, para 114.

USDOC in the course of making its decision to impose the challenged final anti-dumping duty measure demonstrate a lack of uniform, impartial and reasonable administration of the US anti-dumping law. We will consider each of these actions or categories of action separately, first with respect to whether we have found a violation of some other, more specific WTO obligation. Where we have found that a particular action or category of action is not inconsistent with a specific provision of the AD Agreement, we are faced with the question whether a Member can be found to have violated Article X:3(a) of GATT 1994 by an action which is not inconsistent with the specific WTO obligations governing such actions. We have serious doubts as to whether such a finding would be appropriate. Some of Japan's arguments concerning the alleged lack of uniform, impartial, and reasonable administration of the US anti-dumping law assert that USDOC made different decisions in this case than it has made in other cases, or that the decisions were in violation of controlling US legal authority. It is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation.

7.268 Finally, we have been presented with arguments alleging violation of Article X:3(a) of GATT 1994 which relate to the actions of the United States in the context of a single anti-dumping investigation. We doubt whether the final anti-dumping measure before us in this dispute can be considered a measure of "general application". In this context, we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law. While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where the actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements.

7.269 With regard to Japan's specific claim that USDOC unduly accelerated the proceeding, Japan cites as evidence the fact that USDOC initiated the investigation on 15 October 1998, which according to Japan was five days earlier than normal, and sent out questionnaires four days after initiation, instead of 30 days, as Japan maintains is the USDOC's normal practice.[189] The preliminary finding of dumping was issued 120 days after initiation, which Japan asserts is 25 days earlier than normal. Japan asserts that the USDOC has only rarely accelerated proceedings, and has more commonly extended them, in similar circumstances, and that the accelerated actions in this case were neither impartial nor reasonable in light of the complex nature of the case. Japan submits that USDOC's actions to accelerate deadlines constitute a pattern of abusive exercise of rights and a violation of the obligation of good faith administration of the anti-dumping remedy.

7.270 In considering this allegation, we note that the total "acceleration" which is allegedly the source of a partial or biased process in this case was 25 days. Those 25 days were at the expense of the investigating authority, which issued its questionnaires to the parties earlier than under its usual timetable. There is no allegation that the questionnaires somehow were defective or erroneous in a manner which prejudiced any party's interest, by virtue of having been issued earlier than under USDOC's normal timetable. There is no allegation that any extensions of time in any aspect of the investigation, including for submitting responses to questionnaires, were requested by a Japanese party and were denied.[190] Finally, there is no basis on which it could be considered that USDOC

[189] Japan provides a summary of the timing of questionnaires in other cases in 1998 in Exh. JP-69.

[190] Indeed, it appears that while the questionnaires were issued to the parties earlier than the norm, extensions of time were granted to respond, as the deadline for responses was significantly longer than the 30 days required by Article 6.1.1 of the AD Agreement - responses were in the end due 87 days after issuance of the questionnaires. There is also no evidence or allegation that any requests for extensions of time by any other party participating in the investigation were denied.

somehow failed to have sufficient time to conduct the investigation, as the investigation followed USDOC's usual timetable after the questionnaires were issued. We simply cannot see any basis on which to find that USDOC failed to administer the anti-dumping law in a uniform, impartial, and reasonable manner simply because USDOC chose to act faster than it normally did in issuing the questionnaires in this investigation. Its actions were within the limits of its authority under US law, the AD Agreement establishes no obligations as to the timing of issuance of questionnaires, and there is no allegation that any party's interests were adversely affected by USDOC's actions.

7.271 Japan also asserts that USDOC deviated from its normal practice of correcting clerical errors following preliminary determinations. NKK brought a clerical error to USDOC's attention in accordance with US regulation, and in a timely manner. USDOC did not make the correction immediately, but did eventually issue a correction, with retroactive effect. Japan submits that this unexplained departure from USDOC's own practice lacks the uniformity, impartiality and reasonableness mandated by Article X:3(a). Japan does not argue that the failure to correct the NKK clerical error itself created any violation of the AD Agreement.

7.272 In our view, the mere fact that USDOC did not correct an error in its calculation at the first possible time, particularly where, as Japan acknowledges, it was under no legal obligation to do so under the AD Agreement, does not rise to a level that demonstrates a failure to administer the anti-dumping law in a uniform, impartial, and reasonable manner. This is particularly so since USDOC did in fact eventually correct the error, with retroactive effect.

7.273 Japan claims that USDOC's review of its critical circumstances policy during the proceedings, and its subsequent application of this new policy to the case at hand, were inconsistent with the United States' obligations under Article X:3(a). In Japan's view, the timing of the policy change was not impartial, and the application of the policy not reasonable or uniform since an arbitrary date before the filing of the petition was chosen as a reference point rather than the date of initiation. Japan alleges that the substance of the decision was not uniform either since it was based on allegations contained in the petition and went against the conclusion of the USITC on injury.

7.274 We certainly recognize the possibility, and indeed the likelihood, that the USDOC's decision to review its critical circumstances policy at the time it did, and to apply the revised policy in this case, may have been motivated by concerns outside the scope of the anti-dumping investigation itself. However, we have determined above that the USDOC's preliminary critical circumstances determination was not inconsistent with the United States' obligations under Article 10.7 of the AD Agreement as to its substance. That is to say, the United States was entitled to make the preliminary critical circumstances determination it made in this case. Thus, the only basis for Japan's contention is that USDOC made its determination earlier than it had in previous cases. This in itself was not inconsistent with Article 10.7, which allows such determinations to be made after initiation, when it is determined that sufficient evidence exists of the necessary conditions. Moreover, USDOC undertook this action as a result of a change in its policy which was made generally applicable, and has in fact been applied in other cases.[191] Finally, we note that the issuance of early critical circumstances determinations, as well as the choice of reference point for comparing volumes of imports to assess whether they were massive, was already provided for in US law and regulation, and could have been applied in this case on that basis, without necessarily informing the public of a change in generally applicable policy. We have not found the controlling US legal provisions to be inconsistent with the United States' obligations under the AD Agreement Thus, Japan is asking us to conclude that by changing its policy in a manner not inconsistent with its domestic law, and not inconsistent with its WTO obligations under the AD Agreement, and applying that decision on the facts of this case, resulting in a determination not inconsistent with its obligations under the

[191] Merely that the policy change has since been applied in other cases does not demonstrate that it was proper, but it does undermine its weight, whatever that may be, as an indication of failure to impartially administer the anti-dumping law.

AD Agreement, USDOC violated Article X:3 of GATT 1994. We do not find any basis for such a conclusion.

7.275 Japan asserts that USDOC's decisions to apply "facts available" in calculating dumping margins for Japanese companies must be contrasted with the fact that USITC did not apply facts available in assessing injury to the domestic industry. Japan's argument rests on the factual premise that the domestic industry failed to provide requested information within applicable deadlines, which was the basis of USDOC's decision to apply facts available. However, the United States has explained, and we accept that explanation, that the deadlines for receiving information are different before the USITC and the USDOC, and that in fact, the domestic industry did not fail to provide information in a timely manner under the USITC's applicable regulations. Thus, the factual predicate for the application of facts available did not exist in the case of the USITC's determination, and there is no disparity of treatment. Consequently, even assuming that a difference in the treatment of different categories of parties before the two agencies responsible for administering the anti-dumping law in the United States could constitute a violation of Article X:3 of GATT 1994, Japan has failed to establish that this happened as a matter of fact.

7.276 Finally, Japan claims that the use of a two year period of investigation by the USITC in its injury analysis violated Article X:3(a). As discussed above, we have found that it is simply not correct as a matter of fact that USITC relied on a two year period of investigation. USITC clearly collected information for all three years of the period of investigation established in this case, and that information was before it at the time it made its decision. Moreover, we have found that the USITC's analysis and determination of injury were not inconsistent with its obligations under the AD Agreement. There is in our view no basis for concluding that the USITC's actions in this regard, which are not inconsistent with the United States' obligations under the AD Agreement nonetheless violate Article X of GATT 1994.

7.277 The elements raised by Japan in support of its contention relate almost exclusively to individual actions and decisions made in the context of resolving the single anti-dumping proceeding underlying this dispute. We do not consider that Japan has made a *prima facie* case that these individual actions, which of themselves are not inconsistent with US obligations under the AD Agreement, demonstrate that the United States administered its anti-dumping laws in a manner which was not uniform, impartial and reasonable. We therefore conclude that the United States did not act inconsistently with Article X:3 of GATT 1994 in making its determinations and imposing the final anti-dumping measure in dispute.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In light of the findings above, we conclude

(a) that the United States acted inconsistently with Articles 6.8 and Annex II of the AD Agreement in its application of "facts available" to Kawasaki Steel Corporation (KSC), Nippon Steel Corporation (NSC) and NKK Corporation;

(b) that section 735(c)(5)(A) of the Tariff Act of 1930, as amended, which mandates that USDOC exclude only margins based entirely on facts available in determining an all others rate, is inconsistent with Article 9.4 of the AD Agreement, and that therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement; and

(c) that the United States acted inconsistently with Article 2.1 of the AD Agreement in excluding certain home-market sales to affiliated parties from the calculation of normal value on the basis of the "arm's length" test. In addition, in light of the findings above, we conclude that the replacement of those sales with sales to unaffiliated downstream purchasers was inconsistent with Article 2.1 of the AD Agreement.

8.2 In light of the findings above, we conclude

(a) that the United States did not act inconsistently with its obligations under Articles 10.1, 10.6 and 10.7 of the AD Agreement in determining the existence of "critical circumstances". We further find that sections 733(e) and 735(a)(3) of the Tariff Act of 1930, as amended, concerning the determination of critical circumstances are not inconsistent with Articles 10.1, 10.6 and 10.7 of AD Agreement;

(b) that section 771(7)(c)(iv) of the Tariff Act of 1930, as amended, the "captive production" provision, is not inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement. In addition, we further conclude that the United States did not act inconsistently with its obligations under Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement in applying that provision in its determination concerning injury to the US industry;

(c) that the United States did not act inconsistently with Articles 3.1, 3.4 and 3.5 of the AD Agreement in its examination and determination of a causal connection between dumped imports and injury to the domestic industry; and

(d) that United States did not act inconsistently with Article X:3 of GATT 1994 in conducting its investigation and making its determinations in the anti-dumping investigation underlying this dispute.

8.3 With respect to those of Japan's claims not addressed above we have:

(a) concluded that the claim was not within our terms of reference ("general practice" concerning adverse facts available; "general practice" of excluding certain home-market sales from the calculation of normal value), or

(b) concluded that, in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings.

8.4 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 the United States has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Japan under that Agreement.

B. RECOMMENDATION

8.5 Japan has requested that we make specific and concrete findings regarding precisely what the US authorities did incorrectly. This we have done. However, Japan also asserts that we should not leave it to the US authorities to decide what to do in the face of our decision, but that we have a duty to provide a clear and detailed "roadmap" for how the US authorities can fulfill their international obligations in this case. We do not agree with Japan's view of our responsibilities in this regard.

8.6 Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> "it shall recommend that the Member concerned bring the measure into conformity with that agreement" (footnotes omitted).

Article 19.1 goes on to provides that:

> "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member.

8.7 Thus, in our view, the language of Article 19.1 constrains us to recommend that the United States bring its measures into conformity with the provisions of the AD Agreement, and permits us to make suggestions regarding implementation of that recommendation.

8.8 We therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the AD Agreement.

8.9 Japan further requests that we recommend that, if reconsideration of this case by the US anti-dumping authorities in accordance with our findings results in a determination that the imported product was either not dumped or that it did not injure the domestic industry, the United States should revoke its anti-dumping duty order and reimburse any anti-dumping duties collected, and that if reconsideration of this case by the US anti-dumping authorities in accordance with our findings results in a determination that the imported product was dumped to a lesser extent than the duties actually imposed, the United States should reimburse the duties collected to the extent of the difference. In other words, Japan wants us to recommend that the DSB request the United States to undertake certain specific actions in the event that its implementation of our decision has certain consequences.

8.10 The United States argues that the remedy sought by Japan, *i.e.* the revocation of the duty and the reimbursement of the amounts collected, goes beyond WTO practice and the remedies provided in Article 19.1 of the of the DSU. The United States asserts that the specific implementation of a panel decision is a matter for the Member to decide upon, especially in cases such as this where it could be that a measure may remain in place and only certain calculations were found to be inconsistent with the AD Agreement.

8.11 As noted above, the scope of our recommendation is established by Article 19.1 of the DSU. While we are free to suggest ways in which we believe the United States could appropriately implement our recommendation, we decide not to do so in this case. We have found a variety of different violations of the United States' obligations under the AD Agreement, which may necessitate differing responses in order to bring the measure concerned into conformity with the United States' obligations under the AD Agreement. We consider that in the first instance the modalities of the implementation of our recommendation are for the United States to determine. In this regard, we note Article 21.3 of the DSU, which provides:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

In our view, this language clearly establishes a distinction between the **recommendation** of a panel, and the **means** by which that recommendation is to be implemented.[192] The former is governed by Article 19.1, and is limited to the particular form set out therein. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned.

8.12 Viewing Japan's request as a request that we suggest ways in which the United States could implement our recommendation, we decline to make such conditional suggestions. First, we note that, under US law, duties are not actually collected in the amounts determined as the dumping margin in the investigation, but on the basis of the calculations in subsequent administrative reviews. Thus, it is not clear to us that there are any "duties collected" that would be subject to such a suggestion.

8.13 Second, and more importantly, we recall that suggestions under Article 19.1 relate to ways in which a Member could implement a recommendation to bring a measure into conformity with a covered agreement. Japan's request for reimbursement raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which we do not believe have been fully explored in this dispute.

8.14 On the basis of the foregoing, we decline Japan's request for a conditional suggestion regarding revocation of the anti-dumping order and reimbursement of anti-dumping duties collected.

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[192] See Panel Report, *Guatemala-Cement I*, para. 8.3.

ANNEX A

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ANNEX A-1

First written submission of Japan

(3 July 2000)

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Business Confidential Information

In this Submission, including its Exhibits, Japan has placed Business Confidential Information in brackets ("[]"). The bracketed information is highly confidential. This information is provided solely for the purpose of fully informing the Panel of the factual details of the Hot-Rolled Steel investigations. Japanese respondents would be seriously harmed if this information were used for any other purpose or were made available to anyone outside the Panel, the Secretariat officials assisting the Panel, and the official legal team of the United States and the third parties — especially if this information were made available to any of Japanese respondents' competitors. Japan therefore respectfully requests that this information be protected and that it be omitted from the Panel's report.

INTRODUCTION

1. This submission sets forth Japan's challenge to the US imposition of anti-dumping measures on Hot-Rolled Flat-Rolled Carbon-Quality Steel Products ("hot-rolled steel") from Japan. Various provisions of the US anti-dumping law are, on their face, inconsistent with US obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). Furthermore, the application of US law in this investigation was inconsistent not only with numerous substantive provisions of these agreements, but also with Article X:3(a) of GATT 1994 and the well-established international legal obligation to apply one's laws in "good faith." The improper imposition of these anti-dumping measures has essentially halted imports of the subject merchandise from Japan into the United States.

2. The anti-dumping measures on hot-rolled steel were imposed following various determinations made by the US International Trade Commission ("USITC") and the US Department of Commerce ("USDOC"). These two agencies share responsibility for administering the US anti-dumping law, with USDOC determining dumping margins and USITC determining whether the domestic industry has been injured by imports.

3. In conducting the dumping investigation, USDOC violated Articles 2, 6, 9 and 10, and Annex II of the Anti-Dumping Agreement:

- USDOC's established practice of using adverse "facts available" in order to punish respondents for conduct USDOC deems uncooperative is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

- USDOC's application of adverse "facts available" to Kawasaki Steel Corporation ("KSC") was inconsistent with Articles 2, 6, and 9 and Annex II because, although KSC provided all data under its control and cooperated with the investigation, USDOC punished KSC for not providing data controlled by a petitioner.

- USDOC's application of adverse "facts available" to NKK Corporation ("NKK") and Nippon Steel Corporation ("NSC") was also inconsistent with Articles 2, 6 and 9 and Annex II because USDOC improperly rejected and refused to verify data that was provided in a timely manner and was verifiable.

- On its face and as applied by USDOC, the provision of US law requiring that the dumping margin for non-investigated producers and exporters — known as the "all others" rate — be derived from margins calculated using partial "facts available" is inconsistent with Article 9.4.

- Using its well-established arm's length test, USDOC excluded certain home market sales to affiliated parties from the normal value calculation, thereby failing to include sales in the ordinary course of trade in the calculation as required by Article 2.1 and failing to provide a "fair comparison " as required by Article 2.4. USDOC's replacement of such sales with affiliated party resales also violated Articles 2.1, 2.2 and 2.4.

- US law allowing retroactive imposition of provisional measures prior to a preliminary affirmative determination of dumping violates Article 10. On its face, US law (termed "critical circumstances") does not require a finding of "sufficient evidence" in support of the conditions set forth in Article 10.6 in making determinations under Article 10.7, in violation of Articles 10.6 and 10.7. As applied in this case, USDOC based its finding on petitioners' allegations and press

reports, and ignored USITC's preliminary finding of only a threat of injury, also violating the requirements of Articles 10.1, 10.6, and 10.7.

4. The USITC injury investigation and determination violated Articles 3 and 4 of the Anti-Dumping Agreement:

- The "captive production" provision of US law, on its face and as applied by USITC, is inconsistent with the requirements of Articles 3 and 4. When certain facts are present, this provision requires USITC to focus on a narrow segment of the domestic industry rather than on the industry as a whole, improperly inflating any negative impact of imports and precluding an objective examination of all relevant factors and evidence. In this case, USITC effectively based its injury determination on only 30 per cent of the US industry's US sales.

- USITC's determination that the requisite causal relationship existed between imports and injury to the domestic industry was inconsistent with Article 3. Specifically USITC's reliance on the US industry's peak performance year of 1997 as the measure of whether imports were causing injury failed to satisfy the requirements of Article 3.1 and 3.4 that authorities make a determination based on positive evidence, properly evaluate all related factors, and conduct an objective examination.

- USITC also failed to evaluate properly the effect on the US industry of known factors other than dumped imports, including the protracted General Motors strike, increased production by US mini-mills, and faltering US demand for pipe and tube, in violation of Article 3.5.

5. In determining dumping, injury, and causation inconsistently with the provisions of the Anti-Dumping Agreement, the US also acted inconsistently with GATT 1994 Article VI.

6. The US compounded these violations by conducting investigations exhibiting a pattern of bias targeting Japanese respondents. The US thus violated GATT 1994 Article X.3 because its investigations were not complete and its determinations were not made in a uniform, impartial, and reasonable manner as required by Article X:3(a) of GATT 1994:

- USDOC accelerated all aspects of the proceeding, despite its extraordinarily complicated nature.

- USDOC declined to correct a significant unfavourable clerical error in its preliminary determination in violation of its own regulations.

- USDOC revised its critical circumstances policy during the proceeding and then took the unprecedented action of determining it would retroactively impose provisional measures prior to its preliminary determination of dumping.

- USDOC systematically resorted to adverse "facts available" in each instance where Japanese respondent companies made even the most minor, inadvertent mistake in submitting verifiable data. In stark contrast, USDOC and USITC refused to sanction US companies, including interested party petitioners, that purposefully withheld data. USITC compounded this violation by accepting (and relying on) the US steel companies' data after the final briefs had been submitted and oral argument had concluded.

- USITC improperly limited its analysis of the domestic industry to two years of the period investigated, thereby abandoning its normal practice and ignoring the fact that the industry performed better in the third year of investigation than the first.

7. Finally, by maintaining an anti-dumping law, regulations and administrative procedures that do not conform with US obligations under the WTO Agreements, the US violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

8. In light of these US violations, each of which Japan demonstrates in detail below, Japan requests that the Panel to issue the findings and make the recommendations set forth in the conclusion at the end of this submission.

I. PROCEDURAL BACKGROUND FOR DISPUTE SETTLEMENT IN THIS CASE

9. On 18 November 1999, the Government of Japan requested consultations with the US Government pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of GATT 1994, and Article 17.2 of the Anti-Dumping Agreement, regarding preliminary and final determinations in the USDOC and USITC anti-dumping investigations of hot-rolled steel products from Japan.[1]

10. Consultations were held on 13 January 2000. Unfortunately, the consultations failed to resolve the dispute.

11. On 11 February 2000, the Government of Japan requested the establishment of a panel pursuant to Article XXIII:1 of GATT 1994, Articles 4 and 6 of the DSU, and Article 17 of the Anti-Dumping Agreement, and requested that the Panel have the standard terms of reference provided for in Article 7.1 of the DSU.[2]

12. At its 20 March 2000 meeting, the Dispute Settlement Body (DSB) established a panel to examine the complaints of the Government of Japan. The Panel was constituted on 24 May 2000.[3]

13. The Panel's terms of reference, pursuant to DSU Article 7, are:

> To examine, in light of the relevant provisions of the covered agreements cited by Japan in document WT/DS184/2, the matter referred to the DSB by Japan in document WT/DS184/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

II. SUMMARY AND CONTEXT OF THE CHALLENGED ANTI-DUMPING MEASURES

A. TIMELINE FOR THE INVESTIGATIONS

14. On 30 September 1998, several US steel manufacturing companies, the United Steelworkers of America, and the Independent Steelworkers Union filed a petition requesting that USITC and USDOC undertake an anti-dumping duty investigation of imports from Brazil, Japan, and Russia.[4] The petitions alleged that these imports had entered the US market at "less than fair value" (*i.e.*,

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[1] *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan: Request for Consultations by Japan,* G/ADP/D20/1 (23 Nov. 1999).

[2] *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan: Request for the Establishment of a Panel by Japan, WT/DS184/2* (11 Feb. 2000).

[3] *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan: Constitution of the Panel Established at the Request of Japan,* WT/DS184/3 (24 May 2000).

[4] *Petition for the Imposition of Antidumping Duties: Certain Hot-Rolled Steel Flat Products From Japan* , 30 Sept. 1998 ("*Petition*") (excerpts in **Exh. JP-1**). The petition also included a countervailing duty claim against Brazil, which is immaterial to this proceeding.

dumped prices) and materially injured the domestic industry. The next day, on 1 October 1998, USITC instituted its injury investigation.[5]

15. On 8 October 1998, USDOC issued a policy bulletin announcing its unprecedented plan to issue preliminary critical circumstances determinations prior to preliminary dumping determinations.[6] A week later, on 15 October 1998, USDOC initiated its anti-dumping duty investigation.[7]

16. On 17 November 1998, USITC issued an affirmative preliminary determination, finding a reasonable indication that the US industry was threatened with material injury by reason of hot-rolled steel imports from Brazil, Japan, and Russia.[8] USITC found there was no "reasonable indication" of current material injury.[9]

17. On 23 November 1998, USDOC issued an affirmative preliminary critical circumstances determination, stating that all Japanese exporters would be liable for dumping duties retroactively to 90 days before any affirmative preliminary dumping determination.[10] This action occurred eleven weeks prior to a preliminary determination by USDOC and was aimed at deterring shipments during the investigation.[11]

18. On 12 February 1999, USDOC issued a preliminary determination finding that hot-rolled steel from Japan was sold in the United States at dumped prices.[12] Having narrowed its investigation to KSC, NSC, and NKK, as the "mandatory respondents" who were required to participate in the investigation, USDOC issued the following provisional measures to be paid on all entries of all

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[5] *Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia*, 63 Fed. Reg. 53926, 53927 (7 Oct. 1998) (instituting USITC investigations and scheduling preliminary phase investigations) ("*USITC Institution of Investigation*") (**Exh. JP-2**).

[6] *Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, 63 Fed. Reg. 55364, 55364-65 (15 Oct. 1998) (publishing USDOC Policy Bulletin 98/4, "Timing of Issuance of Critical Circumstances Determinations") ("*USDOC Critical Circumstances Policy Bulletin*") (**Exh. JP-3**); *see also* 19 U.S.C. § 1673b(e)(1) (**Exh. JP-4**); 19 C.F.R. § 351.206(c)(2), as amended *(Regulation Concerning Preliminary Critical Circumstances Findings: Final Rule*, 64 Fed. Reg. 48706 (8 Sept. 1999)) (**Exh. JP-5**).

[7] *Initiation of Antidumping Duty Investigations: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Japan and the Russian Federation*, 63 Fed. Reg. 56607, 56613 (22 Oct. 1998) ("USDOC Initiation of Investigation") (**Exh. JP-6**).

[8] *Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia*, 63 Fed. Reg. 65221, 65221 (25 Nov. 1998) *("Notice of USITC Preliminary Injury Determination")* (**Exh. JP-7**); *see also Certain Hot-Rolled Steel Products From Brazil, Japan, and Brazil*, Inv. Nos. 701-TA-384 and 731-TA-806-808 (Preliminary), USITC Pub. 3142 at 1 (Nov. 1998) *("USITC Preliminary Injury Determination"*) (**Exh. JP-8**).

[9] In making this finding, USITC said that the "industry was relatively healthy during much of the period examined. Capacity, production, shipments, and net sales all increased during the period. Employment indicators generally held steady, and the industry's productivity improved. Nevertheless, there are signs of imminent future difficulties for the industry from subject imports." *USITC Preliminary Injury Determination*, USITC Pub. 3142 at 17 (footnotes omitted) (**Exh. JP-8**).

[10] *Preliminary Determinations of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation*, 63 Fed. Reg. 65750, 65751 (30 Nov. 1998) *("USDOC Preliminary Determinations of Critical Circumstances"*) (**Exh. JP-9**).

[11] In a January 1999 press release, USDOC Secretary Daley acknowledged that an early decision would impact imports by stating that "making critical circumstances determinations prior to the preliminary dumping determination . . . put{s} importers on notice that they could be liable for dumping duties up to 90 days earlier than normal." USDOC Press Release, "Early Steel Numbers Tell Encouraging Story but More Remains to be Done, Commerce Secretary William Daley Says" (28 Jan. 1999) (**Exh. JP-10**).

[12] *Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 8291, 8299 (19 Feb. 1999) *("USDOC Preliminary Dumping Determination"*) (**Exh. JP-11**).

Japanese product made 90 days prior to the notice (pursuant to the earlier critical circumstances finding) and all subsequent entries until the final determination:

Preliminary Dumping Margins
Calculated by USDOC

KSC	*67.59%*
NSC	*25.14%*
NKK	*30.63%*
All Others Rate	*35.06%*

19. Following its preliminary determination, USDOC issued several more requests for information, conducted verification at the three mandatory respondents' offices in Japan (and the US in some cases), received interested party comments, and held a public hearing. On 28 April 1999, USDOC issued a final determination that respondents were dumping hot-rolled steel in the United States at the following margins of dumping:

Final Dumping Margins
Calculated by USDOC

KSC	*67.14%*
NSC	*19.65%*
NKK	*17.86%*
All Others Rate	*29.30%*[13]

20. While USDOC conducted its final investigation, USITC continued its own final injury investigation. Following interested party briefing and a public hearing held on 4 May 1999, USITC voted unanimously on 11 June 1999, that the US industry was materially injured or threatened with material injury by reason of hot-rolled steel imports from Japan. On 18 June 1999, USITC transmitted its final affirmative determination to USDOC.[14]

21. On 23 June 1999, USDOC issued an anti-dumping duty order imposing estimated dumping duties on imports from Japan at the rates announced in its final determination.[15]

B. POLITICAL CONTEXT FOR THE INVESTIGATIONS

22. In analyzing the propriety of the US government's determinations in this case, it is important to recognize the intense political context in which those findings were made. Although this case went through the same basic stages as other cases, both the specific procedures and substantive decisions in this case were unlike any other. The US steel industry generated the maximum political pressure, and the US government then allowed that pressure to distort and compromise the investigative process.

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[13] *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (6 May 1999) (*"USDOC Final Dumping Determination")* (**Exh. JP-12**).

[14] On 1 March 1999, USITC scheduled the final phase of its injury investigation. *Scheduling of the Final Phase of an Antidumping Investigation: Certain Hot-Rolled Steel Products From Brazil and Japan*, 64 Fed. Reg. 10723 (5 Mar. 1999); *see also Certain Hot-Rolled Steel Products From Japan*, 64 Fed. Reg. 33514, 33514 (23 Jun. 1999) *("Notice of USITC Final Injury Determination"*) (**Exh. JP-13**); *Certain Hot-Rolled Steel Products From Japan*, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (Jun. 1999) *("USITC Final Injury Determination")* (**Exh. JP-14**).

[15] *Antidumping Duty Order; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 34778, 34780 (29 June 1999) (**Exh. JP-15**). Since USITC had not found critical circumstances from Japan, USDOC had to cancel the retroactive imposition of anti-dumping duties.

23. Just prior to submission of the petition in this case, the US steel industry commenced an aggressive lobbying effort — the so-called " Stand Up For Steel" campaign — to accompany the administrative proceedings. This campaign, which began on 10 September 1998, sought to exert maximum political pressure for special treatment of the US steel industry under the anti-dumping law.[16] Having lost several of the flat-rolled steel cases they had brought in 1992, the steel industry wanted to avoid that outcome at all costs.

24. On 30 September 1998, the day the petition was filed, chief executives of the major US steel concerns met with top administrative officials, including senior USDOC officials, to ask for emergency relief from USDOC.[17] Regarding the importation of hot-rolled steel, the president of United Steelworkers of America told reporters: "We want it stopped. We want the administration to shut it down right now."[18]

25. Secretary of Commerce William Daley publicly expressed support for the case in early October 1998, even before USDOC officially initiated the investigation on 15 October 1998.[19] USDOC then committed to the unprecedented act of expediting the investigations[20], and ultimately imposed provisional measures earlier than *any* prior US anti-dumping investigation since the effective date of the Uruguay Round Agreement.[21] Under a normal schedule, USDOC would have issued its preliminary determination on 4 March 1999, and could have extended that date for a further 50 days until 24 April 1999, due to the complexity of the case (as is inevitable with flat-rolled steel cases).[22]

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[16] The industry's "Stand Up for Steel" coalition includes more than a dozen steel companies, including Bethlehem, LTV Steel Co. and USX Corp., along with the United Steelworkers of America. The US steel industry and the steelworkers' union issued a press release on 10 Sept. 1998, announcing a massive advertising campaign in the print and broadcasting media throughout the country alerting the US public to the seriousness of the import situation. *See* Stand Up For Steel Press Release, "Stand Up For Steel - And American Jobs: Coalition Of Steelworkers And Producers Launches Effort To Sound Alarm on Unfair Foreign Trade Practices" (10 Sep. 1998), <http://www.fairtradewatch.org/press910.html> (**Exh. JP-16**).

[17] "US Steel/Anti-Dumping: Seek Unspecified Emergency Relief," *Dow Jones Commodities Service*, (30 Sept. 1998) (**Exh. JP-17**).

[18] Robert A. Rankin, "Steel-makers demand government protection from cheaper imports," *Knight Ridder/Tribune News Service*, (30 Sept. 1998) (**Exh. JP-18**).

[19] After stating in September 1998 that "{w}e at the Department of Commerce will use every weapon at our disposal to ensure that our essential US industries, like steel are not jeopardized by foreign unfair trade practices," Secretary Daley vowed in early October 1998 to "do whatever he can to expedite the {steel anti-dumping} cases." *See* "Commerce Signals Support for Steel Industry Demands in New Cases," *Inside US Trade* (9 Oct. 1998) (**Exh. JP-19**); Tsukasa Furukawa, "Steel's Trade Complaints Stir Reactions," *American Metal Market* (14 Sept. 1998) (**Exh. JP-20**).

[20] *USDOC Initiation of Investigation*, 63 Fed. Reg. at 56607 (**Exh. JP-6**). Daley told members of the congressional steel caucuses in a 7 October 1999, meeting that he had decided to add additional officials in Import Administration so that the cases can be decided within 140 days rather than 160 days after the filing of the petitions. *See* Rossella Brevetti, "Regula Says Commerce Will Expedite Steel Cases," 15 *International Trade Reporter*, No. 40 (14 Oct. 1998) (**Exh. JP-21**). This promise alone was apparently not enough, as steel executives demanded meetings with the highest level US government officials. They met privately with senior presidential advisors, including Secretary Daley, on 21 October 1998, where they were promised a meeting with the President of the United States in early November. *See* Nancy E. Kelly, "Steel Execs to Meet With President," *American Metal Market*, at 2 (23 Oct. 1998). (**Exh. JP-22**). Ultimately, US steel executives obtained an hour-long private meeting with not only the President of the United States, but also the Vice President and principal cabinet members, where they discussed the investigation of hot-rolled steel products from Japan, Brazil, and Russia, and demanded quantitative restrictions on steel imports while the investigations were proceeding. *See* Nancy E. Kelly, "Steel to Clinton: Erect trade wall," *American Metal Market*, at 1 (9 Nov. 1998) (**Exh. JP-23**).

[21] *See* USDOC *AD and CVD Case History Tables 1980-1999: Investigations*, (last modified 31 Dec. 1999), <http://www.ita.doc.gov/import_admin/records/stats/case.list.txt> (**Exh. JP-24**).

[22] 19 U.S.C. § 1673b(b)(1), (c) (**Exh. JP-4**). Indeed, prior to the issuance of the preliminary determinations in the hot-rolled investigations and following the passage of the Uruguay Round Agreement, the Department has granted extensions in 70 out of 76 anti-dumping investigations in which the USDOC reached a

Here, USDOC adopted a schedule to finish the preliminary determination on 12 February 1999, about three weeks earlier than required by statute — a schedule that would place undue pressure on respondents to comply with USDOC's information requests and undue pressure on USDOC to rush its investigation.

26. Meanwhile, USDOC's 8 October 1998, announcement that it would issue preliminary critical circumstances findings before its preliminary dumping determinations and "as soon as possible after initiation"[23] was clearly aimed at providing relief for the US steel industry. Although USDOC claimed no relationship between its new policy and the hot-rolled steel petition, published reports show otherwise.[24] Furthermore, upon applying the new policy to the hot-rolled case, USDOC made its early affirmative critical circumstances determination despite the fact that (a) USITC had no sufficient evidence of current injury, as clearly required by both US law and the Anti-Dumping Agreement, and (b) USDOC had not yet even preliminarily determined whether the sales were dumped. USDOC essentially provided the domestic industry with injunctive relief without requiring any evidence of wrongdoing: the determination was based on nothing more than petitioners' allegations of dumping and injury.

27. During the course of USDOC's investigation, various US Government officials assured the US steel industry that it would vigorously enforce the unfair trade laws, and joined the industry in condemning the increase in imports.[25] Several members of the US Congress imposed extraordinary pressure on the Clinton Administration to take forceful action. The House of Representatives passed resolutions and nearly passed legislation that would have (a) imposed quotas on steel imports contrary to US WTO obligations and (b) amended the anti-dumping laws to ensure that the results of any unfair trade cases would be favourable to the US steel industry.[26]

28. It was within this political context that USDOC issued its preliminary dumping determinations. The preliminary margins announced on 12 February 1999, which would serve as

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preliminary determination; only one case involving multiple respondents did not receive an extension over the minimum 140 days. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Collated Roofing Nails From the People's Republic of China*, 62 Fed. Reg. 25899 (12 May 1997) (the other countries were Korea and Taiwan, *id.* at 25895, 25904); *see also* USDOC *AD and CVD Case History Tables 1980-1999: Investigations* (last modified 31 Dec. 1999) <http://www.ita.doc.gov/import_admin/records/stats/case.list.txt> (**Exh. JP-24**).

[23] *USDOC Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (**Exh. JP-3**).

[24] One report stated: "The Commerce Department this week issued a new policy that signalled {sic} its willingness to accommodate the US steel industry in its quest to prevent a surge in low-priced imports from entering the United States in the wake of a Sept. 30 filing of trade remedy cases against hot-rolled steel from Russia, Brazil and Japan. . . . The bulletin was issued the day Commerce Secretary Bill Daley was one of three senior Administration officials meeting with congressional supporters of the steel industry, who have been demanding changes in trade law implementation as one way to stem the tide of imports." "Commerce Signals Support for Steel Industry Demands In New Cases," *Inside US Trade* (9 Oct. 1998). A statement issued by a Member of the US Congress, Representative Ralph Regula (who is Chairman of the House Steel Caucus), misinterpreted the Policy Bulletin as itself an early critical-circumstances determination in the hot-rolled investigation. *See* "Officials said to be split on steel industry demands for import curbs," *Inside US Trade* (9 Oct. 1998). These articles are collected in **Exh. JP-25**.

[25] In a White House meeting on 6 Nov. 1998, Secretary Daley stated that the administration would be "very aggressive" against countries subjected to anti-dumping cases. *See* Chad Bowman, "Steel Industry Chiefs 'Hopeful' After Telling President, Cabinet of Cheap Imports' Impact," 15 *International Trade Reporter*, No. 44 (11 Nov. 1998) (**Exh. JP-26**).

[26] A resolution passed overwhelmingly by the House called for a ten-day review of imports from ten countries and a one-year ban if it was determined those countries were not abiding by the spirit or letter of international agreements. In support of the bill, "{d}ozens of congressmen took to the floor . . . to criticize the administrations' inaction on what they repeatedly termed the crises of survival resulting from an onslaught of dumped steel from Asia, Russia and Brazil." Nancy E. Kelly, "House's Steel Import Vote Sends Message," *American Metal Market*, at 2 (19 Oct. 1998) (**Exh. JP-27**).

provisional measures starting on the publication date of the determination (19 February 1999), were all above 25 per cent, the level above which USDOC imputes importer knowledge of dumping. Therefore, USDOC maintained the earlier affirmative finding of critical circumstances against every Japanese exporter.[27]

29. Shortly after issuance of USDOC's preliminary dumping determination, however, NKK's counsel discovered a serious clerical error in the calculation of NKK's margin. The error inflated the preliminary rate by twelve percentage points, meaning that the correct rate would have been well under the 25 per cent threshold. NKK immediately invoked the normal USDOC procedure for correcting such clerical errors. USDOC traditionally corrects its preliminary determinations when the error causes a significant percentage point change in the calculated margin, *i.e*. a change of at least five percentage points.[28] USDOC, however, declined to make the correction in this case, deviating from its regulations and standard practice of correcting its error within thirty days after publication of the preliminary determination.[29] Notwithstanding that USDOC staff in charge of the case had determined that all the criteria for issuing an amended preliminary determination had been satisfied, senior USDOC officials refused to make the correction until the final determination, thus maintaining provisional measures above 25 per cent and the critical circumstances finding.[30]

30. During the course of its investigation of KSC, USDOC demanded that the company report the resales of the affiliated US customer California Steel Industries ("CSI"). That customer, however, was a petitioner in the case and thus favoured the application of dumping duties. Although at first stating that it would cooperate with USDOC 's investigation, CSI ultimately refused to provide most of the requested information. KSC made several requests to USDOC for guidance regarding CSI's uncooperative behaviour, but USDOC never responded to those requests and instead punished KSC with dumping margins triple those of other Japanese companies.[31] USDOC extended this abuse of "facts available" by including the high adverse facts available KSC rate in the calculation of the average "all others" rate used for non-participating exporters. The all others rate was consequently driven well above the margins for NSC and NKK (whose margins were also inflated by the use of adverse facts available, though to a lesser degree than for KSC). Secretary Daley thereby kept his promise to the steel industry to be "very aggressive" against the targets of the anti-dumping case.

31. Meanwhile, USITC commenced its final investigation as political activity on steel protection loomed large. Back in October 1998, the US House of Representatives had already passed by a wide margin a resolution to impose a quota on imported steel.[32] The US Senate vote was still pending as USITC began its investigation and decision making.

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[27] *USDOC Preliminary Determinations of Critical Circumstances*, 63 Fed. Reg. at 65750 (noting that "{t}he Department normally considers margins of 25 per cent or more . . . sufficient to impute knowledge of dumping") (**Exh. JP-9**); *USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8299 (implementing the early preliminary critical circumstances determination by ordering suspension of liquidation of all subject entries on or after the date 90 days before publication of the *USDOC Preliminary Dumping Determination*) (**Exh. JP-11**).

[28] 19 C.F.R. § 351.224(e), (g) (**Exh. JP-5**).

[29] 19 C.F.R. § 351.224(e) (**Exh. JP-5**). In the final determination, USDOC not only agreed with NKK's corrections, but made the correction retroactive to thirty days after NKK's allegation. Yet, this was all too late to remedy the harmful effects of the erroneous preliminary critical circumstances determination. *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24369 (**Exh. JP-12**).

[30] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**). Although discovered later, USDOC had also made a clerical error in the calculation of NSC's margin, which inflated NSC's provisional measures by six percentage points — also above the 25 per cent mark. NSC raised the issue in its case brief. *See* NSC's Case Brief, at 49-53 (13 Apr. 1999) (**Exh. JP-29**). USDOC waited to fix this error in the final determination as well. *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24369 (**Exh. JP-12**).

[31] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24364-69 (**Exh. JP-12**).

[32] Nancy E. Kelly, "House's Steel Import Vote Sends Message," *American Metal Market*, at 2 (19 Oct. 1998) (**Exh. JP-27**).

32. After voting in the affirmative on 11 June 1999, USITC issued a written determination that revealed a number of improper analytical and procedural steps in its effort to create some rational basis for its decision. First, USITC narrowed its focus to a small segment of the overall domestic industry, the "merchant market," and largely ignored the lower import penetration and stronger financial performance for the industry as a whole. Second, in an unprecedented decision, USITC focused its analysis on only the last two years of the period of investigation, instead of comparing the industry's performance in 1998 with the two previous years as context. Third, USITC failed to consider adequately the effect of other factors on the domestic industry, and in doing so inappropriately attributed the effect of such factors to the subject imports.[33]

33. Finally, in marked contrast to its sister agency's harsh treatment of foreign respondents, USITC patiently accommodated the domestic industry throughout its final investigation. USITC refrained from the use of adverse facts available and accepted every piece of information supplied by the domestic mills, despite the domestic industry's refusal to supply certain information, and their failure to meet USITC's deadlines[34] — the same reasons advanced by USDOC to justify the application of adverse facts available for foreign respondents. The contrast between the two agencies in their approach to "facts available" was striking, and indefensible.

C. ECONOMIC CONTEXT FOR THE INVESTIGATIONS

34. Unlike most domestic industries, who rely on the merits of their cases, the domestic steel industry felt it needed political pressure in this case. Part of this need came from the economic context the industry was facing. Beginning in 1991, the US steel industry experienced dramatic growth in its production and shipments. Between 1992 and 1998, US producers' hot-rolled steel shipments increased from less than 48 million tons to almost 64 million tons.[35] Beginning in late 1996 through mid-1998, the US steel mills operated at virtually full capacity, increasing their own imports of hot-rolled steel to feed their downstream finishing mills, and realizing record profits.[36] Fostered by strong domestic demand generally, and for steel specifically, the industry's performance in 1997 was record breaking.[37] This strong economic performance continued through the first half of 1998.[38] Though by year's end the industry showed somewhat weaker performance than 1997, it was still better than 1996 even though imports had doubled.[39]

35. While the large integrated mills (mills using basic oxygen furnaces and pig iron produced by blast furnaces as their primary feedstock) participated in this unprecedented period of sustained expansion and record performance, the main beneficiaries were the so-called "mini-mills" (mills using scrap as feedstock and electric furnaces to produce steel). Between the beginning of the 1990s and the end of 1998, mini-mills entered into the market for flat-rolled carbon steel products, including hot-rolled steel, by investing in approximately 18 million tons of new hot-rolled capacity — the start-up

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[33] *USITC Final Injury Determination*, USITC Pub. 3202 at 17-20 (**Exh. JP-14**).

[34] Respondents' USITC Prehearing Brief, at 4-12 (29 Apr. 1999) (excerpts in **Exh. JP-30**).

[35] **Exh. JP-31** (providing relevant excerpts from various USITC reports showing this growth).

[36] *USITC Final Injury Determination*, USITC Pub. 3202 at C-4 (Table C-1) (**Exh. JP-14**) (showing capacity utilization rates and levels of operating income). The increases in hot-rolled steel purchases by all US importers were high during the years of greatest prosperity for the US steel industry. US mills also increased their imports of semi-finished steel, which would be hot-rolled and then used in further finishing operations. *See* **Exh. JP-32** (providing articles on US mills' purchases of imported semi-finished steel).

[37] *USITC Final Injury Determination*, USITC Pub. 3202 at C-4 (Table C-1) (**Exh. JP-14**).

[38] Demand was fuelled by the strength of the US economy. S*ee* Graph of Hot-Rolled Industry Composite — Profit From Operations (**Exh. JP-33**); World Bank *Annual Report 1999* at 19 (excerpts in **Exh. JP-33**) (citing largest running economic expansion, low and stable inflation rates, projected budget surpluses, the lowest unemployment in history, and a dynamic stock market).

[39] *USITC Final Injury Determination*, USITC Pub. 3202 at C-4, C-5 (Table C-1) (**Exh. JP-14**).

for 14.5 million tons of this hot-rolled capacity began in the 1997-1998 period.[40] Nucor, a leading mini-mill, has since leapfrogged all of the US integrated mills except US Steel to become the second largest US steel producer in the United States. Mini-mills have been successful in capturing market share in the United States because of lower costs of production compared with the integrated mills. Rapidly declining scrap prices after the beginning of the Asian crisis in 1997 provided the minimills with further cost advantages as they were commencing substantial new capacity.[41]

36. Intra-industry domestic competition reached a fevered pitch toward the end of 1998, led by low cost mini-mills that (a) increased their capacity by 50 per cent from 1996 to 1998 (compared with integrated mill capacity increases of only 3.2 per cent), (b) increased their shipments by 31.5 per cent from 1996 to 1998 (compared with the 3.2 per cent decline of the integrated mills), and (c) were most often cited as the price leaders in the marketplace for hot-rolled steel due to a widely-recognized low cost advantage. Indeed, in its report during the final injury investigation, USITC staff characterized this comparison as a "striking difference."[42] With the mini-mill assault on the hot-rolled steel market underway, the US integrated mills moved away from commodity grade hot-rolled steel products to higher value-added products that the mini-mills were not yet capable of producing.[43]

37. In the midst of this fundamental structural change in the steel industry, demand for virtually all types of steel rose to unprecedented levels. Because the integrated mills began shifting production of hot-rolled steel downstream and the mini-mills were experiencing start-up difficulties with their new plants, imports increased to meet the growing gap between hot-rolled steel supply and demand beginning in late 1996. Despite rapidly increasing imports in 1997 and the first half of 1998, prices remained stable and the industry continued its strong performance in terms of production, shipments, capacity utilization, and profits.[44]

38. Demand for steel continued its growth throughout the period investigated by USITC (1996 through 1998), remaining strong through the first two quarters of 1998, but falling off in certain segments of the market in the last two quarters, owing in part to the labour strike at General Motors (the largest single US customer of steel), which shut down the auto company's production for nearly two months. The strike resulted in General Motors purchasing about 685,000 fewer tons of flat-rolled steel than it had planned for 1998.[45] Many domestic mills sought to replace their General Motors sales with sales to the spot market at low prices. Importantly, by the time of the General Motors strike in June 1998, previously ordered foreign steel was already on its way to the United States in anticipation of continued demand growth.

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[40] *See* Paine Webber, "Steel: A Gauntlet for All, Rewards for the Select," *Steel Strategist* #24 at 117 (June 1998); Charles Yost, "Thin-Slab Casting/Flat-Rolling: New Technology To Benefit US Steel Industry," *in* United States International Trade Commission, *Industry Trade and Technology Review*, 1996 ITC LEXIS 428, *52, *65, Table 1 (Oct. 1996). Excerpts of these articles are provided in **Exh**. **JP-34**.

[41] Scrap prices fell from $130 per ton in 1997 to $97 per ton in 1998. *See* Respondents' USITC Prehearing Brief, at 88 (29 Apr. 1999) (excerpts in **Exh. JP-30**).

[42] *See generally* Donald Barnett and Robert Crandall, "Steel: Decline and Renewal," in *Industry Studies* (2d ed. Larry Duetsch, ed. 1998) (**Exh. JP-35**); *USITC Final Injury Determination*, USITC Pub. 3202 at II-1, III-4 to 5 (**Exh. JP-14**).

[43] Leading experts on the US steel industry have written on the important role minimills have played in the industry in recent years. *See e.g.*, Donald Barnett & Robert Crandall, "Steel: Decline and Renewal," *in Industry Studies* (2d ed., Larry Duetsch, ed. 1998), at 127 (showing minimill share of various steel products, including 22 per cent of hot-rolled steel market), 138 ("inevitable effect of mini-mill expansion in the US steel market has been a steady reduction in the capacity of large, integrated firms' plants"), 142 ("The future of the American steel industry lies almost entirely with the minimills.") (**Exh. JP-35**). Messrs. Barnett and Crandall are two of the most respected experts on the US steel industry. This article was provided in its entirety in Exhibit 17 of the Japanese producers' prehearing brief to USITC.

[44] *USITC Final Injury Determination*, USITC Pub. 3202 at C-3, C-4 (Table C-1) (**Exh. JP-14**).

[45] *Id.* at II-4 (**Exh. JP-14**).

39. Prices of hot-rolled steel and virtually all other types of steel therefore fell substantially during the summer of 1998. Prices of all flat-rolled carbon steel products fell regardless of import trends or import market share, with the steepest declines being in a market where imports had not increased and constituted only a small share of the market — corrosion-resistant steel.[46] The timing of these price declines suggested their strong causal relationship with a combination of factors including the two-month strike at General Motors, reduced demand from the pipe and tube sector as these companies adjusted inventories, and concerns about the impact of several million tons of long anticipated additional capacity finally coming on stream from the mini-mills.

40. Rather than wait for the market to correct itself, the domestic steel industry blamed imports, mounted a public relations and lobbying campaign to win political support to restrain imports, and filed the first of a string of anti-dumping and countervailing duty complaints — the complaint on hot-rolled steel.

D. INTERNATIONAL RAMIFICATIONS FOR THE INVESTIGATIONS

41. Since 1997, US steel producers and steelworkers unions have filed with US authorities a large number of anti-dumping petitions on steel products from Japan. As a result, at the start of the year 2000, as much as 80 per cent of Japan's steel exports to the United States were subject to anti-dumping orders or to pending trade law investigations (including safeguard investigations on some products). Indeed, these actions against imported steel reach much more broadly than just Japan. Steel imports from over twenty countries have been the subject of recent US anti-dumping procedures, including Argentina, Belgium, Brazil, Canada, China, Czech Republic, France, Germany, India, Indonesia, Italy, Korea, Macedonia, Mexico, Romania, Russia, Slovakia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, United Kingdom, and Venezuela.[47]

42. Steel has been the primary target for anti-dumping measures in the United States for over twenty years, with a disproportionate number of all dumping cases being brought by the US steel industry and unions.[48] As anti-dumping measures are used to close the US market to imports of certain products, other countries are responding with their own, equally effective, anti-dumping measures.

43. Although anti-dumping measures are authorized under international trade rules, WTO members have tried to constrain the use and abuse of anti-dumping measures to protect the trade liberalizing principles that underlie other WTO obligations. As a result, the WTO permits only anti-dumping measures that comply with a specific and detailed set of legal disciplines. Still, respected economists have raised concerns that proliferating and undisciplined anti-dumping measures pose a serious problem for world trade.[49]

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[46] Transaction Pricing Service, *Purchasing Magazine*, (price series for hot-rolled steel, cold-rolled steel, and hot-dipped galvanized steel, showing parallel declines in prices) (**Exh. JP-36**).

[47] *See* USDOC *AD and CVD Case History Tables 1980-1999: Investigations*, (last modified 31 Dec. 1999) <http://www.ita.doc.gov/import_admin/records/stats/case.list.txt> (**Exh. JP-24**).

[48] Since 1979, the US Government has initiated 183 anti-dumping and 96 countervailing duty cases involving steel. US steel producers currently are protected by 56 anti-dumping and 20 countervailing duty orders.

[49] US Federal Reserve Chairman Alan Greenspan recently criticized the use of anti-dumping measures to erect trade barriers:

. . . {T}here are reasons to be concerned that the benefits of increasingly open trade may not be allowed to be as readily forthcoming in the future as they have been in the past half century. . . . Administrative protection in the form of antidumping suits and countervailing duties is a case in point. While these forms of protection have often been imposed under the label of promoting "fair trade," often times they are just simple guises for inhibiting competition. Typically, antidumping duties are levied when foreign average prices are below average cost of production. But that also describes a practice that often emerges as a wholly appropriate response to a softening in demand. It is the rare case that prices fall below marginal cost, which would be a

44. If not properly disciplined, the application of anti-dumping measures will lead to a dangerous level of protectionism around the world. Anti-dumping measures have become far more effective at shielding domestic markets in the United States from foreign competition than were the gray area measures employed in the 1980' s and 1990's or the tariff and non-tariff barriers that were eliminated in multiple rounds of multilateral trade negotiations over a five-decade period.[50] Under these circumstances, the WTO should not tolerate improper application of anti-dumping measures.

45. The recent hot-rolled steel investigation is a compelling example of the direction of US anti-dumping law and practice, and the abuses of the narrow principle in GATT 1994 allowing limited application of anti-dumping measures. In the United States, the threshold for application of anti-dumping measures is becoming lower and lower, while the anti-dumping measures themselves are erecting higher and higher barriers to trade. The WTO should reject the result-oriented and economically dubious determinations of dumping, injury, and causation in the hot-rolled steel case.

III. STANDARDS OF REVIEW

46. The Panel must bear in mind the specific standards of review set forth in the Anti-Dumping Agreement and GATT 1994.

A. ANTI-DUMPING AGREEMENT STANDARDS OF REVIEW

47. The Anti-Dumping Agreement establishes two particular standards of review that panels are to follow when examining claims under the Anti-Dumping Agreement.

48. Article 17.6(i) of the Anti-Dumping Agreement addresses the Panel's assessment of an authority's establishment and evaluation of the facts. It is a two part standard of review, instructing that the Panel "shall determine whether the authorities' establishment of the facts was proper *and* whether their evaluation of those facts was unbiased and objective." (Emphasis added.) Accordingly, the Panel should first determine whether the US Government collected, evaluated, and processed facts during the investigation in a manner consistent with the rules provided under the Anti-Dumping Agreement, and thus established the facts in a "proper" manner. This includes an assessment of whether all relevant facts were considered, including those which might detract from an affirmative determination, and whether adequate explanation was provided for how certain determinations were reached. Second, the Panel should determine whether the US Government evaluated those facts in an unbiased and objective manner.

49. The Government of Japan does not ask the Panel to determine whether another conclusion is possible from the facts that were made available to the US Government in the underlying administrative proceeding. The factual arguments in this case go directly to the US Government's improper establishment of the facts and the non-objective and biased evaluation of the facts so as to favor the interests of the domestic industry in a manner inconsistent with the provisions of the Anti-Dumping Agreement.

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more relevant standard. Antidumping initiatives should be reserved, in the view of many economists, for those cases where anticompetitive behaviour is involved. Contrary to popular notions about antidumping suits, under US and WTO law, it is not required to show evidence of predatory behaviour, or intention to monopolize, or of any other intentional efforts to drive competitors out of business.

Alan Greenspan, "Trade and technology," Remarks Before the Alliance for the Commonwealth, Conference on International Business, Boston, Massachusetts (2 June 1999) (**Exh. JP-37**).

[50] For this history of protection, *see* I.M. Destler, *American Trade Politics, passim* (3d ed. 1995); Gary Hufbauer *et al*, *Trade Protectionism in the United States*: *31 Case Studies,* 154-84 (1986*);* Gary Hufbauer and Kimberly Elliott, *Measuring the Costs of Protection in the United States*, 19-22, 103-05 (1994) (excerpts in **Exh. JP-38)**.

50. Article 17.6(ii) guides the Panel's assessment of an administering authority's interpretation of the Anti-Dumping Agreement. The first sentence of this provision instructs that the Panel "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law." Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention") are the most frequently followed and cited customary rules of interpretation under international law. WTO Panels and the Appellate Body rely upon these rules to guide their legal interpretation. These rules of interpretation explain that first the interpreter looks to the text, context, object, and purpose of the provision. If ambiguity still exists, the interpreter then looks to supplementary materials, such as negotiating history. These rules assume that at the end of the interpretation process, the interpreter will craft *one* nonambiguous interpretation.[51]

51. The Government of Japan contends that the US measures challenged in this case are impermissible under the interpretative rules of the Vienna Convention. The US Government has completely ignored certain legal standards or provisions under the Anti-Dumping Agreement, or acted inconsistently with the relevant provisions beyond any "permissible" legal interpretation. These aspects of US law and practice rest upon interpretations of the Anti-Dumping Agreement that do not reflect good faith, and are therefore not permissible interpretations.

B. GATT 1994 STANDARDS OF REVIEW FOR CLAIMS UNDER ARTICLE X:3

52. The Appellate Body has confirmed that Article 11 of the DSU provides the relevant standard of review for all WTO claims other than those under the Anti-Dumping Agreement, which in this case is relevant to Japan's GATT 1994 Article X:3(a) claims.[52] Article 11 instructs that the Panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." This standard instructs the Panel to consider carefully all of the relevant facts in the case, as well as the overall conformity with WTO provisions.

IV. USDOC'S TREATMENT OF EVIDENCE AND APPLICATION OF "FACTS AVAILABLE" WAS INCONSISTENT WITH ARTICLES 2, 6, AND 9 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

53. The Anti-Dumping Agreement establishes a neutral concept of "facts available," intended to fill gaps in information so that dumping authorities can carry out the necessary calculations. USDOC, however, consistently uses the US statute governing facts available to punish respondents in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement. Furthermore, in this case, USDOC improperly rejected relevant data from each of the respondents, conducted a biased evaluation of the facts, and wrongfully applied adverse facts available, contrary to Articles 2, 6, and 9 and Annex II of the Anti-Dumping Agreement.

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[51] In a recent article on the standard of review, focusing on Article 17 of the Anti-Dumping Agreement in particular, two noted scholars conclude:

Thus, it is not clear what sort of ambiguity in an agreement's provision is sufficient to lead a reviewing panel to the second step of the analysis contemplated in Article 17.6(ii). Once a panel has invoked Articles 31 and 32 of the Vienna Convention, it presumably will have already settled on a nonambiguous, nonabsurd interpretation.

Steven P. Croley and John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l L. 193, 201 (1996).

[52] *EC—Measures Concerning Meat and Meat Products (Hormones)*, adopted 13 Feb. 1998, WT/DS26/AB/R, WT/DS48/AB/R, at paras. 114-119.

A. BACKGROUND ON US LAW AND PRACTICE

54. Section 776 of the Tariff Act of 1930, as amended, authorizes USDOC and USITC to use "facts available" where:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested . . .
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . .
> (C) significantly impedes a proceeding under this title, or
> (D) provides such information but the information cannot be verified.[53]

55. The statute also authorizes USDOC and USITC to use "adverse inferences," defined as "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available," when resorting to facts available. Such inferences may apply to circumstances in which " an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from {USDOC or USITC} (as the case may be)."[54]

56. In practice, USDOC bases its determinations on facts available (with respect to foreign respondents) far more frequently than USITC (with respect to all questionnaire recipients, including the US industry).[55] Often USDOC chooses *adverse* facts available in an effort to punish respondents. Indeed, since passage of the Uruguay Round agreements, USDOC has consistently resorted to a punitive form of adverse facts available when it determines that a respondent has not cooperated to the best of its ability. Specifically, as USDOC stated in a recent preliminary dumping determination:

> The Department's practice when selecting an adverse FA rate from among the possible sources of information has been to ensure that the margin is sufficiently adverse so "as to effectuate the purpose of the FA rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[56]

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[53] 19 U.S.C. § 1677e(a) (**Exh. JP-4**).

[54] 19 U.S.C. § 1677e(b) (**Exh. JP-4**). USDOC 's regulations provide little additional guidance for interpreting this provision. The regulations simply reiterate the statutory standards. *See* 19 C.F.R. § 351.308 (**Exh. JP-5**). In response to comments received before implementation of the final anti-dumping regulations, USDOC did clarify that use of adverse facts available is *discretionary* and case-and fact-specific. *See Anti-Dumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27340-41 (19 May 1997) (excerpts in **Exh. JP-39**).

[55] At the time of the hot-rolled steel investigation, USITC had explicitly drawn adverse inferences in only two cases. *See Tart Cherry Juice and Tart Cherry Juice Concentrate from Germany and Yugoslavia*, Inv. Nos. 731-TA-512 and 513, (Prelim.), USITC Pub. 2378 at 21 & n.70 (May 1991); *Certain Welded Carbon Steel Pipes and Tubes from Taiwan and Venezuela*, Inv. Nos. 731-TA-211 and 212 (Prelim.), USITC Pub. 1639 at 13-15 (Feb. 1985).

[56] *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part*, 65 Fed. Reg. 35886, 35887 (6 June 2000) (citation omitted); *see also Frozen Concentrated Orange Juice From Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 64 Fed. Reg. 43650, 43652 (11 Aug. 1999) (choosing as facts available the highest company-specific and transaction-specific margins which were "sufficiently high to effectuate the purpose of the facts available rule — which is to encourage the participation of these companies in future segments of this proceeding"); *Steel Wire Rope From the Republic of Korea; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order*, 63 Fed. Reg. 17986, 17987 (13 Apr. 1998) (noting that the

The purpose of the "sufficiently adverse" language is clearly aimed at punishing respondents which USDOC deems noncooperative, a practice that violates US obligations under the Anti-Dumping Agreement.

B. USDOC'S ESTABLISHED PRACTICE OF APPLYING ADVERSE FACTS AVAILABLE TO PUNISH RESPONDENTS IS INCONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

57. Article 6.8 unambiguously describes the circumstances in which facts available may be applied:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations . . . may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

In turn, Annex II of the Anti-Dumping Agreement provides in Paragraph 7 that:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with *special circumspection* . . . . It is clear, however, that *if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate*. (Emphasis added.)

58. Neither Article 6.8 nor Annex II uses the word "adverse," let alone "adverse inferences," and they certainly do not contemplate the punitive use of facts available. Paragraph 7 of Annex II mentions only the possibility of "less favourable" results: it merely states that the situation in which a party does not cooperate "could lead to a result which is less favourable to the party." In other words, the less favourable result is not meant to be purposeful, but rather coincidental. Even then, however, the "facts" must be neutral and credible; the "result" may turn out to be less favourable, but the facts themselves must be proper. As stated by the Panel in *US—Atlantic Salmon:*

> {T}he United States had not acted within its rights under Article 6:8 by imputing to Nordsvalaks the highest costs of production figure found for any other farm in the

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potential use of FA by the DOC provides the only incentive for foreign exporters and producers to respond to questionnaires (SAA at 868) and that "one factor the Department considers in applying the facts available is the extent to which a party may benefit from its own lack of participation" (SAA at 870)); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Spain*, 63 Fed. Reg. 40391, 40398 (29 July 1998) (basing the margin for all unreported US sales on adverse facts available, selecting a sufficiently adverse margin so as to induce respondents to provide the DOC with complete and accurate data in a timely manner). These cases are only a sampling among several cases that have used nearly identical language when explaining the reasoning behind USDOC's choice of adverse facts available. **Exhibit JP-40** contains a copy of the relevant pages from the cited cases as well as a full list of cases in which USDOC has adopted the same practice. Despite otherwise critical opinions issued by the courts concerning USDOC's use of punitive adverse facts available, the current practice has been generally accepted by the courts. *See, e.g., Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States* 865 F. Supp. 857, 858 (Ct. Int'l Trade 1994) (finding that the purpose of the best information available provisions (the precursor to facts available) was to encourage compliance with DOC's request for information as the DOC lacks subpoena power).

> sample *without considering how this would affect the representativeness of the results of the sample.*[57]

The use of the word "representativeness" here is critical. The purpose of any use of facts available is to fill gaps in information in a manner consistent with existing data. The purpose is not to punish a party.

59. Under the US anti-dumping law, when a party has failed to cooperate by not acting to the best of its ability to provide certain information, USDOC does not look for representative facts available that might lead coincidentally to a less favourable result, as intended by Annex II. Instead, in accordance with the statute, USDOC searches for data that are purposefully "adverse." Worse still, following its established practice, USDOC looks for data that are "sufficiently adverse" so as to induce respondents to provide complete and accurate information. Such punitive forms of facts available far exceed the neutral gap filling purposes of Article 6.8 and Annex II.

60. The Panel should therefore deem USDOC's established practice of applying adverse facts available to punish respondents as inconsistent with Articles 6.8 and Annex II. Such established practices are subject to facial challenge under Article XVI:4 of the WTO Agreement which requires that "Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements."[58] The Panel in *US—Section 301* found that the phrase "laws, regulations and administrative procedures" in Article XVI:4 should be read broadly, stating:

> even though the statutory language granting specific powers to a government agency may be prima facie consistent with WTO rules, *the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation . . .* "[59]

A Panel must therefore examine a Member**'**s anti-dumping law as a whole, including the generally applicable interpretations of those laws and regulations adopted by the domestic anti-dumping authorities.[60] This includes interpretations such as USDOC**'**s policy with respect to adverse facts available.

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[57] United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 30 Nov. 1992, ADP/87, at para. 450 (unadopted) ("US—Atlantic Salmon") (emphasis added).

[58] Article 18.4 of the Anti-Dumping Agreement confirms in substantially identical terms the same requirement for domestic anti-dumping laws. According to Article XVI:3 of the WTO Agreement, any conflict between a provision of the Anti-Dumping Agreement and a provision of the WTO Agreement has to be resolved in favor of the provision of the WTO Agreement. This suggests that Article XVI:4 of the WTO Agreement ranks higher than Article 18.4 of the Anti-Dumping Agreement in the hierarchy of WTO provisions. Japan will therefore focus its discussion below exclusively on Article XVI:4. However, if the Panel were to regard Article 18.4 of the Anti-Dumping Agreement as the applicable provision, Japan's references to Article XVI:4 should be understood as references to Article 18.4 of the Anti-Dumping Agreement.

[59] *United States—Sections 301-310 of the Trade Act of 1974*, 22 Dec . 1999, WT/DS152/R, at paras. 7.24-7.27 (emphasis added) (*"US—Section 301"*).

[60] Article XVI:4 reflects the fact that domestic law at odds with WTO law generally creates uncertainty for private operators, thereby adversely affecting the competitive opportunities for the goods or services of other Members. The WTO agreements seek to ensure that goods or services of domestic and foreign origin are accorded equal competitive opportunities. A party does not act in good faith if it accepts an obligation stipulating one behaviour, but adopts domestic law calling for another. The *US—Section 301* Panel embraced this view. *Id.* paras. 7.81, 7.90.

C. IN APPLYING ADVERSE FACTS AVAILABLE TO KSC, DOC VIOLATED ARTICLES 2, 6, 9 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

1. Summary of the facts: USDOC's application of adverse facts available for KSC

61. During the period investigated by USDOC, respondent KSC made about [ ] of its US sales to CSI, an affiliated importer that was also a petitioner in the case. USDOC wanted detailed data from CSI about its sales to its own customers. When CSI refused to cooperate with KSC to provide information about CSI's resales and further manufactured product, USDOC applied adverse facts available in calculating KSC's dumping margin.

62. In 1986, KSC entered into a 50/50 joint venture with the Brazilian mining company, Companhia Vale de Rio Doce ("CVRD "), to own CSI, the largest steel rolling operation on the West Coast of the United States.[61] CSI is a slab-rolling producer of hot-rolled sheet, cold-rolled sheet and strip, galvanized sheet, and pipe and tube. At times, due to hot-rolling capacity constraints, CSI purchases hot-rolled steel to resell or further manufacture into downstream products. In 1998, when demand for hot-rolled steel grew in the United States, CSI began purchasing significant quantities of imported hot-rolled steel.

63. Because of the size of its shipments to the United States, KSC was named a "mandatory" respondent in the hot-rolled steel case, meaning it had to respond in full to USDOC's questionnaires. When a respondent is affiliated with a US customer, USDOC requires detailed information from the affiliated customer regarding its resales and further manufacture of the product imported from the respondent.

64. In this case, however, CSI was not merely KSC's affiliated customer, but also an active member of the US hot-rolled steel industry. More importantly, CSI was itself a petitioner in the anti-dumping investigation of hot-rolled steel imports from Japan. In other words, despite their relationship, CSI and KSC were direct competitors in the manufacture and sale of steel products in the US market. Their adverse relationship was confirmed by CSI's decision to join the petition and publicly testify against hot-rolled steel imports from Japan and Brazil, the home markets of its two parent companies.

65. Furthermore, KSC was far removed from its affiliate's day-to-day operations at the time of USDOC's investigation. Mr. Lorenço Gonçalves was then President and CEO of CSI. Mr. Gonçalves had been appointed to these positions after resigning from CSN (the Brazilian steel maker and part owner of CVRD) and being nominated by CVRD.

66. This situation placed KSC in an untenable position. Because under USDOC rules KSC and CSI were affiliated, USDOC treated them as one entity for purposes of its dumping analysis.[62] Therefore, USDOC required that KSC report in its questionnaire response CSI's confidential further manufacturing and resale price data. Yet, because CSI and KSC do not share the details of their cost, pricing, or sales information, and because KSC could not control CSI without the cooperation of CVRD, KSC could not obtain the data from CSI.

67. KSC invested substantial resources attempting to convince CSI and, by extension, CVRD to help KSC respond to USDOC's requests. These efforts are summarized in a timeline attached as **Exhibit JP-42**. Every time USDOC requested the information, KSC's attorneys asked CSI for its help. Although at first offering to help, CEO and President Mr. Gonçalves ultimately refused to cooperate. The fact that the President and CEO of CSI was nominated by CVRD, and that he directly

[61] CSI produces about 1.625 million tons of hot-rolled steel per year. *See* KSC Letter to USDOC of 10 Nov. 1998, at 6-7 **(Exh. JP-42)**.

[62] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24367 (**Exh. JP-12**).

refused KSC's requests, shows that neither CSI nor KSC's joint venture partner CVRD would cooperate with KSC. Faced with such stonewalling on the part of Mr. Gonçalves, KSC had no reason to contact CVRD officials in Brazil directly in order to confirm their view on this issue. Furthermore, during the course of its investigation, USDOC never suggested or requested that KSC take this step, even though KSC had specifically asked USDOC for guidance regarding CSI's uncooperative behaviour.

68. The preliminary determination provided the first notice of USDOC's decision on this topic. USDOC applied adverse facts available in calculating KSC's margin for its sales involving CSI. USDOC condemned KSC for a supposed "failure to act to the best of its ability" with regard to CSI. USDOC treated KSC and CSI as a single entity, assuming that KSC had sufficient control over CSI to compel its cooperation. Yet, in doing so, USDOC disregarded the fact that KSC had no power to control CSI without cooperation either from CSI itself or from the other 50-per cent owner, CVRD. USDOC made no proposals in its preliminary determination for how KSC should try to obtain CSI's cooperation.

69. During verification conducted by USDOC officials between the preliminary and final determinations, KSC again documented its good faith efforts and CSI's refusal to cooperate.[63] KSC also explained and documented that it had no way in which to force CSI to share its further manufacturing and resale data due to the structure and management of the joint venture.

70. USDOC nevertheless again applied adverse facts available in its final determination. It acknowledged CSI's refusal to cooperate, stating that neither KSC nor CSI "demonstrated to the Department's satisfaction that {submission of the information was} not possible;" and "KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information with respect to the CSI sales."[64] USDOC ignored petitioner CSI's conflict of interest, and merely listed all the methods it could think of that KSC had not utilized to obtain the information. Among these was discussing the issue with its joint venture partner, CVRD. Yet, USDOC never addressed Mr. Gonçalves' relationship with CVRD or the fact that CVRD had no legal duty to cooperate with KSC, or that, without CVRD's cooperation, KSC had no means to compel CSI to cooperate either.[65]

71. As adverse facts available, USDOC chose to use the second-highest margin ([ ]) that it calculated for any individual product type ("CONNUM"[66]) for which it had US sales data.[67] USDOC

[63] KSC Sales Verification Report, at 21-22 (26 Mar. 1999) (**Exh. JP-42**).

[64] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24368 (**Exh. JP-12**).

[65] USDOC focused its rejection of KSC's arguments on the fact that the shareholder agreement between KSC and CVRD concerning the CSI joint venture provided a mechanism through which KSC could have obtained the CSI data. The US will undoubtedly repeat this assertion here. The shareholder agreement, however, is irrelevant to the question presented by USDOC's action under the Anti-Dumping Agreement. Whether or not the shareholder agreement (which is attached here at **Exhibit JP-42)** gave KSC a method of obtaining the CSI's data (it does not), the question under the Agreement is whether KSC's failure to utilize those methods permitted either the use of "adverse" or even "less favourable" facts available. Japan contends that it does not. As Japan demonstrates below, the existence of the shareholder agreement does not affect the fact that: (a) the Anti-Dumping Agreement does not permit the use of punitive adverse facts available; and (b) that the requisite level of non-cooperation did not exist to justify even less favourable facts available given that KSC could not obtain the requested information from CSI without CVRD's cooperation.

[66] "CONNUM" stands for "control number." USDOC requires the physical characteristics of each product be assigned a number or letter pursuant to specific USDOC codes. For example, merchandise that had the characteristic of being "painted" is assigned number "1." Unpainted merchandise is assigned number "2." The codes all strung together comprise the CONNUM. Each transaction is therefore assigned an individual CONNUM based on physical characteristics. Using these CONNUMs, USDOC can then sort the merchandise in the computer programme.

admitted that its action was punitive, stating "we sought a margin that is sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information."[68] To merge this margin with KSC's non-facts available margin, USDOC first calculated the percentage represented by KSC's sales to CSI, based on the general information provided in KSC's initial response. Given that [ ] of KSC's US sales were made to CSI, USDOC attributed KSC's second-highest margin for any individual product type to about [ ] of KSC's total sales.[69]

72. The surrogate margin USDOC chose as adverse facts available significantly exceeded the non-facts available KSC margin as well as the margins found for the other respondents, NSC and NKK and consequently inflated KSC's overall margin by [ ] percentage points.[70]

2. The application of adverse facts available for KSC was inconsistent with the Anti-Dumping Agreement

(a) Article 6.8 and Annex II of the Anti-Dumping Agreement do not permit the use of adverse inferences in applying facts available

73. As discussed in Section B above, USDOC's consistent practice of applying adverse facts available to punish respondents violates Article 6.8 and Annex II of the Anti-Dumping Agreement. This same practice was applied in the hot-rolled steel investigation against KSC when USDOC chose a margin "that is sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information. " Therefore, this practice, as applied in this case, violated Article 6.8 and Annex II of the Anti-Dumping Agreement.

(b) KSC's actions did not justify the "less favourable" result contemplated by Annex II of the Anti-Dumping Agreement

74. Even if Article 6.8 permitted the use of facts available in this case, and even if the words "less favourable" in Annex II could be read to justify an adverse result — an interpretation with which Japan disagrees — USDOC's actions with respect to KSC were nevertheless inconsistent with paragraph 7 of Annex II in at least three distinct ways.

- ***USDOC ignored KSC's cooperation and failed to inform KSC of the actions it should have taken***

75. In order to justify less favourable facts available under paragraph 7 of Annex II, an authority must determine that a party did not cooperate. When discerning the level of cooperation intended by

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[67] Specifically, USDOC examined all of the sales for which it calculated a margin in KSC's database. The absolute highest margin appeared for the sale of a special type of hot-rolled steel that carried an unusual CONNUM. USDOC therefore examined the second-highest margin calculated out of KSC's entire database and adopted this margin as its adverse facts available.

[68] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24369 **(Exh. JP-12).**

[69] KSC's second highest margin was [ ] per cent, which resulted from a comparison of dissimilar products both in quality and quantity. The product sold in the domestic market was to a particular customer that required special quality (both high tensile strength and excellent formability). The quantity was less than [..] tons. On the other hand, the nearly [ ] tons of product sold to the United States was common high tensile strength product for pipe. It is noteworthy that in reviewing an earlier USDOC investigation of hot-rolled steel imports (as well as other steel products), a US court specifically held that USDOC may not use the highest non-aberrant margin as adverse facts available where the deficiencies in a respondent's downstream sales data are due to factors outside that respondent's control. *See Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1007 (Ct. Int'l Trade 1994) (excerpts provided in **Exh. JP-43**).

[70] *See* Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44).**

Annex II, an authority must consider the requirements of Article 6.13: "The authorities shall take due account of any difficulties experienced by interested parties. . . in supplying information requested, and shall provide any assistance practicable." The word "assistance" includes informing a respondent of alternative methods for obtaining information when its own methods have failed.

76. KSC repeatedly tried to obtain CSI's information but its requests were refused. KSC informed USDOC of these events and asked USDOC for its guidance as to what action USDOC thought KSC should take to obtain CSI's information, but to no avail. Based on these facts, it is clear that KSC cooperated as much as could be expected under paragraph 7 of Annex II.

77. If USDOC was unsatisfied with KSC's efforts to obtain CSI's information, it had ample opportunity to abide by Article 6.13 and instruct KSC how to obtain the information. USDOC never did this. Instead, it waited to propose alternative methods until it was too late — in the final determination — and claimed that KSC should have thought of these methods on its own in order to meet USDOC's standard of cooperation. USDOC therefore required an impermissible standard of cooperation. As a result, USDOC violated paragraph 7 of Annex II of the Anti-Dumping Agreement by applying any form of less favourable facts available — let alone more severe adverse facts available — while requiring KSC to cooperate at a level far beyond the level required by paragraph 7 of Annex II, to the negligence of USDOC's own obligation to assist KSC.

- ***USDOC ignored the fact that KSC did not "withhold" information***

78. USDOC acted inconsistently with paragraph 7 by ignoring the clear requirement that the interested party be "with{holding}" information from the administering authority to justify facts available leading to a "less favourable" result. USDOC completely ignored this criterion. The plain meaning of "is being withheld" requires that a party have something in its possession that it refuses to turn over.[71] Or, at least, the party must have some kind of control over the desired item such that the party is able to exert its control so as to keep the item from being turned over.

79. Here, USDOC applied an adverse inference to KSC's sales, despite the fact that KSC did not "withhold" any information from the authorities. KSC never had the information in its possession, nor did KSC have any control legally or in fact over the information without the voluntary cooperation of its contractual partner CVRD.

USDOC did not exercise "special circumspection"

80. USDOC also failed to exercise "special circumspection" when it chose which secondary sources to use as facts available. In the hot-rolled steel case, USDOC chose the second-highest margin calculated for all KSC sales. According to the *New Shorter Oxford English Dictionary*, "circumspection" is defined as "cautious observation of circumstances" and "taking everything into account." USDOC failed to approach its choice of facts available with "cautious observation of circumstances" when it chose an abnormally high surrogate margin. It also failed to "take everything into account," such as the fact that the party withholding the information — CSI — actually benefited from the application of adverse facts available. USDOC affirmatively refused to consider these circumstances, stating "{w}e cannot reasonably predict or weigh the multitude of effects this might or might not have on the parties involved."[72]

[71] The definition of "withhold" in the *New Shorter Oxford English Dictionary* is: "1. restrain or hold back from action; keep under restraint; 2. keep back (what belongs to, is due to, or is desired by another); refrain from giving, granting, or allowing."

[72] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24368 (**Exh. JP-12**).

(c) USDOC's failure to calculate constructed export price correctly for KSC is inconsistent with Article 2.3 of the Anti-Dumping Agreement

81. Rather than calculate an export price for KSC's sales of hot-rolled steel to CSI, USDOC used the second-highest margin from any of KSC's sales for all of those CSI transactions. This unreasonable surrogate for export price constitutes a measure inconsistent with Article 2.3 of the Anti-Dumping Agreement governing the calculation of export price.

82. Article 2.3 of the Anti-Dumping Agreement speaks directly to the calculation of export price when an affiliated company is involved. It provides:

> 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.

83. Article 2.3 mandates that administering authorities calculate export price on the basis of resale price or another "reasonable basis" if that authority is concerned that the prices to an affiliated importer are unreliable. Here, USDOC did not express any specific concerns, but proceeded immediately to the *assumption* that because KSC and CSI were affiliated, CSI's resale prices were necessary. When CSI refused to submit to USDOC its resale prices, USDOC simply skipped determining any type of export price for KSC's sales to CSI and went directly to the application of an abnormally high margin.[73] Article 2.3, however, permits the calculation of a price, not the imposition of a margin.

84. USDOC's failure to consider the many reasonable alternatives available to it, and subsequent application of an unreasonably high adverse facts available margin to KSC's sales to CSI, ignores the mandate of Article 2.3 to calculate export price on a "reasonable basis." A logical step would have been for USDOC to request KSC's own prices to CSI and then test the data to see whether they were reliable or not. If the prices were not reliable, then an adjustment could be applied based on sales to unaffiliated companies. But instead, USDOC simply disregarded the calculation of export price.

85. The Panel decision on *US—Atlantic Salmon* confirms the unreasonableness of USDOC's choice in this situation. The Panel held that any right to apply facts available "had to be interpreted in conjunction with the relevant substantive provisions of the Agreement."[74] Therefore, the Panel concluded:

> {T}he United States had not acted within its rights under Article 6:8 by imputing to Nordsvalaks the highest costs of production figure found for any other farm in the sample without considering how this would affect the representativeness of the results

[73] Because a margin is a factor or both export price and normal value, there is no guarantee that had the USDOC applied a facts available export price instead of a facts available dumping margin itself, that the margin calculated would have been similar. In other words, using a facts available margin instead of a facts available export price, USDOC applied facts available both to the missing export price data and to the verified normal value data for all CSI transactions.

[74] *US—Atlantic Salmon*, at para. 447.

> of the sample, *and had thereby acted inconsistently with its obligations under Article 2:4 of the Agreement.*[75]

The use of adverse facts available "affecting the representativeness of the results" in that case therefore not only violated Article 6.8, but also Article 2.4.

86. Similarly, in the hot-rolled steel case, USDOC failed to take into account that it was acting under Article 2.3. Selection of the second-highest margin found of any "dumped" products as the substitute did not take into account the mandate to calculate export price on a reasonable basis. Indeed, USDOC eschewed any calculation and moved straight to the application of the second-highest margin. In doing so, USDOC disregarded the existence of perfectly acceptable normal values (comparable product sold at the same level of trade) to which they could compare a surrogate export price based on "facts available" if necessary. USDOC failed to explain why its choice had any rational relationship to the calculation of export price for KSC's sales to CSI or for CSI's resales.[76]

87. The failure to calculate a constructed export price is also inconsistent with Article 2.3 in the context of Articles 2.1 and 2.4 of the Anti-Dumping Agreement. Article 2.1 requires that export prices and normal value be compared to determine whether a product is being dumped. Because USDOC failed to calculate properly an export price on a "reasonable basis," USDOC also failed to compare properly an export price to normal value. In this regard, the second sentence of Article 2.4 requires that the "fair comparison" between export price and normal value "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." As noted above, USDOC had a database full of acceptable, contemporaneous KSC normal values at the same level of trade to which to compare a reasonably constructed facts available export price. USDOC's affirmative choice not to do so highlights the biased nature in which it was assessing the facts and applying "adverse" facts available.

(d) USDOC's excessive margin of dumping for KSC is inconsistent with Article 9.3 of the Anti-Dumping Agreement

88. Article 9.3 of the Anti-Dumping Agreement mandates that "{t}he amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." By wrongfully using "adverse" facts available under the US statute and imposing measures inconsistent with Article 2, USDOC ultimately applied an anti-dumping duty much higher than the margin of dumping that would exist under a correctly applied Article 2.

89. Based on the data submitted by KSC, KSC's margin would have been significantly lower if USDOC had acted consistently with its decisions *vis-à-vis* KSC's other affiliated customers and simply ignored those transactions. However, because USDOC chose to apply the second highest calculated margin as adverse facts available, the overall margin imposed by USDOC was inflated by [ ] percentage points.[77] The resulting margin was significantly above any reasonable margin that USDOC could have calculated properly under Article 2 and was, therefore, inconsistent with Article 9.3 of the Anti-Dumping Agreement.[78]

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[75] *Id*. para. 450 (emphasis added). The reference to Article 2:4 is to the Tokyo Round Anti-Dumping Code. This Article is now Article 2.2 of the current Anti-Dumping Agreement.

[76] If USDOC could have devised a reason to think that KSC's sales to CSI would in reality have such high margins, then perhaps USDOC could have rationally justified its use of the second highest margin. But, there were no facts to support such an assumption. USDOC in fact made no such assumption and thereby acted inconsistently with Article 2.3 of the Anti-Dumping Agreement.

[77] Affidavit of Robert H. Huey, Counsel to KSC (**Exh. JP-44**).

[78] The context of Article 9 underscores the wrongfulness of USDOC's actions. Article VI:2 of GATT 1994 governs the imposition of duties in the anti-dumping context. The provision is clear that duties are to be imposed strictly to offset any *actual* dumping, not to impose punitive measures. *See United States—Antidumping Act of 1916*, 31 Mar. 2000, WT/DS136/R, at para. 6.189. (The United States has appealed this

D. IN APPLYING ADVERSE FACTS AVAILABLE TO NSC AND NKK, USDOC VIOLATED ARTICLES 2, 6, 9 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

90. USDOC rejected certain clarifying information submitted by respondents NSC and NKK even though this data was submitted in time for USDOC to verify and analyze it for the final determination. Instead of accepting the information, USDOC applied adverse facts available to that portion of the companies' sales affected by the clarification, thus inflating both companies' dumping margins. USDOC's decision to apply facts available, as well as its choice of adverse facts available, was inconsistent with the Anti-Dumping Agreement.

1. Summary of the facts: USDOC's application of adverse facts available for NSC and NKK

91. USDOC's application of adverse facts available for NSC and NKK center upon one specific item of information: the conversion factor for ensuring that all sales in the respective home market and US sales databases were in the same unit of measure.[79] Although during the applicable period of investigation the overwhelming majority of NKK's sales and NSC's sales were sold based on the actual weight of the steel (for which a conversion factor was irrelevant), both NKK and NSC also shipped a small number of sales based on theoretical weights.[80]

92. In its initial questionnaire issued to respondents, USDOC requested the following quantity information be submitted with respect to all home market and US sales: quantity, quantity unit of measure, quantity type, weight conversion factor, and converted quantity. With respect to "quantity type," the USDOC questionnaire requested that respondents " specify whether the quantity is expressed in actual weight or on some other basis, e.g. theoretical weight." For "weight conversion factor," the USDOC questionnaire simply stated:

> If you have reported both actual weights and weights expressed on some other basis, you must provide the Department with the conversion factor you have used to arrive at a uniform quantity measure.[81]

93. In its initial questionnaire response, NKK responded to this specific request by advising USDOC that providing such conversion factor for NKK's home market sales database was either impracticable or impossible.[82]

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panel decision. *See United States—Antidumping Act of 1916, Notification of an Appeal by the United States under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS136/5, 29 May 2000.)

[79] Steel mills sell their steel product based on either of two possible weights. The first and most common is the actual weight of the steel product, which is determined by actually weighing the steel. An alternative means is "theoretical" weight, which is calculated using a detailed formula based on various characteristics of the steel. Theoretical weight eliminates the time and resources needed actually to weigh the steel. Modern technology has made the actual weighing process less burdensome, and it is now the norm. Some customers, however, still buy steel on a theoretical weight basis.

[80] NSC's theoretical weight sales were made to the United States, while NKK's theoretical weight sales were made only in the home market. *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24360, 24363 (**Exh. JP-12**). In addition, NSC made a small quantity of sales of sheet in the home market at theoretical weight, but these sales were not used in matching to US sales.

[81] USDOC Section B Questionnaire, at B-19 (30 Oct. 1998) (excerpts in **Exh. JP-45**).

[82] NKK Section B Questionnaire Response, at B-29 to B-30 (22 Dec. 1998) (excerpts in **Exh. JP-45**). NKK explained that to arrive at a truly uniform quantity measure for NKK's home market sales, NKK would either have to convert 99.5 per cent of the database from an actual weight to theoretical weight basis or determine the actual weight of the 0.5 per cent of the database that was sold on a theoretical weight basis. The first option would have meant converting virtually the entire database to a less accurate weight. The second

94. In its supplemental questionnaire to NKK, USDOC essentially repeated the same question, requesting that NKK "clearly describe the conversion factor that *you used.*"[83] This follow-up question included no meaningful clarification; indeed, it suggested that USDOC had not understood NKK's original response. NKK's attorneys called the relevant USDOC official for clarification and were told that the supplemental question sought simply to confirm that NKK did not have a conversion factor to report.[84] The official explained that NKK need only repeat the response it provided in its initial questionnaire response. NKK followed these specific USDOC instructions.[85]

95. NSC also responded in good faith to USDOC's conversion factor request. At the time, NSC did not use a conversion factor in its normal course of business and did not know how one could be calculated. NSC told USDOC, as NSC personnel believed at that time, that NSC did not weigh the steel sold on a theoretical weight basis and therefore, "lacking an actual weight, NSC has no way of calculating the requested theoretical-to-actual weight conversion factor."[86]

96. USDOC issued various subsequent supplemental questionnaires to NSC and NKK, but none of the additional supplemental questionnaires addressed the weight-conversion factor. Then, to the shock of both companies, the preliminary determination applied "adverse" facts available to those NSC and NKK transactions that were made using theoretical weight. By resorting to its "adverse inference" provision, USDOC punished both NSC and NKK for their inability to provide a ratio that they explained they had no means to calculate at that time. For NKK, USDOC substituted the highest normal value price it could find in NKK's home market database for all of NKK's theoretical weight-based sales. For NSC, USDOC did not try to calculate a surrogate US price, but instead applied a surrogate margin (the highest of all margins for individual CONNUMs, which was [ ] per cent), ignoring the fact that NSC's US sales list contained acceptable facts available prices.[87]

97. Upon reviewing the preliminary determination, NKK discovered that KSC had used a "best estimate" as a surrogate for a weight conversion factor, and that this approach had been accepted by USDOC.[88] Despite USDOC's knowledge of this alternative methodology and despite the phone call from NKK's attorney requesting clarification of this issue, USDOC had chosen not to alert NKK as to this acceptable alternative methodology. NKK immediately submitted to USDOC (within one week of the preliminary determination) a correction to its initial and supplemental responses containing a weight conversion factor based on the same best estimate methodology utilized by KSC. NKK made this submission nine days before the commencement of verification and over ten weeks before the USDOC's final determination.[89]

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option was impossible because theoretical weight cannot be converted to actual weight with precision if the actual weight is not known.

[83] NKK Supplemental Sections B, C, D Questionnaire, at 2 (4 Jan. 1999) (**Exh. JP-45**).

[84] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**).

[85] NKK Supplemental Section B Questionnaire Response, at BS-14 to BS-15 (26 Jan. 1999) (**Exh. JP-45**).

[86] NSC Supplemental Section B Questionnaire Response, at Supp. B-24 (26 Jan. 1999) (**Exh. JP-29**). NSC's response was based on the understanding of sales division personnel at NSC headquarters who were responsible for preparing NSC's questionnaire responses. The sales staff believed that coils sold on a theoretical weight basis were never weighed, in part, because no actual weight figure appeared on any sales documentation. NSC's sales database also contains no information about actual weights for theoretical weight sales. Furthermore, sales division personnel understood that cut-to-length hot-rolled steel plate (which accounted for the bulk of the theoretical weight sales) was always sold based on theoretical weight and was never weighed.

[87] *USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8298 (**Exh. JP-11**).

[88] KSC Section B Response, at B-23 to B-24, Exhibit 6 (**Exh. JP-45**); (21 Dec. 1998) KSC Supplemental Response, at 18-20 (**Exh. JP-45**). KSC' s conversion factor, which relied on other production information to better estimate weight, satisfied USDOC.

[89] NKK letter to USDOC of 23 Feb. 1999, at 4-8 (**Exh. JP-45**).

98. While preparing for verification, NSC headquarters and sales officials who had been preparing NSC's questionnaire responses discovered new information.[90] For the first time, these officials learned that the actual weights for sales made on a theoretical weight basis were contained in a production database maintained at one of NSC's factories, separated from the main sales databases maintained at headquarters. The production databases do not overlap with the sales databases maintained at NSC headquarters, and cannot be accessed from NSC headquarters.[91] NSC immediately submitted to the USDOC, 14 days before verification, a correction to its initial and supplemental responses, providing the conversion factor.[92] NSC explained why the oversight had occurred. In particular, the merchandise was weighed by an isolated group in the production division, and the actual weights were kept in a separate database not tied to the primary sales databases. One week later, seven days before verification, NSC submitted to USDOC all of the backup data to its weight conversion factor, in particular each of the actual weights for the sales made on a theoretical weight basis.[93]

99. NKK and NSC submitted their corrections pursuant to a specific provision of USDOC's regulations governing USDOC's acceptance or rejection of factual information, particularly corrections that are discovered prior to verification. Both companies met this regulatory deadline, having filed their corrections to the conversion factor no later than seven days prior to verification.[94] The conversion factors were submitted along with a large amount of additional data and other corrections that added to or revised substantial parts of the companies' reported sales. Indeed, NSC submitted — at USDOC's request — other data that revised every US and home market sale.[95] In other words, USDOC accepted pre-verification data that affected <u>every single sale</u>, but rejected a single number (the conversion factor) that affected only a small number of sales even though that number was submitted at least seven days before verification.

100. USDOC officials visited the home offices in Japan of both NSC and NKK, and were prepared to verify the corrections that had been submitted prior to verification.[96] USDOC officials verified NKK's best estimate factor for the small quantity of sales that had been sold on a theoretical weight basis, but then decided not to place its verification of NKK's conversion factor estimate on the record.[97] Following verification, USDOC ordered NKK to remove its submitted information from the record and returned to NKK all of its submissions regarding the best estimate factor.[98] By contrast,

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[90] Verification preparation is often the first time that headquarters officials, branch sales staff, and technical staff come together to prepare all of the back-up documents to verify the sales and cost information that was submitted as part of the thousands of pages in questionnaire responses. In the questionnaire response period, the primary focus is on the main computer systems and putting together an appropriate database that contains all of the necessary information in the format desired by USDOC. Verification, on the other hand, is document intensive, and it requires the specific expertise of personnel involved in each step of the production and sales processes.

[91] NSC Letter to USDOC of 15 Mar. 1999 (**Exh. JP-29**).

[92] NSC Letter to USDOC of 22 Feb. 1999, at 6. The public version of this letter was submitted the next day, on 23 Feb. 1999. (**Exh. JP-29**).

[93] NSC Letter to USDOC of 1 Mar. 1999, public version on 2 March 1999 (**Exh. JP-29**).

[94] 19 C.F.R. § 351.301(b)(1) provides that parties may submit factual information until seven days prior to the start of verification. *See* **Exh. JP-5**. NKK submitted this information on 22 February 1999, which was nine days before its verification. NSC submitted the conversion factor on 22 February 1999, 14 days before verification; NSC's backup data was filed 1 March 1999, seven days before verification.

[95] USDOC Letter to NSC of 12 Apr. 1999 (**Exh. JP-29**). Such changes often require each sale observation be to changed, such as when an average selling expense adjustment is recalculated.

[96] USDOC's NKK Sales Verification Agenda, at 3 (16 Feb. 1999) (excerpts in **Exh. JP-45**); USDOC's NSC Sales Verification Agenda, at 3 (17 Feb. 1999) (excerpts in **Exh. JP-29**).

[97] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**)

[98] USDOC Letter to NKK of 15 Apr. 1999 (**Exh. JP-45**).

USDOC accepted all of the other new factual data and information that had been included in the letter in which NKK submitted its best estimate factor.

101. USDOC refused to verify any of NSC's conversion factor data despite its previous request that NSC be prepared to verify how NSC's computer systems capture weights.[99] This refusal came despite repeated assurances from USDOC officials prior to and during the verification process that they would verify the data.[100] In the last hours of the verification, NSC's staff and attorneys were told that USDOC supervisors back in Washington had instructed the USDOC verifiers in Japan not to verify the information.[101] USDOC officials also refused to listen to, or to verify, NSC's explanation of the circumstances that led to its inadvertent error. Further, following verification NSC was told by USDOC officials that its conversion factor and supporting data were rejected and expunged from the record.[102]

102. In its final determination, USDOC upheld its decision to apply facts available and adverse inferences with respect to NSC' s and NKK's theoretical weight sales.[103] USDOC continued to apply to NSC's theoretical weight sales the highest calculated margin for any US sale in that same CONNUM (*i.e.*, any sale having the identical product characteristics). With respect to NKK, USDOC continued to apply the highest calculated adjusted domestic price for any CONNUM. USDOC did not acknowledge in its final determination that any failure to respond earlier was due to inadvertent error or misunderstanding.[104]

2. Application of facts available and use of adverse inferences against NSC and NKK was inconsistent with the Anti-Dumping Agreement

103. USDOC applied "facts available" to these two companies inconsistently with the Anti-Dumping Agreement.[105] In addition, USDOC invoked facts available after it ignored acceptable and accurate data submitted by both NSC and NKK. USDOC' s failure to properly establish the facts is therefore also inconsistent with numerous provisions of the Anti-Dumping Agreement.

(a) USDOC's application of adverse facts available was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement

104. As discussed above, USDOC's established practice of applying adverse facts available to punish respondents is facially violative of Article 6.8 and Annex II. Application of that policy here violated the Agreement in other ways as well.

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[99] USDOC's NSC Sales Verification Agenda, at 11 (17 Feb. 1999) (excerpts in **Exh. JP-29**).

[100] NSC Case Brief, at 16 (13 Apr. 1999) (excerpts in **Exh. JP-29**).

[101] *Id.* (excerpts in **Exh. JP-29**).

[102] USDOC informed NSC of this decision on the day that NSC was required to submit its case brief commenting on legal issues raised in the preliminary determination and at verification. This date appears to have been chosen by USDOC for calculated reasons: once case briefs are submitted, further comments must be limited to addressing issues raised by other parties.

[103] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24363 (**Exh. JP-12**).

[104] The net impact on the overall NSC margin was two percentage points, while the impact on the overall NKK margin was 0.09 percentage points. *See* Affidavit of Daniel J. Plaine, Counsel to NSC (**Exh. JP-46**); Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**).

[105] The discussions of inconsistent measures taken by the US Government with respect to NSC and NKK are grouped together in this section only because of the relative similarity of the factual circumstances surrounding their wrongful treatment. Despite this grouping, the Government of Japan alleges that the US Government acted inconsistently with the Anti-Dumping Agreement in two individual instances — once with respect to NSC and a second time with respect to NKK.

(1) NKK and NSC submitted their corrections "within a reasonable period"

105. Article 6.8 limits the use of facts available to the following circumstances: (a) cases in which "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period," or (b) cases in which any interested party "significantly impedes the investigation." In this case, neither NSC nor NKK ever refused or failed to provide the information regarding the minor weight conversion factor "within a reasonable period," nor did they "significantly impede the investigation."

106. The notion of "a reasonable period" must be considered in context. The weight conversion factor played a minor role in the complex and voluminous computer programme that USDOC uses to calculate an ultimate margin; it would affect only a few lines of computer code. Moreover, the code would be triggered for only a handful of sales given that so few had been made in theoretical weight.

107. Furthermore, NSC and NKK submitted the information regarding the weight conversion factor "within a reasonable period" as defined in USDOC's own regulatory deadlines for factual information. Specifically, USDOC regulation 19 C.F.R. § 351.301(b)(1) establishes the final date for the submission of factual information as seven days prior to verification.[106] The use of verification as the benchmark for this final deadline underscores the reality that respondents frequently uncover errors or gaps during verification preparation, or as a result of the preliminary determination, and have to submit corrected factual information to USDOC. USDOC's own regulations frame what would be a good faith interpretation of "within a reasonable period."

108. Finally, USDOC officials visited Japan prepared to verify this information. The verification agendas sent to NKK and NSC included an item indicating that USDOC would verify the way in which actual weights were calculated (*i.e.*, converted from theoretical weight).[107] Indeed, USDOC fully verified NKK's best estimate factor.[108] Similarly, USDOC verifiers repeatedly told NSC staff that the weight conversion factor would be verified.[109] USDOC therefore ratified the notion that both companies had submitted this information "within a reasonable period" as set forth in Article 6.8 of the Anti-Dumping Agreement.

(2) Annex II, paragraph 5 mandates the acceptance of these corrections

109. USDOC's decision to reject the factual corrections submitted by both NSC and NKK was similarly inconsistent with paragraph 5 of Annex II.[110] Paragraph 5 instructs:

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

110. Here, the information submitted was "ideal in all respects." The fact that it was submitted after the questionnaire deadline does not change this fact. Furthermore, both NSC and NKK acted to the best of their ability by submitting the requisite information as soon as they became aware of their ability to do so — which was still before the regulatory deadline for submitting factual information

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[106] *See* Exh. JP-5.

[107] NKK Sales Verification Agenda, at 11 (16 Feb. 1999) (excerpts in **Exh. JP-45**); NSC Sales Verification Agenda, at 11 (17 Feb. 1999) (excerpts in **Exh. JP-29**). Both agendas asked: "Please provide worksheets showing how your production and sales systems capture actual weights as reported in your section B and C sales files."

[108] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**).

[109] NSC Case Brief, at 16 (13 Apr. 1999) (excerpts in **Exh. JP-29**).

[110] Article 6.8 refers to the provisions in Annex II to guide the application of facts available.

and early enough in the investigation for USDOC to verify the information and incorporate it into its final determination.

(3) USDOC's application of adverse facts available was inconsistent with Annex II, paragraph 7

111. USDOC's decision was also inconsistent with Annex II, paragraph 7 governing the application of facts available. The first sentence of paragraph 7 begins "*If* the authorities have to base their finding on information from a secondary source." (Emphasis added.) USDOC did not "have to" base its findings on any other source. The data was made available to USDOC; there was no gap to fill.

112. Even if the Panel accepts the use of facts available, however, the question becomes whether this situation should have led "to a result which is less favourable to the party." Such a situation exists only when an interested party "does not cooperate and thus relevant information is withheld from the authorities." This did not happen in this case.

113. USDOC required an impermissibly high level of cooperation from NKK and NSC.[111] Both companies met the "cooperation" standard of paragraph 7 by submitting the weight conversion information as soon as they were aware of their ability to do so. NKK even called the US officials to determine what was needed, and was then misled by those officials. Both parties submitted the information in time for verification. These actions demonstrate good faith "cooperation."

114. With respect to the "withheld" criterion, USDOC officials never made a finding on this issue — nor could they because both parties initially replied in good faith that they did not possess the requisite information, and then supplied it prior to verification when they realized they could. Therefore, NSC and NKK cannot be deemed to have "withheld the information."

115. Finally, USDOC acted inconsistently with paragraph 7 by failing to exercise "special circumspection" in choosing which facts available to apply. Here, USDOC did not take into account any of the mitigating circumstances surrounding NKK's and NSC's corrections. This was an unprecedented accelerated investigation. Officials at both companies were under severe time constraints to submit thousands of pages of information and millions of pieces of data. Both companies ultimately and accurately submitted this one minor piece of data in time for verification. USDOC in fact verified NKK's information, and was prepared to verify NSC's information. Despite the fact that USDOC had accurate and relevant information in its hands, USDOC chose to use unrepresentative information relating to other NKK and NSC transactions. No "special circumspection" was exercised at all.

(b) USDOC'S treatment of the evidence submitted by NKK and NSC was inconsistent with Article 6 of the Anti-Dumping Agreement

116. Along with the wrongful application of facts available, USDOC failed to establish the facts properly.

(1) USDOC failed to provide NKK with proper notice or a proper opportunity to respond and defend itself as required by Article 6.1

117. Article 6.1 requires that:

[111] As discussed above with respect to KSC, paragraph 7 requires only that an interested party "cooperate," while the US statute goes beyond this requirement and demands that an interested party act "to the best of its ability."

> All interested parties in an anti-dumping investigation *shall be given notice* of the information which the authorities require and *ample opportunity* to present in writing all evidence which they consider relevant in respect of the investigation in question. (Emphasis added.)

Paragraph 1 of Annex II states further that before applying facts available, "the investigating authorities should *specify in detail the information* required from any party." (Emphasis added.) These provisions place the onus on the administering authority to explain in detail the type of information that it is seeking. It is not up to the responding party to guess what the administering authority is looking for. Notice is central to a party's due process rights.

118. Here, USDOC failed to "specify in detail" the type of best estimate information that it wanted from NKK and thereby also failed to provide "notice of the information which the authorities require." NKK attorneys called USDOC officials for clarification as to how to respond, and those officials instructed that NKK need not submit any conversion factor and never requested it again. Yet, in its final determination, USDOC declared that NKK "should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable."[112] Having been told by USDOC officials that the information was unnecessary, NKK could not reasonably have made such a conclusion.

119. Article 6.1 also requires that the authority provide the interested party with "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." USDOC violated this requirement by misleading NKK during its attorneys' phone call with USDOC officials and then rejecting NKK's evidence regarding the weight conversion factor once NKK understood what USDOC was seeking. USDOC deprived NKK of any opportunity, let alone "ample" opportunity, to present in writing its evidence regarding the weight conversion factor.

(2) USDOC failed properly to verify NKK's and NSC's factual corrections as required by Article 6.6

120. USDOC also acted inconsistently with Article 6.6, which states that "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." USDOC fully verified the accuracy of NKK's weight conversion factor, but chose not to place its findings on the record.[113] As for NSC, despite repeated assurances that it would verify the weight conversion factor, in the last hours of verification USDOC officials told NSC that USDOC headquarters had issued final orders not to verify the information.[114]

121. Article 6.6 places the onus on authorities to satisfy themselves as to the accuracy of information. The only exceptions to this mandate are the limited circumstances set forth in Article 6.8, which authorizes the use of facts available. In this case, USDOC should not have applied facts available and thus should have verified the NSC and NKK conversion factor data as planned. Even if USDOC believed that facts available might be applied, the facts in this case at least clearly showed that USDOC's application of facts available required strict examination in advance and that verification of the data was therefore warranted. USDOC officials had no right to ignore the mandate of Article 6.6 and refuse to "satisfy themselves as to the accuracy of the information."

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[112] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24362 (**Exh. JP-12**).
[113] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**).
[114] NSC Case Brief, at 16 (13 Apr. 1999) (excerpts in **Exh. JP-29**).

(3) USDOC impermissibly failed to take into account the difficulties faced by NKK and NSC as required by Article 6.13

122. Article 6.13 states:

> The authorities shall take *due account of any difficulties experienced by interested parties,* in particular small companies, in supplying information requested, and shall *provide any assistance practicable.* (Emphasis added.)

123. USDOC officials acted inconsistently with Article 6.13 because they failed to take into account the difficulties faced by NKK and NSC with regard to the submission of a weight conversion factor. USDOC not only did not provide any meaningful assistance, instead USDOC itself created NKK's difficult situation by telling the company to merely reiterate its previous statement on the issue.

124. Similarly, USDOC failed to consider the difficulties faced by NSC. Conversion factors were not necessary for NSC's sales operations and therefore the staff preparing the responses to USDOC's questionnaires were unaware of the data until they discovered it in preparation for verification. Despite mitigating facts, USDOC did not account for any of them in its final determination. USDOC simply and impermissibly accused NSC of failing to act to the best of its ability and ignored the accurate and verifiable information.

(c) USDOC's choice of adverse facts available is inconsistent with Article 2.4 of the Anti-Dumping Agreement

125. USDOC's arbitrary rejection of evidence and application of adverse facts available against NSC and NKK was also inconsistent with Article 2.4 of the Anti-Dumping Agreement governing the comparison of export price and normal value. Article 2.4 requires in particular that the administering authority make a "fair comparison . . . between the export price and the normal value."

126. The Panel decision in *US—Atlantic Salmon* discussed above again informs this analysis.[115] USDOC failed to consider the nature of its calculation when choosing which facts available to apply to these sales. For NSC, USDOC carried out no calculation whatsoever. Instead, it went straight to the application of the highest margin by CONNUM.[116] This application ignored the fact that USDOC had contemporaneous normal values that could have been used in a "fair comparison" as required by Article 2.4. As for NKK, because its theoretical sales were made in the home market, USDOC chose to inflate NKK's normal value on these specific sales to as high a price as possible. The products from which USDOC derived the highest normal value possible, however, were isolated transactions with no rational relationship to the overall average normal value for those specific product categories.[117] This unreasonable substitution precludes a "fair comparison."

127. Finally, Article 2.4 contains a provision similar to Article 6.1 which states that "the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison." USDOC told NKK the information was *not* necessary, and therefore cannot fairly punish NKK for not providing the information.

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[115] As noted above, that GATT Panel established a requirement that a dumping authority determine appropriate facts available "in conjunction with the relevant substantive provisions of the Agreement." *US—Atlantic Salmon,* at para. 447.

[116] USDOC skipped the entire process of calculating an export price and went straight to assigning the highest margin it could find for that product type (CONNUM). USDOC never even went through the steps of calculating a price and comparing that price to normal value as required by Article 2. *See* Affidavit of Daniel J. Plaine, Counsel to NSC (**Exh. JP-46**). Article 2.3 requires the calculation of an export price on a "reasonable basis."

[117] *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28**).

(d) USDOC's application of facts available to NKK and NSC is also inconsistent with Article 9.3 of the Anti-Dumping Agreement

128. This failure to calculate the margins correctly under Article 2 in turn led to measures inconsistent with Article 9.3 of the Anti-Dumping Agreement. Article 9.3 holds that "{t}he amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." Here, USDOC applied faulty and inflated variables in the margin calculations for both NSC and NKK. For NSC, USDOC never even made the calculation as required by Article 2 for those sales made on a theoretical weight basis. For NKK, USDOC wrongfully carried out the mandated "fair comparison" of Article 2.4 by using normal values from completely dissimilar products for those sales made on a theoretical basis. In this way, USDOC affirmatively inflated the applied anti-dumping margin well beyond any margin that could have been calculated properly under Article 2. USDOC's decision, therefore, was inconsistent with Article 9.3 of the Anti-Dumping Agreement.

V. US LAW GOVERNING CALCULATION OF THE "ALL OTHERS" RATE, ON ITS FACE AND AS APPLIED HERE, IS INCONSISTENT WITH ARTICLE 9.4 OF THE ANTI-DUMPING AGREEMENT

129. Article 9.4 of the Anti-Dumping Agreement specifically prohibits authorities from calculating "all others" rates based on margins using facts available. Following US law, USDOC used each respondent's dumping margins — each of which, as discussed above, were based on partial adverse facts available — to calculate an inflated all others rate. Thus, US law, on its face and as applied, violates Article 9.4.

A. BACKGROUND ON US LAW AND PRACTICE

130. When describing the calculation of the "all others" rate, US law creates a distinction between individual rates based "entirely" on facts available and individual rates based only partially on facts available. The statute provides that USDOC shall determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and then determine the estimated all-others rate for all exporters and producers not individually investigated.[118] Paragraph (5) of that subsection prescribes the "{m}ethod for determining estimated all-others rate":

(A) General rule

For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 1677e of this title {*i.e.*, any margins determined entirely on the basis of facts available}.

(B) Exception

If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined *entirely* under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted

[118] 19 U.S.C. § 1673d(c)(1)(B)(i) (**Exh. JP-4**).

> average dumping margins determined for the exporters and producers individually investigated.[119]

131. USDOC regulations do not specify how to calculate the "all others" rate, but USDOC's general practice is to calculate it as the weighted average of the dumping margins established for the respondents, excluding any zero or *de minimis* margins, as directed by the US statute. USDOC's practice also excludes margins based entirely on facts available.[120]

B. SUMMARY OF THE FACTS: APPLICATION OF THE STATUTE AND ADMINISTRATIVE PRACTICE

132. In its investigation of hot-rolled steel from Japan, USDOC did not individually investigate all Japanese producers and exporters. USDOC initially issued questionnaires to six companies (Kobe, KSC, Nisshin, NKK, NSC, and Sumitomo Metal Industries ("SMI")), but ultimately selected only three of these companies (KSC, NKK, and NSC) as mandatory respondents.[121] USDOC did not allow the other companies to participate in the investigation.[122] Thus, pursuant to US law, three companies were assigned individual dumping margins; the remaining companies were assigned an "all others" rate that was the weighted average of the margins calculated for the three mandatory respondents.[123]

133. As discussed in Part IV of this submission, the margins determined for the three selected companies were significantly distorted by USDOC's unjustified application of adverse facts available. Mathematically, these high margins are responsible for the inflated "all others" rate of 29.30 per cent.

134. USDOC's basis for including the inflated rates is not explicit, but appears to be based on the distinction made by the US statute. Apparently, USDOC reasoned that since the individual margins were not based "*entirely* upon the facts available," the margins could be included in the "all others" rate under the US statute specifying that margins determined "entirely" on the basis of facts available should be excluded.[124] SMI strenuously argued in comments filed after the preliminary determination that USDOC should not distort the "all others" rate in this manner, but USDOC ignored SMI.[125]

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[119] 19 U.S.C. § 1673d(c)(5) (emphasis added) (**Exh. JP-4**). The statute governing preliminary determinations of dumping margins requires USDOC to determine "an estimated all-others rate for all exporters and producers not individually investigated," and incorporates by reference 19 U.S.C. § 1673d(c)(5). *See* 19 U.S.C. § 1673b(d)(1) (**Exh. JP-4**).

[120] *See, e.g., USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8299 (**Exh. JP-11**).

[121] *Id.* at 8291-94 (**Exh. JP-11**).

[122] The statute authorizes USDOC to limit the number of companies investigated, if investigation of every known exporter or producer would be unduly burdensome and would thereby inhibit timely completion of the investigation. *See* 19 U.S.C. § 1677f-1(c)(2) (**Exh. JP-4**). Considering the complexities likely to arise in the investigation and USDOC's limited resources, USDOC determined that it would not be practicable to investigate every company that wanted to participate. USDOC therefore selected the three companies that accounted for the largest volume of subject imports. *See USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8294 (**Exh. JP-11**).

[123] *USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8299 (**Exh. JP-11**); *see also USDOC Final Dumping Determination*, 64 Fed. Reg. at 24370 (**Exh. JP-12**).

[124] *USDOC Preliminary Dumping Determination*, at 8299 (emphasis added) (**Exh. JP-11**); 19 U.S.C. § 1673d(c)(5)(B) (**Exh. JP-4**).

[125] *USDOC Final Dumping Determination*, at 24364, 24368, 24370 (**Exh. JP-12**); Sumitomo Metal Indus., Ltd. Case Brief, at 4-5 (12 Apr. 1999) (excerpts in **Exh. JP-48**).

C. USDOC'S INCLUSION OF PARTIAL FACTS AVAILABLE IN THE "ALL OTHERS" RATE IS INCONSISTENT WITH ARTICLE 9.4 OF THE ANTI-DUMPING AGREEMENT

1. On its face, the US statute is inconsistent with the requirement of Article 9.4 that authorities "shall disregard" margins based on facts available

135. Article 9.4 unambiguously specifies that an authority "shall disregard" margins based on facts available in determining the "all others rate." Unlike the US statute, the Agreement does not distinguish between determinations based entirely on facts available and determinations based partially on facts available.[126] Article 9.4 provides:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined
>
> *provided that the authorities shall disregard* for the purpose of this paragraph any zero and *de minimis* margins *and margins established under the circumstances referred to in paragraph 8 of Article 6*. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10 of Article 6. (Emphasis added.)

136. The text of Article 9.4 thus sets a critical limitation on the calculation of an "all others" rate. The investigating authority "shall disregard . . . margins established under the circumstances referred to in paragraph 8 of Article 6," a reference to the provision governing "facts available." As Article 9.4 uses the mandatory term "shall" and the unambiguous term "disregard," the obligation is not discretionary.[127]

137. The broad language of Article 6.8 covers any resort to facts available. It does not draw the distinction in the US statute between determinations based "entirely" on facts available and determinations based only partially on facts available. To the contrary, Article 6.8 contemplates the use of partial facts available whenever possible, to more accurately assess possible dumping. Resorting entirely to facts available is limited to truly and entirely uncooperative parties.

138. The circumstances under which "facts available" may become the basis for a company's dumping margin under Article 6.8 are quite limited: it is used only in instances where a company

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[126] Indeed, the US proposed language during the Uruguay Round that would incorporate the "entirely" language, and it was rejected by the other members.

[127] The context provided by other paragraphs of Article 9 also supports this interpretation of Article 9.4. Article 9.3 provides that the dumping margin "shall not exceed the margin of dumping as established under Article 2." Dumping margins should thus be based on real numbers determined under Article 2, not hypothetical numbers. If the authorities can base the "all others" rate on margins determined under Article 2 based on real information, it makes no sense to "exceed" that margin of dumping by including exaggerated margins based on "facts available."

either (a) "refuses access to, or otherwise does not provide, necessary information within a reasonable period", or (b) "significantly impedes the investigation." The decision to resort to the facts available responds to a particular action of a particular company. The companies that fall within the "all others" category, by definition, have not been individually investigated. They have not even been given the opportunity to provide any information at all. A company not individually investigated could not ever "significantly impede{ } the investigation." Indeed, USDOC excludes them precisely to speed the investigation. USDOC's use of an adverse facts-available margin, however, effectively punishes "all others" for the perceived uncooperative actions or inactions of other companies.

139. The US statute requires USDOC to estimate an all-others rate excluding only margins "determined *entirely*" on the basis of facts available.[128] US law and practice impose a limitation that defeats the objective of issuing an "all others" rate that reflects real and not inflated margins of dumping. By impermissibly defining the exclusion too narrowly, the US statute is therefore facially inconsistent with Article 9.4 of the Anti-Dumping Agreement.

2. USDOC's specific calculation of the all others rate in the investigation of hot-rolled steel from Japan was also inconsistent with Article 9.4

140. By following the US statute, USDOC violated Article 9.4. On the particular facts of this case, all three mandatory respondents' margins were based on what US law would deem "partial" facts available. USDOC was therefore required by Article 9.4 to "disregard" the facts available portion of these margins for purposes of calculating the "all others" rate and should have used only that portion of the margins not based on facts available. USDOC could have done this, but instead used each company's margin to calculate the all others rate.

VI. USDOC'S EXCLUSION OF CERTAIN HOME MARKET SALES FROM THE CALCULATION OF NORMAL VALUE, AND THE REPLACEMENT OF SUCH SALES WITH DOWNSTREAM SALES, ARE BOTH INCONSISTENT WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

141. USDOC excluded certain home-market sales from the normal-value calculation by incorrectly classifying them as "outside the ordinary course of trade" if they failed to meet the "arm's length" or "99.5 per cent" test. Under this test, sales to affiliated customers are excluded if their weighted average price was less than 99.5 per cent of the weighted average price of product sold to unaffiliated customers. Upon excluding the sales, USDOC often replaces them with the affiliates' inevitably higher-priced downstream resales, with no cost adjustment to the price to reflect the different level of trade.

142. These practices — which are applied consistently by USDOC — systematically inflated the dumping margins in the hot-rolled steel case either because low-priced home market sales were ignored and sometimes replaced by higher priced sales. They are inconsistent with Article 2.4, in combination with Article 2.1 and 2.2, because (a) the sales that USDOC chose to disregard were made in the ordinary course of trade, (b) the replacement of such sales with affiliated customers' resales is not contemplated anywhere in Article 2, and (c) the unjustified inflation of normal value by the application of these practices contravenes the requirement in Article 2.4 that authorities make a "fair comparison" between export price and normal value.

A. BACKGROUND ON US LAW AND PRACTICE

143. The US statute defining normal value is Section 773 of the Tariff Act of 1930. The relevant subsection defines normal value as

[128] 19 U.S.C. § 1673d(c)(5) (emphasis added) (**Exh. JP-4**).

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the *ordinary course of trade* and, to the extent practicable, at the same level of trade as the export price or constructed export price.[129]

US law defines "ordinary course of trade" as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."[130]

144. The statute also contains an exception to this rule which authorizes the replacement of sales *to* an affiliated reseller with sales *by* an affiliated reseller. Specifically, "{i}f the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) *by* such affiliated party *may* be used in determining normal value."[131] Section 771(33) defines "affiliated" parties to include companies in which a party owns as little as five per cent of the outstanding voting stock.[132]

145. USDOC's regulations reiterate and further define some of the terms used in the statute. For instance, the regulations provide that:

> The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, *based on an evaluation of all of the circumstances particular to the sale in question*, that such sales or transactions have characteristics that are *extraordinary for the market in question.*[133]

146. The regulations go on to say that USDOC may consider a sale to an affiliated party at a non-arm's length price outside the "ordinary course of trade."[134] Although the regulations do not define "arm's length price," they clarify that if a respondent made sales to affiliated parties, then normal value may be calculated based on those sales only if USDOC is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." (Emphasis added.)[135]

147. If a respondent sells in the home market "through" an affiliated customer that merely resells the product, then USDOC's regulations permit it to "calculate normal value based on the sale *by* such affiliated party."[136] Such sales are used in the event the prices to the affiliated reseller are deemed not "comparable" (*i.e.*, not made at arm's length).[137]

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[129] 19 U.S.C. § 1677b(a)(1)(B)(i) (emphasis added) (**Exh. JP-4**).

[130] 19 U.S.C. § 1677(15) (**Exh. JP-4**). The same statute specifically provides that USDOC shall treat two types of transactions, "among others," as outside the ordinary course of trade: sales below cost and transactions between affiliated parties for the purchase of inputs used to calculate costs of production. 19 U.S.C. § 1677(15)(A)-(B) (**Exh. JP-4**).

[131] 19 U.S.C. § 1677b(a)(5) (emphasis added) (**Exh. JP-4**). This provision has been a part of the US anti-dumping statute since 1988. Pub. L. 100-414, § 1319 (amending Section 773 to include this subsection).

[132] 19 U.S.C. § 1677(33)(E) (**Exh. JP-4**). Under USDOC regulations and practice, companies may be deemed affiliated even when one owns less than five per cent of the voting stock of the others.

[133] 19 C.F.R. § 351.102(b) (emphasis added) (**Exh. JP-5**).

[134] *Id.* (**Exh. JP-5**).

[135] *Id.* (**Exh. JP-5**). USDOC regulations track the statutory definition of "affiliated" parties. *See* 19 C.F.R. § 351.102(b) (**Exh. JP-5**).

[136] 19 C.F.R. § 351.403(d) (emphasis added) (**Exh. JP-5**).

[137] These sales are not always reported, however, either because they are of insignificant quantities or because the respondent does not have the requisite control of the affiliate to report the resales.

148. Upon rejecting sales to an affiliate for failing the arm's length test, USDOC has two options: it can discard the sales in its calculation of normal value, or it can replace the sales with the affiliate's resales — assuming such sales have also been reported to USDOC by the respondent.

149. Since 1993, USDOC has followed a practice of considering sales of product *to* an affiliated customer to be at "arm's length" and thus included in the calculation of normal value only if the weighted average price for all sales of the product to the affiliated customer are 99.5 per cent or more of the weighted average price of sales of the product to non-affiliated customers. This practice is known as the "arm's-length test" or "99.5 per cent test."[138]

150. If sales to an affiliate fail the arm's length, USDOC has adopted a practice of excluding such sales from its calculation of normal value and, in some instances, replacing such sales with the affiliate's resales, assuming such sales have also been reported by the respondent.

151. After passage of the US Uruguay Round Agreements Act, USDOC invited comments on whether to change and/or codify certain regulations and practices. The US steel industry opposed efforts to change USDOC's arm's-length test.[139] In its published final rule USDOC complied, saying "We will continue to apply the current 99.5 per cent test *unless and until* we develop a new method."[140] It has done so, without exception, since then. Japan therefore considers this an established practice that may be the subject of a facial challenge under the Anti-Dumping Agreement.[141]

B. SUMMARY OF THE FACTS: APPLICATION OF THE ARM'S LENGTH TEST IN THE INVESTIGATION OF HOT-ROLLED STEEL FROM JAPAN

152. The questionnaire issued to the Japanese respondents instructed them that their sales to affiliated customers in the home market were subject to rejection and possible replacement with the affiliates' resales.

153. A significant percentage of each respondent's home market sales were to customers that USDOC considered to be " affiliated." NKK and NSC each reported their sales to such customers and, where possible, the resales of those affiliated customers willing and able to supply the data. Knowing that USDOC would disregard its sales to one affiliated reseller, KSC made the decision to report its affiliate's resales (some of which were also to affiliates).

154. USDOC applied the 99.5 per cent arm's length test to the respondents' sales to affiliated customers (and to KSC's affiliate's resales to affiliates).[142] The vast majority of the respondents' reported sales to affiliated customers failed the 99.5 per cent test. USDOC therefore excluded these sales from its calculation of normal value, noting that they were "outside the ordinary course of

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[138] This test was first developed by USDOC in 1993, when rendering preliminary determinations in a wave of simultaneous investigations of flat-rolled steel imports from various countries. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina*, 58 Fed. Reg. 7066, 7069 (4 Feb. 1993) ("Appendix II: Issues Common to All Anti-Dumping Investigations of Flat-Rolled Steel Products"). The test was confirmed over respondents' objections. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina*, 58 Fed. Reg. 37062, 37077 (9 July 1993) ("Appendix II: Issues Common to All Anti-Dumping Investigations of Flat-Rolled Steel Products "). Excerpts of these determinations are provided in **Exh. JP-49**.

[139] *See* **Exh. JP-50** containing comments submitted by counsel to the US steel industry.

[140] *Anti-Dumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27355 (19 May 1997) (emphasis added) (excerpts in **Exh. JP-39**).

[141] Such established practices are subject to facial challenges under the Anti-Dumping Agreement pursuant to the interpretation of WTO Agreement Article XVI:4 in the *US-Section 301* Panel. *See* discussion above with regard to adverse facts available.

[142] *USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8295 (**Exh. JP-11)**.

trade"[143], and sometimes replaced them with the affiliates' downstream resales, sometimes with no adjustment for any resulting differences in level of trade. USDOC affirmed this decision in its final determination.[144]

155. USDOC's use of the 99.5 per cent test, as well as the substitution of sales to affiliates with the affiliates' resales, inflated each respondents' dumping margins. KSC's margin increased by more than [ ] percentage points.[145] Application of the 99.5 per cent test in this case is therefore subject to an as-applied challenge under the Anti-Dumping Agreement.

C. USDOC VIOLATED ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

1. Article 2.4 of the Anti-Dumping Agreement, in combination with Article 2.1, does not permit USDOC to treat sales to affiliates that fail the 99.5 per cent arm's length test as outside the ordinary course of trade

156. Article 2.4 states that a "fair comparison shall be made between the export price and the normal value." In performing that comparison, Article 2.1 explains that normal value shall be based on sales "in the ordinary course of trade:"

> For the purpose 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.

157. "Ordinary course of trade" is a term of art in international trade law. It is a well-accepted concept, as reflected in USDOC's own questionnaire: "Generally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product."[146]

158. USDOC applied its arm's length test in this case — as it has in all others since 1993 — to all home market sales made by respondents to affiliated customers. It then disregarded all sales to any affiliated customer whose sales failed the test. It did so based on the premise under US law, that sales to affiliates that fail the arm' s length test are not in the ordinary course of trade.

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[143] *Id.* (Exh. JP-11).

[144] NKK documented the flaws of the 99.5 per cent test and proposed alternatives to USDOC's 99.5 per cent test, including an alternative based on the widely applied statistical concept of "standard deviation." NKK Supplemental Questionnaire Response, at Exhibit 3 (26 Jan. 1999) (excerpts in **Exh. JP-52**). NKK renewed this argument in its case brief. NKK Case Brief, at 33-49 (13 Apr. 1999) (excerpts in **Exh. JP-52**). USDOC did not seriously address these alternatives. *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24342 (**Exh. JP-12**).

[145] *See* Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44)**. USDOC' s practice inflated NSC's and NKK's margins by about one percentage point each. *See* Affidavit of Daniel L. Porter, Counsel to NKK (**Exh. JP-28)**; Affidavit of Daniel J. Plaine, Counsel to NSC **(Exh. JP-46)**. The reason for the larger impact on KSC's margin is that upon rejecting the sales to affiliates, the next most similar home market product matches to US sales were very different in physical characteristics and, upon application of the difference in merchandise adjustment, resulted in a distorted apples-to-oranges comparison.

[146] USDOC Questionnaire, Appendix I: Glossary of Terms (19 Oct. 1998) (**Exh. JP-51**). *Black' s Law Dictionary* defines "ordinary course of business" as: "The transaction of business according to the common usages and customs of the commercial world generally or of the particular community or (in some cases) of the particular individual whose acts are under consideration. . . . In general, any matter which transpires as a matter of normal and incidental daily customs and practices in business." *Black's Law Dictionary* at 1098 (6th ed. 1990).

159. Nothing in the Agreement can be construed to suggest that sales made to affiliates — in which the respondent may own as little as a five per cent share — at prices nearly identical to prices sold to unaffiliated customers are outside the "ordinary course of trade."

160. A 0.5 percentage point average price differential is too small a difference upon which to base a finding that sales to affiliates are not ordinary. Indeed, USDOC's own regulations label price differentials of 0.5 per cent "*de minimis* "; at the investigation stage, both USDOC regulations and Article 5.8 of the Anti-Dumping Agreement treat price differentials as large as 2.0 per cent as *de minimis.*[147]

161. A simple example confirms the ludicrous nature of USDOC's test. If sales to an unaffiliated company were at an average price of $300 per ton and sales of the same product to a company of which the supplier owns five per cent were at an average of $298 per ton, USDOC would not consider the affiliated sales ordinary. Yet, USDOC would deem the affiliated sales ordinary if they averaged $500 per ton. This strains common sense.

2. The replacement of home-market sales to an affiliate with the affiliate's resales is inconsistent with Article 2.2 of the Anti-Dumping Agreement

162. Articles 2.2 and 2.3 confirm that USDOC is not permitted to use affiliates' downstream sales. Article 2.2 governs what an authority must do if there are no home market sales "in the ordinary course of trade". It may compare export price either with sales to a third country or with a constructed value.[148] Replacing the respondent's home-market sales with the downstream sales of affiliated resellers is not an option.

163 In stark contrast, Article 2.3 — which covers export price transactions — specifically allows an investigating authority to construct an export price "on the basis of the price at which the imported products are first resold to an independent buyer" if the export price is deemed "unreliable" due to affiliation between the exporter and the importer. In other words, replacement of an exporter's sales to an affiliate with the affiliate's resales are specifically permitted in the calculation of export price under Article 2.3.[149]

164. The Agreement's silence on the use of downstream sales in the home market is significant. By specifying that export price sales to affiliated customers may be replaced by the affiliates' resales implies that other sales to affiliated customers (e.g., sales in the home market) may not be so replaced. This interpretation of Article 2.3 is supported by a basic principle of treaty interpretation, *expressio unius est exclusio alterius* (to specify one thing is to exclude all other things).[150] Therefore, it is clear that replacing the respondents' home market sales with their affiliates' downstream sales is a violation of Article 2.2.

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[147] *See* 19 C.F.R. 351.106 (**Exh. JP-5**); *see also* 19 U.S.C. 1673d(a) (**Exh. JP-4)**.

[148] The last clause of Article 2.2 — "cost of production. . . plus a reasonable amount. . ." — is what is commonly known as constructed value.

[149] This interpretation of Article 2.3 is supported by a basic principle of treaty interpretation, *expressio unius est exclusio alterius* (to specify one thing is to exclude all other things). *See generally* Lord McNair, *The Law of Treaties* 399-410 (1961) (excerpts in **Exh. JP-54**). By specifying that export price sales to affiliated customers may be disregarded, the Agreement implies that other sales to affiliated customers (*e.g.*, sales in the home market) may not be disregarded.

[150] *See generally* Lord McNair, *The Law of Treaties* 399-410 (1961) (excerpts in **Exh. JP-54**).

3. The "fair comparison" requirement in Article 2.4 prohibits the use of USDOC's arm's length test to discard sales to affiliates

165. Article 2.4's requirement that authorities make a "fair comparison" between export price and normal value does not permit USDOC to exclude home-market sales to affiliates simply because they fail the 99.5 per cent arm's length test, it also does not permit USDOC to replace a respondent's home-market sales to affiliated resellers with the resellers' downstream sales.

(a) Exclusion of sales via application of the 99.5 per cent test is inconsistent with Article 2.4

166. Article 2.4 provides, "A fair comparison shall be made between the export price and the normal value. The comparison shall be made at the same level of trade, normally at the ex-factory level."

167. When a group of sales fails the 99.5 per cent test, normal value is increased because lower priced home market sales are excluded from the calculation and sometimes replaced by downstream sales which are higher priced downstream sale by the costs and profits of the resellers. When normal value is increased, the dumping margin is also increased. USDOC cannot justify this practice. A "fair" comparison does not permit statistically arbitrary rules that reject low-priced sales from the calculation of normal value and thereby artificially inflate the dumping margin.

168. **Exhibit JP-53** provides several examples illustrating the inherent distortions created by the 99.5 per cent test. The examples all reflect the two fundamental problems with the test. First, the test is one-sided: it tests only lower prices, and considers higher prices to be normal no matter how high. Second, the test fails to account for the degree of variability in prices; by collapsing the degree of variability into a single average number, the test produces absurd outcomes.[151]

169. A "fair" arm's-length test would incorporate some statistically valid technique to identify those prices that are " outliers," whether they are lower or higher than prices charged to non-affiliated customers.[152] For example, standard deviation analysis captures both the frequency and the magnitude of the variation from mean.[153] Unless USDOC applies a statistically valid test, comparisons of normal value and export price under US will remain unfair, in violation of Article 2.4.

(b) Replacing a respondent's home market sales with its affiliate's downstream resales is inconsistent with Article 2.4

170. As discussed above, Japan believes that the use of downstream home market sales to replace sales to affiliated parties is not permitted by Article 2.2 and 2.3 in accordance with the principle of *expressio unius est exclusio alterius* (to specify one thing is to exclude all other things). Japan also believes that the use of such downstream sales violates the requirement of Article 2.4 that a "fair comparison" be made with the respondent's US sales. Comparison of downstream sales in one market with ex-factory sales in the other market is an apples-to-oranges comparison. Prices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit. These downstream home-market sales are often at a different

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[151] *See also* Affidavit of Edward J. Heiden and John Pisarkiewicz, Statisticians (**Exh. JP-56**) (resumes of Mr. Heiden and Mr. Pisarkiewicz accompany their affidavit).

[152] Panels have rejected statistically invalid methodologies. *See e.g. US—Atlantic Salmon*, at para. 426.

[153] *See* Affidavit of Edward J. Heiden and John Pisarkiewicz, Statisticians (**Exh. JP-56**). In the underlying investigation, NKK specifically proposed that USDOC adopt a standard-deviation methodology to replace the 99.5 per cent rest. USDOC rejected this alternative, not because it was flawed but because USDOC felt the 99.5 per cent test was not unreasonable. *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24342 (**Exh. JP-12**).

level of trade, and therefore cannot be compared to export sales made directly to unaffiliated customers under Article 2.4. USDOC's comparison of resales to direct sales is virtually certain to result in artificially inflated dumping margins, and are therefore not "fair comparisons."

VII. USDOC'S CRITICAL CIRCUMSTANCES DETERMINATIONS ARE INCONSISTENT WITH ARTICLE 10 OF THE ANTI-DUMPING AGREEMENT

171. In this case, USDOC issued an unprecedented early finding of "critical circumstances" — allowing retroactive imposition of anti-dumping measures — based solely on allegations in the petition. This action essentially stopped exports of hot-rolled steel from Japan. After USDOC's late November announcement, Japanese imports fell precipitously from 399,927 tons in November 1998 to a mere 14,437 tons in January 1999.

172. USDOC's critical circumstances finding in this case violated US obligations under the Anti-Dumping Agreement in three respects. First, Article 10.6 requires that a preliminary critical circumstances finding be based on evidence of injury, not a mere threat of injury as had been found in this case. Second, USDOC's critical-circumstances finding was not supported by "sufficient evidence" as required by Article 10.7. In both of these respects, the determination made in this case, and the new USDOC Policy Bulletin that precipitated the determination, violated the Anti-Dumping Agreement. Third, the evidentiary standards governing preliminary critical circumstances findings, on their face, fail to meet the "sufficient evidence" standard of Article 10.7.

A. BACKGROUND ON US LAW AND PRACTICE

173. Section 733(e)(1) of the Tariff Act of 1930, as amended, allows the USDOC to impose anti-dumping duties retroactive 90 days prior to a preliminary determination of dumping. The statute provides:

> If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by {USDOC}, then {USDOC} shall promptly (at any time after the initiation of the investigation under this part) determine, on the basis of the information available at that time, whether there is a reasonable basis to believe or suspect that—
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> (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
>
> (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and
>
> (B) there have been massive imports of the subject merchandise over a relatively short period.[154]

174. Regarding the statutory criterion of "massive imports . . . over a relatively short period," the relevant regulation provides that USDOC:

> normally will consider a "relatively short period" as the period beginning on the date the proceeding begins and ending at least three months later. However, if {USDOC}

[154] Codified at 19 U.S.C. § 1673b(e)(1) (**Exh. JP-4**). The corresponding provision for final determinations of critical circumstances is section 735(a)(3), 19 U.S.C. § 1673d(a)(3).

> finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, then {USDOC} may consider a period of not less than three months from that earlier time.[155]

175. USDOC fleshed out this regime with four specific policies. First, the normal practice had been not to announce a finding of critical circumstances until USDOC's preliminary determination of dumping. This practice allowed USDOC to have the benefit of its own preliminary assessment of possible anti-dumping margins, and not just petitioner's allegations, when deciding whether importers should have known about the dumping. Until this case, USDOC apparently followed this practice without exception, as evidenced by the formal announcement — coincident with the hot-rolled case — indicating that USDOC decided to depart from that practice in this case.[156]

176. Second, USDOC formerly interpreted the US statute to require a preliminary determination of current injury by USITC during the period examined. USDOC deemed a preliminary determination of threat of injury to be insufficient. In USDOC's own words:

> When {USITC} has preliminarily found no reasonable indication that a US industry is experiencing present material injury by reason of the dumped subject merchandise, but only a threat of such injury, {USDOC} has determined that it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury.[157]

In cases beginning in late 1997, USDOC without any explanation reversed this practice and issued critical-circumstances determinations even though USITC preliminarily found only the threat of material injury.[158] Interestingly, USDOC made this change in cases involving imports of steel from non-WTO members - *i.e.*, cases which could not be challenged in the WTO.

177. Third, in determining whether the importers "knew or should have known" that the subject merchandise was dumped, USDOC normally considers margins of 15 per cent or more sufficient to impute knowledge of dumping for constructed export price sales, and margins of 25 per cent or more for export price sales.[159] In this case, however, USDOC used the inflated margins alleged in the petition to meet this requirement.

178. Finally, in selecting a "relatively short period" for measuring whether imports have increased massively, USDOC had traditionally examined the change in import levels from each investigated company over the periods immediately preceding and immediately following the initiation of the

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[155] 19 C.F.R. § 351.206(i) (**Exh. JP-5**).

[156] *USDOC Critical Circumstances Policy Bulletin* (**Exh. JP-3**); *see also* 19 C.F.R. § 351.206(c)(2), as amended *(Regulation Concerning Preliminary Critical Circumstances Findings: Final Rule*, 64 Fed. Reg. 48706 (8 Sept. 1999)) (**Exh. JP-5**). USDOC's policy of waiting until the dumping determination reflected the fact that the US statute (like the Anti-Dumping Agreement) does not allow collection of retroactive duties unless and until USDOC renders an affirmative preliminary dumping determination. 19 U.S.C. § 1673b(e)(2) (**Exh. JP-4**).

[157] *Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China,* 62 Fed. Reg. 9160, 9164 (28 Feb. 1997).

[158] *See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China,* 62 Fed. Reg. 61964, 61967 (20 Nov. 1997) (the other countries were Russia and Ukraine, *id*. at 61793, 31961-62).

[159] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber From the Republic of Korea,* 63 Fed. Reg. 59514, 59518 (4 Nov. 1998).

investigation.[160] At the earliest, USDOC would examine a period before and after the date the petition was filed.[161] In this case, however, USDOC examined the six months preceding initiation.

B. SUMMARY OF THE FACTS: USDOC'S CRITICAL CIRCUMSTANCES FINDINGS

179. USDOC's practice changed in significant respects to accommodate political pressure accompanying the petition against hot-rolled steel imports. The petition filed on 30 September 1998, asked that USDOC depart from its standard practice and make a critical circumstances determination within thirty days of initiating the investigation.[162] In response to intense political pressure from the US steel industry[163], USDOC issued a Policy Bulletin — dated 8 October 1998, only eight days after the petition was filed — announcing that USDOC would now issue critical circumstances determinations "as soon as possible after initiation" of an investigation.[164]

180. To facilitate expedited critical circumstances determinations, the Policy Bulletin also announced that USDOC would have to start examining "earlier base periods" to determine if "importers, exporters or producers had reason to believe that a case was likely to be filed."[165]

181. In response to the Policy Bulletin and the petitioners' request for an early critical circumstances determination, five Japanese mills filed a joint letter with USDOC on 26 October 1998, opposing petitioners' request. This submission included detailed argument showing the absence of any credible evidence to support petitioners' allegations.[166]

182. USDOC nonetheless made its unprecedented preliminary determination of critical circumstances on 23 November 1998, eleven weeks before its preliminary determination of dumping.[167] USDOC blindly accepted the allegations set forth in the petition: "since we have not yet made a preliminary finding of dumping, the most reasonable source of information concerning

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[160] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 Fed. Reg. 31958, 31962 (11 Jun. 1997).

[161] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms From the People's Republic of China*, 63 Fed. Reg. 41794, 41800 (5 Aug. 1998). In at least one anti-dumping investigation since the hot-rolled steel investigation, USDOC has returned to examining the "relatively short period" before and after the filing of the petition. *See Preliminary Determinations of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Japan and South Africa*, 65 Fed. Reg. 12509, 12510 (9 Mar. 2000).

[162] The petition also requested that the preliminary dumping determination be made separately and not later than ninety days *after* the critical-circumstances determination. *See Petition*, Vol. III, at I-3 (excerpts in **Exh. JP-1**).

[163] *See supra* Part II.B.

[164] *USDOC Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (**Exh. JP-3**).

[165] *Id*. (**Exh. JP-3**).

[166] First, rumours in the press are inherently speculative and cannot form a basis for concluding that importers should have known that an anti-dumping investigation of hot-rolled steel was likely. Second, the mills reviewed the main newspaper articles that allegedly provided "notice" that an anti-dumping case was imminent; in fact, these articles were ambiguous and rarely discussed either hot-rolled steel specifically or Japan specifically. Third, the mills reviewed publicly-available information from the same period reporting strong demand for hot-rolled steel and rising prices; these articles indicated that an importer would not have reason to know that an anti-dumping investigation was likely. *See* Willkie Farr & Gallagher Letter to USDOC of 26 Oct. 1998 (**Exh. JP-57**). In addition, NKK filed a separate letter with USDOC on 18 Nov. 1998, arguing that US law precluded USDOC from rendering an early preliminary finding in the face of the USITC's Preliminary Injury Determination that there was only a threat of injury. *See* Willkie Farr & Gallagher Letter to USDOC of 18 Nov. 1998 (**Exh. JP-58**).

[167] *USDOC Preliminary Critical Circumstances Determinations*, 63 Fed. Reg. at 65750-51 (**Exh. JP-9**).

knowledge of dumping is the petition itself."[168] Thus, USDOC, for the first time, relied entirely on the greater-than-25-per cent margins alleged in the petition.

183. On the question of whether importers knew or should have known that injury would result, USDOC again relied on the petition. USDOC cited "numerous press reports from early to mid-1998 regarding rising imports, falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers" as evidence that importers knew they were injuring US producers. Though noting that USITC "preliminarily found threat of material injury to the domestic industry due to imports of hot-rolled steel from Japan," USDOC concluded nevertheless that importers somehow should have known that *present* material injury — not threat — from the dumped merchandise was likely.

184. USDOC then carefully selected a time period that exaggerated the growth in imports to support its finding of "massive" imports. USDOC agreed with petitioners that a couple of press articles satisfied its new policy and justified an earlier measurement period for import volumes.[169]

185. The following table summarizes the changes to USDOC's critical circumstances practice made in this case:

Issue of Methodology	**Traditional USDOC Practice *Before* the Investigation of Hot-rolled Steel from Japan**	**USDOC Practice *During* the Investigation of Hot-rolled Steel from Japan**
Timing of the Announcement	Contemporaneous with the preliminary dumping determination	**"As soon as possible after initiation"**
Basis for Imputing Knowledge of Injury to Importers	Injury only, not threat (until 1997 cases involving imports from China, Russia, and Ukraine)	**Injury or threat**
Basis for Imputing Knowledge of Dumping to Importers	Calculations of the dumping margin based on questionnaire responses and other record data	**Allegations in the petition, including (1) the magnitude of dumping margins alleged, and (2) selected newspaper reports**
Reference Point for the "Relatively Short Period" in Which to Measure Import Volumes	(1) Initiation of the investigation, or (2) Date the petition is filed	**Arbitrary date six months *before* petition was even filed**

The result of these new practices, as applied in the hot-rolled case, was to find the existence of critical circumstances for all imports of hot-rolled steel from Japan and to require, upon issuance of an affirmative preliminary dumping determination, that entries of all such imports during the 90-day period prior to the preliminary dumping determination be subject to duty collection at the rates determined in the preliminary dumping determination.[170] Eleven weeks later, in its preliminary dumping determination, USDOC affirmed its earlier preliminary critical circumstances decision and directed the US Customs Service to require a cash deposit or posting of a bond, in order to ensure that duties are collected retroactively as previously described.[171]

186. USDOC applied the same analysis in its final dumping determination, but had to make a few adjustments in light of the facts. Specifically, USDOC could not find critical circumstances for NSC and NKK, because the final dumping margins for these two companies were each less than 25 per

[168] *Id*. at 65750 (**Exh.JP-9**).
[169] *Id*. at 65751 (**Exh. JP-9**).
[170] *Id*.
[171] *USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8299 (**Exh. JP-11**).

cent.[172] USDOC indicated it would refund cash deposits and release any bonds on entries of these companies' product during the critical-circumstances period. As to KSC and "all others," however, USDOC continued to find critical circumstances and maintained the suspended liquidation for imports of the products from these companies.[173]

187. In the final phase of its investigation, USITC found that critical circumstances did not exist, so USDOC could not impose retroactive duties on hot-rolled steel imports from Japan. However, application of the new Policy Bulletin in USDOC's preliminary critical circumstances determination warned importers that they would be liable for retroactive duties of unknown magnitude. The uncertainty introduced by the preliminary finding quickly shut down trade. Monthly import statistics show that imports of hot-rolled steel from Japan plummeted from 399,927 tons per month in November 1998 (the month of the actual preliminary critical circumstances finding) to 91,225 tons in December 1998, 14,437 tons in January 1999, and barely 4,300 tons in February 1999 all prior to the preliminary dumping determination.[174]

C. USDOC VIOLATED ARTICLE 10 OF THE ANTI-DUMPING AGREEMENT

1. Article 10.6 does not permit a finding of critical circumstances based solely on threat of material injury

188. Article 10.6 limits the application of retroactive duties to situations where there is present injury, not threat. Yet, in this case, USDOC issued its preliminary finding of critical circumstances notwithstanding USITC's determination that there was no reasonable indication of present injury, but merely a reasonable indication of threat thereof.

189 Article 10.6 authorizes retroactive duties only when "the authorities determine" that both of the following exist:

> (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
>
> (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment. (Emphasis added.)

[172] It is worth noting that the petition only contained estimated dumping margins for NSC and NKK, which turned out to be inflated. USDOC had therefore applied critical circumstances in its preliminary finding based on incorrect petition data for the two companies for whom critical circumstances were not found in the final determination.

[173] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24369-70 (**Exh. JP-12**). USDOC's justification for these findings was the magnitude of the final dumping margins exceeded 25 per cent. As noted elsewhere in this submission, however, these margins were wrongly inflated by USDOC's improper resort to adverse facts available against KSC and USDOC's improper use of the facts-available rates in calculating the "all others" rate. *See supra* Part V and VI.

[174] We note that in the final phase of its investigation, USITC found that critical circumstances did not exist. *USITC Final Injury Determination*, USITC Pub. 3202 at 21-23 (**Exh. JP-14**). Under US law, USDOC could therefore not impose retroactive duties. At this late stage in the process, however, the chilling effect on imports had already occurred and the early announcement had served its purpose.

190. The plain language of Article 10.6 consistently specifies that a finding of "injury" must be made, not mere "threat of injury." Under a general principle of treaty interpretation, by specifying "injury," the Agreement excludes alternative concepts such as "threat of injury."[175]

191. Context confirms this interpretation. Throughout Article 10, "injury" is consistently distinguished from "threat of injury" in the context of whether anti-dumping duties may be imposed retroactively.[176] Article 10.2 provides:

> *Where a final determination of injury (but not a threat thereof or a material retardation of the establishment of an industry)* is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied. (Emphasis added.)

Article 10.2 thus expressly distinguishes "injury" from "threat thereof" and permits retroactive anti-dumping duties only if there is a determination of current injury. A threat determination alone is insufficient: retroactive duties may be levied after finding threat only if there would have been a final injury determination absent provisional measures.

192. Similarly, Article 10.4 provides that remedies for threat of injury should be prospective only. Article 10.4 provides:

> Except as provided in paragraph 2, *where a determination of threat of injury or material retardation is made (but no injury has yet occurred)* a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner. (Emphasis added.)

Logically, threat of some future (and not yet realized) injury does not require remedial measures to be applied retroactively, except for the limited situation set forth in Article 10.2.

193. Thus "injury," as used throughout Article 10, cannot be interpreted as a generic term covering injury, threat of injury, and material retardation. The text of Article 10.6, and the context provided by paragraphs 2 and 4 of that Article, indicate that retroactive duties may be imposed only to address actual "injury" in the past, not to address a "threat of injury" in the future.

194. These provisions reflect a strong desire to restrain retroactive provisional measures. It makes no sense to interpret Article 10.6 broadly as allowing precisely the type of retroactivity that Articles 10.2 and 10.4 seek to prevent. The need to avoid excessive retroactivity is even greater in the preliminary stages of an investigation, where incomplete information can lead to measures that unjustifiably disrupt trade.

195. In this case, USDOC exploited the ambiguity of the US statute, which does not adequately distinguish between injury and threat, to make a finding of critical circumstances. Despite a negative

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[175] *Expressio unius est exclusio alterius* (to specify one thing implies the exclusion of another). *See generally* Lord McNair, *The Law of Treaties* 399-410 (1961) (excerpts in **Exh. JP-54)**.

[176] In Article 3 of the Anti-Dumping Agreement, footnote 9 provides that the word "injury" includes "threat of material injury" as well as other concepts *"unless otherwise specified"*. (Emphasis added.) Consistent with this footnote, Article 10 specifies certain distinctions between injury and threat in the context of retroactive duties.

current injury determination by USITC, USDOC relied on petitioners' claims to make an affirmative critical circumstance finding.[177]

196. In addition, USDOC's finding of present injury was contrary to USITC's finding of no present injury.[178] USDOC acknowledged USITC's preliminary determination of threat, but explained that "therefore {we} also considered other sources of information, including numerous press reports.[179] In other words, USDOC ignored the US agency entrusted to make injury determinations, and the deliberations of that agency. USDOC replaced USITC deliberation about the facts with petitioners' self-serving selection of press reports. This establishment of a critical fact was improper, and the USDOC evaluation of the facts was neither unbiased nor objective.

2. USDOC ignored the requirement of Article 10.7 to have sufficient evidence

(a) Article 10.7 expressly requires "sufficient evidence" that the elements of Article 10.6 have been met

197. Article 10.7 requires that the steps necessary to collect retroactive duties may be taken only on the basis of "sufficient evidence." In this investigation, USDOC's preliminary critical circumstances finding was based merely on allegations in the petition and on the newspaper articles the US steel industry attached to its petition. It was not supported by "sufficient evidence."

198. Article 10.7 establishes the evidentiary standard for Article 10.6: the authorities may impose retroactive duties as described in Article 10.6 — including "withholding of appraisement" — only when they have "sufficient evidence" that the conditions for critical circumstances are met. The sufficiency standard of Article 10.7 is therefore essential to the question of whether the US finding of critical circumstances is consistent with the substantive elements of Article 10.6.

199. Other Panels have evaluated the meaning of "sufficient evidence" in analogous contexts. In the *US—Softwood Lumber* case, the Panel explained that "sufficient evidence" means:

> more than mere allegation or conjecture, and could not be taken to mean just "any evidence." In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement.[180]

A recent WTO Panel confirmed that "sufficient evidence" is a meaningful, objective standard requiring more than a mere allegation. In *Mexico—High Fructose Corn Syrup,* the Panel examined whether Mexico had "sufficient evidence" to initiate an anti-dumping investigation. The Panel framed its task as determining "whether 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" its decision.[181]

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[177] *USITC Preliminary Injury Determination*, USITC Pub. 3142 at 1 (**Exh. JP-8**). USITC ultimately based its final affirmative determination on *current* injury. *USITC Final Injury Determination*, USITC Pub. 3202 at 1 (**Exh. JP-14**). However, this determination was made in July 1999, more than six months after USITC had found a reasonable indication of *threat* in its preliminary determination.

[178] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24335-37 (**Exh. JP-12**).

[179] *Id*. at 24337-38 (**Exh. JP-12**).

[180] *United States—Measures Affecting Imports of Softwood Lumber from Canada*, adopted 27 Oct. 1993, BISD 40S/358, at para. 332 (*"US—Softwood Lumber"); Cf. United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, adopted 25 Apr. 1997, WT/DS33/AB/R, at para. 16 (*"US—Wool Shirts"*).

[181] *Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, adopted on 28 Jan. 2000, WT/DS132/R, at para. 7.57 *("Mexico—High Fructose Corn Syrup"*).

200. The standard of sufficiency is higher when applying accelerated provisional measures than it is when initiating an investigation. After all, provisional measures benefit (ideally) from some investigation, whereas initiations (by definition) do not. Furthermore, provisional measures have a more dramatic commercial consequence and should therefore reflect a more careful examination of evidence than initiation.

(b) USDOC imposed provisional measures without having "sufficient evidence" within the meaning of Article 10.7

201. In this case, USDOC did not have "sufficient evidence" to sustain its preliminary finding of critical circumstances. The evidentiary basis for this decision, was virtually non-existent and therefore not "sufficient" or "legally satisfactory." An "unbiased and objective" analysis could not have led to the conclusion that the evidence was "sufficient." To meet the requirements of Articles 10.6 and 10.7, USDOC would have needed:

- "sufficient evidence" that "the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury"; and

- "sufficient evidence" that "the injury is caused by massive dumped imports of a product in a relatively short time"; and

- "sufficient evidence" that the massive dumped imports are "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied."

USDOC failed to meet any of these requirements.

202. USDOC lacked sufficient evidence of dumping. As USDOC admitted, there was no history of dumping hot-rolled steel from Japan.[182] USDOC had no actual evidence; it found that importers knew or should have known of dumping by relying solely on the dumping margins alleged in the petition, all of which happened to exceed 25 per cent. Therefore, USDOC had *no* evidence apart from the allegations — much less *sufficient* evidence as required by Article 10.7 — to support the necessary findings required in Article 10.6(i). USDOC essentially found that importers should have known they were dumping because petitioners alleged they were dumping.

203. USDOC also had no sufficient evidence of injury. To establish that importers should have known the allegedly dumped imports caused injury, an element of Section 733(e)(1)(A)(ii) as well as Article 10.6(i), USDOC relied on the press reports attached to the petition.[183] Such press reports, even if true, are not consistent with a finding of current injury. Indeed, after a preliminary investigation, USITC found not even a "reasonable indication" of injury, but only a reasonable indication of the threat of future injury. Far from indicating injury, the data collected by USITC demonstrated that:

> The industry was relatively healthy during much of the period examined. Capacity, production, shipments, and net sales all increased during the period. Employment indicators generally held steady, and the industry's productivity improved.[184]

USITC thus lacked sufficient evidence to support a necessary finding under Article 10.6(ii) that injury existed or that, under Article 10.6(i), importers should have been aware of it. Indeed, the USITC findings proved exactly the opposite, and the USDOC essentially ignored these findings.

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[182] Therefore, USDOC could not rely on Section 733(e)(1)(A)(I) as a basis for a critical circumstances determination. *USDOC Preliminary Critical Circumstances Determination*, 63 Fed. Reg. at 65750 (**Exh. JP-9**).

[183] *Id.* (**Exh. JP-9**).

[184] *USITC Preliminary Injury Determination*, USITC Pub. 3142 at 17 (emphasis added) (**Exh. JP-8**).

204. Finally, USDOC lacked sufficient evidence of "massive dumped imports" over a relatively short period. USDOC departed from its normal practice of assessing the period before and after the filing of a petition (*i.e.*, 30 September 1998) or initiation of the investigation (*i.e.*, 15 October 1998) for determining whether "massive imports" existed. Instead, USDOC found that importers, exporters, or producers had reason to believe that an anti-dumping investigation of hot-rolled steel from Japan was "likely" as early as April 1998.[185] USDOC therefore picked the five months preceding and the five months following this arbitrary date to determine whether imports were "massive." Again, the only basis for this finding was general press reports of the possibility of anti-dumping cases against steel products generally from foreign countries generally. Only one or two obscure articles mentioned either Japan or hot-rolled steel specifically. As a result of its essentially arbitrary selection of April 1998 as the point from which a reasonable importer should have believed an anti-dumping investigation of hot-rolled steel from Japan to be imminent, USDOC never even acknowledged the fact that imports of hot-rolled steel from the Japanese companies subject to investigation actually declined during the period after the petition was filed.[186]

205. It is important to recall the remedial purpose of retroactive duties in evaluating the determination of " massive dumped imports." USDOC ignored the entire second half of Article 10.6(ii), which explains why "massive" imports are even important: because the injury caused by the imports' timing and volume "is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." USDOC conveniently made no mention of this element in any of its determinations. Indeed, it is impossible to reason how "massive imports" occurring before a petition is filed could in any way undermine the remedial effects of an anti-dumping duty, when the earliest the duty could be applied is 90 days before the preliminary dumping determination. This period — between the petition and the announcement of provisional measures — should be the benchmark for determining whether the imports were "massive" (as it was under US law until the petition was filed in this case).

206. Previous Panels have already recognized that allegations are not sufficient evidence.[187] As the Appellate Body has observed, it is "difficult, indeed, to see how *any* system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."[188] Yet in this case USDOC relied on nothing but allegations and press clips. In the face of USITC's preliminary decision that there was only a threat of injury, "an unbiased and objective investigating authority evaluating that evidence" could not "properly have determined that sufficient evidence" existed to justify a preliminary critical circumstances finding.[189] As USDOC has admitted elsewhere, "it would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation."[190]

207. Instead of waiting for its own analysis of dumping margins, instead of respecting the USITC judgment that there was only threat of injury, instead of waiting to see the import trends after the case had been filed, USDOC abandoned an unbiased and objective assessment of the situation and instead jumped to conclusions based on petitioners' self-serving allegations. Application of the policy set in USDOC's new Policy Bulletin caused these abuses. The Policy Bulletin will continue to cause similar abuses in the future.

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[185] *USDOC Preliminary Critical Circumstances Determination* , 63 Fed. Reg. at 65751. (**Exh. JP-9**).

[186] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24337-38 (**Exh. JP-12**).

[187] *US—Softwood Lumber*, at para. 332.

[188] *US—Wool Shirts*, at 14 (emphasis added).

[189] *Mexico—High Fructose Corn Syrup*, at para. 7.57.

[190] *Anti-Dumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27328 (19 May 1997) (commenting on proposed change to USDOC regulations governing suspension of liquidation) (excerpts in **Exh. JP-39**).

3. On its face, the US statute does not meet the "sufficient evidence" requirement of Article 10.7 in making determinations under Article 10.6

208. Section 733(e) of the Tariff Act of 1930 is inconsistent on its face with the requirements of Article 10.6 and 10.7. US law does not ensure that the US authorities respect the explicit requirements of Article 10 in applying retroactive provisional measures. This standard of " sufficient evidence" represents the essential safeguard against arbitrary imposition of the extraordinary remedy of retroactive provisional measures. Whether at the preliminary stage of withholding assessment or the final stage of levying actual duties (final *estimated* duties under US law), retroactive measures have an extraordinary chilling effect on trade, and must be invoked only when permitted by Article 10.

209. US law violates Articles 10.6 and 10.7 in at least two ways. First, US law does not require the findings of fact required by Article 10.6. More specifically, at the preliminary stage, US law requires no finding that the massive dumped imports are "likely to seriously undermine the remedial effect" of the duty, notwithstanding the clear requirement of Article 10.6(ii) to do so. US law also requires only that "there have been massive imports," notwithstanding the Article 10.6(ii) requirement of a determination that "the injury is caused by massive dumped imports."[191] The US statute thus simplistically looks only to an increase in the volume of imports, and does not require any analysis that the massive imports have been dumped or have caused injury. The US law does not require USITC or USDOC to look at this issue, and they do not do so.

210. Second, although Article 10.7 requires "sufficient evidence" of the elements of Article 10.6, US law requires only "a reasonable basis to believe or suspect" that conditions of critical circumstances exist. This is a much lower threshold. What is "reasonable" is not necessarily "sufficient" and what one "believes or suspects" is not necessarily "evidence." The US statute directs USDOC to find critical circumstances based on mere suspicion or belief, without any real evidence. The mere existence of this provision chills trade because importers know that USDOC can find critical circumstances based on a whim and a petitioner's unfounded allegation. When these low standards combine with the new policy to make these determinations even earlier, and with even less evidence, the failure to meet Article 10 requirements becomes more serious.

211. Even worse, US law allows USDOC to speculate about matters on which USITC has expertise. USITC makes decisions based on an investigation specifically geared toward determining the existence of material injury by reason of imports. USDOC does not undertake such investigations and therefore does not collect the same amount of evidence on the question of injury. To the extent US law permits USDOC to ignore the expertise of USITC, it violates the sufficient evidence requirements of Articles 10.7.

212. Section 733(e) of the Tariff Act of 1930, therefore, is facially inconsistent with Articles 10.6 and 10.7. The US statute sets forth an evidentiary standard that does not meet the sufficiency standard required to apply provisional measures retroactively and does not require findings of fact necessary to apply retroactive provisional measures under Article 10 of the Anti-Dumping Agreement.

4. Because USDOC's preliminary critical circumstances findings and the relevant US statutory provisions violate Articles 10.6 and 10.7, they also violate Article 10.1.

213. Article 10.1 of the Anti-Dumping Agreement provides that:

> Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 (provisional measures) and paragraph 1 of Article 9 (imposition and

[191] Section 733(e)(1)(b), 19. U.S.C. § 1673b(e)(1)(b) (**Exh. JP-4**).

> collection of anti-dumping duties), respectively, enters into force, subject to the exceptions set out in this Article.

Thus, determinations to levy anti-dumping duties retroactively are permissible only if justified by one of the "exceptions set out in this Article." Since, as established in the previous sections, USDOC's preliminary critical circumstances finding and the US statutory provision governing such findings are not justified by one of the exceptions and thus violate Articles 10.6 and 10.7, they also violate Article 10.1.

VIII. USITC'S INJURY AND CAUSATION DETERMINATIONS WERE INCONSISTENT WITH ARTICLES 3 AND 4 OF THE ANTI-DUMPING AGREEMENT

214. US law and practice regarding injury and causation are inconsistent with WTO obligations. First, the captive production provision of US law, both on its face and as applied in this case, is inconsistent with US obligations under the Anti-Dumping Agreement because it requires USITC under certain circumstances to focus its causation and injury analysis on a narrow segment of an industry rather than the industry as a whole.

215. Second, USITC's causation analysis in the hot-rolled steel case, already tainted by the captive production provision, suffered from a variety of other infirmities. In analyzing the domestic industry's condition, USITC departed from long-standing practice and ignored the first year of its three-year period of investigation, focusing instead on the domestic industry's record-breaking performance in the second year and the decline from that year in the final third year. USITC also summarily dismissed or completely ignored an array of alternative causes of injury to the hot-rolled steel industry, failing both to consider all known alternative causes of injury and to conduct an objective analysis.

A. THE CAPTIVE PRODUCTION PROVISION, BOTH ON ITS FACE AND AS APPLIED IN THIS CASE, IS INCONSISTENT WITH ARTICLES 3 AND 4 OF THE ANTI-DUMPING AGREEMENT

1. Background on US law and practice

216. The US statute requires that USITC determine whether an industry in the United States is injured "by reason of" imports from the country being investigated.[192] The statute provides guidance to USITC for evaluating the volume, the price, and the impact of the imports being investigated.

217. Although in most cases USITC analyzes the domestic industry as a whole, USITC sometimes narrows its inquiry under the captive production provision:

> If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the like product in the merchant market, and the Commission finds that —
>
> (i) the domestic like product produced that is internally transferred for processing in other downstream article does not enter the merchant market for the domestic like product,
>
> (ii) the domestic like product is the predominant material input in the production of that downstream product, and

[192] 19 U.S.C. § 1673b(a)(1) (**Exh. JP-4**); 19 U.S.C. § 1673d(b)(1) (**Exh. JP-4**); 19 U.S.C. § 1677(7)(B) (**Exh. JP-4**).

> (iii) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article
>
> then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), *shall focus primarily on the merchant market for the domestic like product.*[193]

218. When the statutory language "shall focus primarily" applies, USITC does not meaningfully examine the remainder of the domestic industry's output — the so-called "captive production" consumed to make downstream products. The use of "shall" strips away any USITC discretion to make case-by-case determinations. The use of "focus" skews the analysis to the merchant market at the expense of the rest of the domestic industry. The statute then adds the modifier "primarily" to narrow the focus even more. Given that the domestic industry consists of both captive and merchant market production, USITC is not considering domestic producers "as a whole" when its injury and causation analysis is "primarily focused" on the merchant market segment.

219. This provision appeared in US law in 1994 at the urging of the US steel industry. After losing several injury determinations on hot-rolled steel (including from Japan) in 1993[194], the US steel industry wanted to amend the trade laws to make affirmative injury determinations more likely in the future. In the 1993 case concerning hot-rolled steel, USITC properly focused on the industry as a whole and cited substantial captive production as an important condition of competition that shielded domestic producers from import competition, a factor that contributed significantly to its negative injury and threat determinations.[195] The industry was determined to reverse this analytic approach to captive production, first with a failed legal challenge[196], followed by a vigorous lobbying campaign to influence the Uruguay Round Agreements implementing legislation.[197] The Committee to Support US Trade Laws, consisting of domestic steelmakers and their outside counsel, issued a list of 34 "imperatives" for the implementing legislation, including a captive production provision prohibiting USITC from considering captive production in its injury and causation analysis. The steel industry itself proposed that captive production should only be considered by USITC as part of the domestic industry if it is shown to compete directly with subject imports. Eventually the Administration acquiesced to this political pressure and the captive production provision became part of US law.

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[193] Section 771(7)(c)(iv) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(7)(C)(iv)) (emphasis added) (**Exh. JP-4**). The merchant market segment of an industry is that segment consisting of commercial shipments on the open market, for example, to original equipment manufacturers or independent distributors. The "captive" segment of the market consists of the same like product produced for internal consumption for the production of further-processed, downstream products, such as when hot-rolled steel is internally transferred by a company to its cold-rolling mill, where it is further processed into a thinner-gauge product known as cold-rolled steel.

[194] *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final), and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664 (Aug. 1993) ("*1993 Flat-Rolled Steel Case"*) (excerpts in **Exh. JP-59**). This broad case involved four different "like products": plate, hot-rolled steel, cold-rolled steel, and galvanized steel.

[195] *Id.* at 15-18 (**Exh. JP-59**). The economic logic behind this "shielding effect" is discussed further below.

[196] USITC's analysis was affirmed on appeal to the US Court of International Trade. *See US Steel Group v. United States*, 873 F.Supp. 673, 684 (Ct. Int'l Trade 1994) (excerpts in **Exh. JP-60**).

[197] **Exh. JP-61** provides a chronology of this campaign, including various articles describing the domestic industry pressure to change US law.

2. The captive production provision on its face is inconsistent with Articles 3 and 4

220. Articles 3 and 4 require an authority to consider a domestic industry in its entirety throughout its injury and causation analysis. The very definition of the term "domestic industry" in Article 4.1 is "domestic producers as a whole of the like products." The definition of "injury" in footnote 9 is "material injury to a domestic industry, threat of injury to a domestic industry or material retardation of the establishment of such an industry." Whenever these two terms are invoked in Articles 3.1, 3.2, 3.4, 3.5, and 3.6, they direct an authority to undertake an "objective examination" of the "domestic producers as a whole of the like products."

221. The fundamental logic behind this legal obligation is clear: authorities may not segment a domestic industry and focus their analysis on the worst performing segments to find material injury, and then impose anti-dumping duties benefiting all domestic producers. Such an examination certainly would not be "objective" as required by Article 3.1. Yet this is precisely what USITC must do when the captive production provision applies — focus its injury analysis on the merchant market and potentially find material injury, even if the industry as a whole is not experiencing material injury. Given the mandatory nature of the captive production provision — and, therefore, the lack of discretion the USITC has in whether to apply the provision — it is inconsistent with Articles 3 and 4 on its face, regardless of its application in the hot-rolled steel case.

(a) The captive production provision ignores the Article 4.1 definition of the "domestic industry" as the entire productive output of the industry, not part of that output

222. The definition of "domestic industry" in Article 4.1 requires authorities to consider an overall domestic industry, and not a narrow segment of that industry. The provision explains that:

> the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.[198]

223. The US successfully argued this point in *Mexico—High Fructose Corn Syrup*, in which it objected to the Mexican authority's exclusive focus on one market segment in its causation analysis. The authority had limited its analysis to the segment of the Mexican high fructose corn syrup industry serving the industrial market, while completely ignoring the industry segment serving the consumer market, even though the consumer segment represented 47 per cent of industry revenues.[199] The Panel sided with the US finding that the Article 4.1 definition of domestic industry and the footnote 9 definition of injury have "unavoidable consequences," namely that "the domestic industry with respect to which injury is considered and determined must be . . . the domestic producers of the like product as a whole."[200] While the Agreement does not completely preclude a sectoral analysis, the Panel found such an analysis is only relevant in so far as it illuminates conditions in the industry as a whole; the analysis of a particular segment is alone insufficient for establishing injury.[201]

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[198] The *New Shorter Oxford English Dictionary* defines "whole" as "the full, complete, or total amount or extent of." A segment or portion of an industry cannot be "the full, complete, or total extent of" an industry. An authority focusing on a segment or portion of a domestic industry's output is therefore ignoring the Article 4.1 definition of "domestic industry."

[199] *Mexico—High Fructose Corn Syrup*, at para. 5.490. SECOFI justified its analysis on grounds that import competition was limited to the industrial market. *Id.* para. 7.159.

[200] *Id.* para. 7.147.

[201] *Id.* para. 7.154.

224. Another Panel adopted a similar definition of domestic industry in *Argentina—Footwear.*[202] Because Argentina had found only one like product, the Panel found Argentina was required to consider each serious injury factor for domestic producers as a whole of footwear and did not need to make separate findings for each individual industry segment.[203]

225. Thus, Panels have consistently embraced the view that the core concept for defining the domestic industry in Article 4.1 — "domestic producers as a whole of the like product" — means precisely what it says. An authority's finding of injury must be based on an analysis of the industry as a whole.[204]

226. The captive production provision is inconsistent with Article 4.1 on its face. The provision compels USITC to focus its analysis primarily on merchant market data, necessarily precluding any balanced assessment of the data about the industry as a whole, thereby making an affirmative determination more likely. Moreover, in addition to distorting USITC's analysis of market share and domestic industry financial performance, the captive production provision's mandatory focus on the merchant market forces the USITC to ignore the attenuated nature of import competition in the captive market — a key condition of competition. From the perspective of the industry as a whole, the higher the proportion of domestic production of a like product consumed in downstream captive production (rather than in competition with subject imports in the merchant market), the lower the likelihood that imports could possibly adversely affect the domestic industry's overall performance.

(b) The captive production provision violates Article 3.2 because it exaggerates subject import market share relative to all domestic production

227. Article 3.2 provides that the increase in dumped import volume "*shall*" be considered either in absolute terms or "relative to *production* or *consumption*." (Emphasis added.) In light of footnote 9 and Article 4.1, an authority must consider domestic producers as a whole of the like products, not a portion thereof.

228. The Panel in *Mexico—High Fructose Corn Syrup* found that Article 3.2 requires an authority 's market share analysis to encompass the industry as a whole, and not merely an industry segment. The Panel held that Mexico's market share analysis was inconsistent with Article 3.2, because "the analysis and findings concerning market share and prices are based on information accounting for only 53 per cent of the production of the domestic industry, and not information regarding the domestic industry as a whole."[205] This Panel decision properly recognizes that evaluating market share based on a narrow market segment invariably distorts the analysis, and precludes an appropriate consideration of the industry as a whole.

229. The captive production provision likewise violates Article 3.2 by narrowing USITC's market share analysis to the merchant market, thereby decreasing apparent consumption, and increasing import market share. The market share analysis mandated by the captive production provision mirrors exactly the market share analysis undertaken by Mexico in *Mexico —High Fructose Corn Syrup,* which the United States deemed "particularly egregious." To paraphrase the US argument against

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[202] *Argentina—Safeguard Measures on Imports of Footwear,* adopted on 25 Jun. 1999 WT/DS121/R ("*Argentina—Footwear*"). Panel reports interpreting the Safeguards Agreement definition of domestic industry are relevant to interpreting the Anti-Dumping Agreement definition of domestic industry, because the two definitions are virtually identical. *See* Article 4.2(1)(C). The Panel report in *Mexico—High Fructose Corn Syrup* specifically noted the relevance of *Argentina—Footwear* for interpreting the Anti-Dumping Agreement on this point. *See Mexico—High Fructose Corn Syrup,* at 218 n.625.

[203] *Argentina—Footwear,* at paras. 8.135-137.

[204] We treat the phrases "industry as a whole" and "producers as a whole" interchangeably throughout this discussion. *See Mexico—High Fructose Corn Syrup,* at para 7.160.

[205] *Mexico—High Fructose Corn Syrup,* at para. 7.153.

Mexico's approach, the "constriction of the denominator of domestic consumption" required by the captive production provision "greatly exaggerate{s} the level of import market share."[206]

230. The US argument was accurate and applies here as well. When the captive production provision is applied, subject import market share — the ratio of subject import volume to the total market — will always increase. This distortion occurs because the volume of subject imports (the numerator) remains unchanged but the volume of domestic shipments (the denominator) shrinks because USITC "focuses primarily" on the merchant market instead examining the industry as a whole.[207] The smaller the merchant market, and the less it matters to the overall health of the domestic industry as a whole, the higher the import penetration. Imports are perceived to be the biggest problem in precisely those situations where imports actually matter the least. It is for precisely this reason that Article 3.2 requires market share analysis to focus on total production, not a narrow subset.

(c) The captive production provision violates Article 3.4 by requiring an evaluation of certain key factors based on a narrow segment of the industry

231. Article 3.4 provides that "the examination of the impact of dumped imports on the *domestic industry* concerned *shall* include an evaluation of *all* relevant economic factors and indices having a bearing on the state of the *industry*." (Emphasis added.) In the context of the Article 4.1 definition of "domestic industry," Article 3.4 requires an authority to consider "all relevant economic factors" with respect to "the state of domestic producers as a whole of the domestic like products." Thus, an authority cannot base an injury finding on an analysis of economic factors affecting only a limited industry segment.

232. In *Mexico—High Fructose Corn Syrup* the Panel clarified:

> It is important to differentiate the *consideration of factors* relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the *determination of injury* or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production.[208]

In other words, while a sectoral analysis might prove useful in analyzing certain factors, it cannot be the basis for a determination of injury.[209]

233. The Panel in *Korea—Dairy*[210] went further, embracing the requirement that each relevant economic factor must be considered with respect to the domestic industry as a whole.[211] The EC

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[206] *Id.* para. 5.491.

[207] In this case, the distortion was quite large: the market share in 1998 increased from 8.4 per cent to 17.7 per cent of consumption value. On a quantity basis, the increase was from 9.3 per cent to 21.0 per cent. *USITC Final Injury Determination,* at C-3, C-5 (**Exh. JP-14**).

[208] *Mexico—High Fructose Corn Syrup*, para. at 7.154 (emphasis added).

[209] This is precisely the point made by the United States in its first submission in the *Mexico—High Fructose Corn Syrup* case. To quote:

> While the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and includes having a bearing on the state of the industry" (Article 3.4), it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole.

Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) From the United States: First Submission of the United States of America at 48 (12 Feb. 1999). The US cannot reconcile this argument with the captive production provision.

complained that although the Korean authority had found only one domestic industry, it had considered the raw milk segment for certain injury factors, and the milk powder segment for others, instead of considering the industry as a whole. The Panel found such an approach impermissible under the provision of the Safeguard Agreement that mirrors Article 3.4 of the Anti-Dumping Agreement.[212]

234. When the captive production provision applies, USITC must focus its injury analysis on the financial performance of the merchant market segment, thereby exaggerating the impact of subject imports. Domestic production is captively consumed, rather than sold on the merchant market, precisely when a company can increase profits by selling the downstream product instead of the upstream product. The captive production provision thus skews USITC's focus to the portion of the domestic industry's production that is usually less profitable.[213] The distortion caused by the captive production provision is particularly serious as it requires USITC to focus primarily on the merchant market in determining market share and financial performance instead of generally considering these two factors. The market share and financial performance determined through primarily focusing on the merchant market will almost inevitably provide inflated numbers.

235. Although the factual issues of market share and financial performance form the analytic core of any injury determination, the captive production provision leaves no discretion to consider fully both the merchant market and the overall industry. Nor does the provision require any explanation of how the merchant market relates to the industry as a whole. Instead, the smaller an industry's merchant market segment, the greater the distortions. The exaggeration of import market share, and the depression of domestic industry financial performance, worsen as the percentage of captive production increases, and USITC's injury determination rests on an ever smaller portion of the domestic industry in the merchant market segment. Article 3.4 does not allow authorities to evaluate some factors with respect to a narrow segment, and other factors with respect to the industry as a whole. All factors must be assessed with respect to the industry as a whole.

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[210] *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted on 21 Jun. 1999 ("*Korea—Dairy*"). The Panel's findings with respect to Article 4.2(a) were not appealed to the appellate body. *See Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 14 Dec. 1999, AB-1999-8 at 18.

[211] Article 4.2(a) of the Safeguards Agreement is analogous to Article 3.4 of the Anti-Dumping Agreement, providing that the serious injury investigation evaluate all relevant factors bearing on the state of the domestic industry, defined as "domestic producers as a whole of the like products or directly competitive products." *See* Safeguards Agreement, Article 4.2(a) ("In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation in the industry. . . ."); Article 4.1(c) ("{a} 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products. . . ."). The Panel report in *Mexico—High Fructose Corn Syrup* specifically noted the relevance of the Panel report in *Korea—Dairy* for interpreting the Anti-Dumping Agreement. *See Mexico—High Fructose Corn Syrup*, at para. 7.155 n. 625. This Panel then embraced precisely the same interpretation of Article 3.4 itself. Both plain language of Article 3.4 and its context when read with Article 4.1 require authorities to assess all factors in relation to the industry as a whole.

[212] The Panel held: "In considering each of the factors listed in Article 4.2, and any other factors found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry." *Korea—Dairy*, at para. 7.58. The Panel concluded, "{a} lack of consideration of all segments, without any explanation, is a flaw we find present in Korea's analysis." *Id.*

[213] This case illustrates the potentially dramatic differences: in 1998 the financial performance of the overall industry was 2.6 per cent operating profit, but the performance of the merchant market was only 0.6 per cent operating profit. *USITC Final Injury Determination*, at C-4, C-6 (**Exh. JP-14**).

(d) The captive production provision violates the requirement of Article 3.5 to establish a causal connection between the effects of dumping and the industry as a whole

236. Article 3.5 provides that "it *must* be demonstrated that the dumped imports are, through the effects of dumping . . . *causing injury* within the meaning of this Agreement . . . based on an examination of *all* relevant evidence before the authorities." (Emphasis added.) In light of footnote 9 and Article 4.1, Article 3.5 requires an authority to demonstrate causation between imports and injury to domestic producers as a whole of the like product, not merely an industry segment.[214] Yet the captive production provision forces USITC largely to ignore the attenuated nature of competition in the captive market.

237. Prior to the captive production provision's enactment, USITC generally recognized this logic. In the 1993 flat-rolled steel products case, the petitioners argued that USITC should exclude captive production from its injury analysis, because it does not compete directly with imports.[215] USITC not only rejected this argument, but found with respect to captively consumed hot-rolled steel that "two-thirds of the production in this industry is shielded to a large extent from any potential adverse effects of subsidized and {less than fair value} imports."216 USITC concluded, "{t}he cumulated imports thus had little or no effect on the largest portion of the hot-rolled steel industry's production.[217] USITC applied this same logic to captive production in numerous other cases prior to the enactment of the captive production provision.[218]

238. The subsequent captive production provision — created largely in response to the negative injury determinations in the 1993 flat-rolled steel case — has essentially inverted the USITC's traditional analysis of captive production. Under the provision, USITC now must ignore the shielding effect of captive production, and focus instead on the "injury" to that portion of the domestic industry serving the merchant market. Nowhere does the provision require or even allow the USITC to relate the merchant market back to the industry as a whole. Indeed, the use of "primarily focus" prevents the USITC from stepping back to put its findings in broader context.

239. The captive production provision thus makes it impossible for USITC to consider fully "all relevant evidence before the authorities" as Article 3.5 requires. When the provision applies, and USITC must focus primarily on the merchant market, the ramifications of captive production on injury and causation are marginalized. In particular, USITC could not possibly focus primarily on the merchant market, and simultaneously find that substantial captive production has largely shielded an industry from import competition — these two findings cannot be logically reconciled. Yet this is precisely the sort of " relevant evidence" that proved pivotal for the negative determinations in the 1993 flat-rolled case.[219] Hence, the captive production provision is facially inconsistent with Article 3.5.

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[214] Although this specific provision has not been addressed by prior Panels, the analogy to Article 3.4 is quite close. When read in context, Article 3.5 requires the same focus on the industry as a whole that Article 3.4 requires.

[215] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664 at 22 (**Exh. JP-59**).

[216] *Id.* at 21 (**Exh. JP-59**)

[217] *Id.* at 53 (**Exh. JP-59**).

[218] *See Fresh Garlic From the People's Republic of China*, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-4 n. 67 (Nov. 1994); *Stainless Steel Wire Rod From Brazil and France*, Inv. Nos. 731-TA-636 and 637 (Final), USITC Pub. 2721 at I-10 to I-11 (Jan. 1994); *Stainless Steel Wire Rod from India*, Inv. No. 731-TA-338 (Final), USITC Pub. 2704 at I-10 to I-11 (Nov. 1993); *DRAMs of One Megabyte and Above From the Republic of Korea*, Inv. No. 731-TA-472 (Final), USITC Pub. 2629 at 29-30 n. 109 (Jun. 1991); *Silicon Metal From the People's Republic of China*, Inv. No. 731-TA-556 (Final), USITC Pub. 2385 at 10-11 (May 1993). Excerpts of these determinations are provided in **Exh. JP-62**.

[219] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664 at 53 (**Exh. JP-59**).

(e) The captive production provision violates the Article 3.6 requirement to analyze the effect of imports on all domestic production

240. Article 3.6 provides that "the effect of the dumped imports shall be assessed in relation to the *domestic production of the like product* when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits." (Emphasis added.) The word "production" explicitly focuses attention on the output of the domestic industry and not sales to various segments or subsegments. This is consistent throughout Article 3. Moreover, it is an accepted principle of treaty interpretation that language is to be interpreted consistently throughout a treaty.[220] Therefore, "domestic production of the like product" cannot mean a portion of domestic production of the like product without being inconsistent with the virtually identical definition of domestic industry in Article 4.1.

241. Accordingly, Article 3.6 can only be understood to require an authority to consider the effect of dumped imports in relation to domestic production *as a whole* of the like product. The Panel in *Mexico—High Fructose Corn Syrup* confirmed this interpretation in its consideration of Article 3.6. The Mexican authorities had justified their analysis of the industrial segment to the exclusion of the consumer segment on grounds that Article 3.6 permits an authority to focus its analysis on the industry segment that competes directly with imports, when separate data permits the identification of such a segment.[221] The Panel rejected Mexico's argument, holding that "Article 3.6 does not, on its face, allow the determination of injury or threat of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, rather than on the basis of the industry as a whole." Rather, the provision only permits an authority to consider production of a broader product group that includes the domestic like product, when information on production of the like product is unavailable.[222]

242. The captive production provision is facially inconsistent with Article 3.6, because it requires USITC to focus its assessment of the two most important indices of the effect of dumped imports — market share and financial performance — on the merchant market segment of the domestic industry, rather than domestic producers as a whole. USITC cannot assess the effect of dumped imports in relation to all domestic production of the like product, as Article 3.6 requires, and focus primarily on the merchant market, as the captive production provision requires.

(f) The captive production provision violates the Article 3.1 requirement that injury determinations be based on an "objective examination"

243. When USITC focuses primarily on the merchant market, its examination of factors is not "objective" as required by Article 3.1. An examination of these factors can only be objective if performed for the industry as a whole. Limitation of the analysis to the merchant market by definition skews the analysis unobjectively toward the merchant market which inevitably makes an affirmative determination more likely.

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[220] Vienna Convention on the Law of Treaties, art. 31, done at Vienna, 23 May 1969, 1155 U.N.T.S.; (1969) 8 *International Legal Materials* 679 ("Vienna Convention"); *see, e.g., Turkey—Restrictions on Imports of Textile and Clothing Products,* adopted on 31 May 1999, WT/DS34/R, at para. 9.125 ("The same terms being used in paragraphs 5(a) and 5(b) should not lead to different interpretations.").

[221] *See Mexico—High Fructose Corn Syrup,* at para. 7.156. Because the authority possessed separate data on the industrial segment of the Mexican sugar industry, and had determined that imports only competed with the industrial segment, it limited its analysis to the industrial segment. *Id.*

[222] *Id.* para. 7.157. In fact, the mandate for a narrow exception just confirms the importance of the basic principle: focus on all domestic production of the like product whenever possible.

3. USITC applied the captive production provision in this case inconsistently with Articles 3 and 4 of the Anti-Dumping Agreement

(a) Summary of the facts: Application of the captive production provision in the hot-rolled steel case

244. In the hot-rolled steel investigation, three commissioners found that the necessary conditions existed requiring application of the captive production provision. These commissioners therefore focused primarily on the merchant market when performing their analysis of the relevant factors for determining injury, particularly in their assessment of market share and factors affecting financial performance.[223] Under US law, if three commissioners find current injury, this is sufficient for an affirmative determination.[224] Three other commissioners found that the provision did not apply, but one of these commissioners nevertheless considered the same merchant market data in parallel with data on the industry as a whole.[225]

(b) The WTO-inconsistent captive production provision decisively influenced the USITC determination in the hot-rolled steel case

245. USITC's application of the captive production provision confirms the provision's flawed analytic approach and its influence on USITC deliberations. Fundamentally, the commissioners could not have considered, either primarily or secondarily, data for the merchant market in this case without distorting their judgment. The fact that data for domestic producers as a whole was contained in the staff report, and even mentioned by the USITC in its decision, in no way mitigates these distortions. Without the captive production provision, USITC would have considered:

- import penetration that never exceeded single digits;
- consistent operating profits throughout the period; and
- financial performance in 1998 that was *better* than the performance in 1996 before the increase in imports.

246. With the captive production provision, and the impermissible focus on the merchant market, the economic picture changes completely:

- import penetration increases to 21 per cent of the market;
- operating profits in 1998 drop to break-even levels; and
- operating profits plunge precisely when the imports surge.

The two dramatically different and irreconcilable versions of economic reality demonstrate precisely why the Anti-Dumping Agreement requires a focus on the domestic industry overall, and not sub-segments. Articles 3 and 4 create various specific requirements that govern how authorities should frame the facts they consider.

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[223] *USITC Final Injury Determination*, USITC Pub. 3202 at 35 (Vice Chairman Miller and Commissioners Hillman and Koplan) (**Exh. JP-14**).

[224] 19 U.S.C. § 1677(11) (**Exh. JP-4**). This provision on tie votes has been upheld by the courts. *See United States Steel Group v. United States*, 96 F.3d 1352, 1365-1367 (Fed. Cir. 1996); *MBL Corp. v. United States*, 787 F. Supp. 202, 205-208 (Ct. Int'l Trade 1992) Excerpts of these cases are provided in **Exh. JP-63**.

[225] *USITC Final Injury Determination* at 29 (Chairman Bragg) (**Exh. JP-14**). Commissioner Crawford considered only the industry as a whole. *Id.* at 29, n. 21 (**Exh. JP-14**). Commissioner Askey also noted that she did not consider any merchant market data. *Id*. at 29, n. 23 (**Exh. JP-14**).

247. The impact of the captive production provision on USITC's determination of facts, and its analysis of those facts, can be further illuminated in two ways. First, a comparison of the 1993 and 1999 hot-rolled steel anti-dumping cases demonstrates that the captive production provision enabled USITC to find present material injury despite the fact the domestic industry as a whole was healthier in 1999 than in 1993 when USITC rendered a negative determination. Second, Commissioner Askey's dissent confirms that a finding of present material injury would have been factually and logically impossible had the USITC focused on the industry as a whole and recognized the shielding effect of captive production.

(1) A comparison of the 1993 and 1999 hot-rolled anti-dumping cases demonstrates the significant impact of the captive production provision

248. Prior to adoption of the captive production provision, USITC properly viewed captive production as shielding domestic producers from import competition, making injury from subject imports less likely. Largely on this basis, USITC rendered a negative determination in the 1993 hot-rolled steel case, notwithstanding the fact that the industry's operating performance over the period of investigation was much worse than the industry's operating performance in the most recent hot-rolled steel case. For example, overall industry capacity declined two per cent over the 1990-1992 period, but increased nine per cent over the 1996-1998 period. Overall industry shipments declined 1.4 million short tons over the 1990-1992 period, but increased 500,000 short tons over the 1996-1998 period. Capacity utilization of 87.5 per cent in 1998 was significantly higher than 80.4 per cent in 1992. Overall industry operating margins declined from a meagre 0.3 per cent operating profit to an even more serious 10 per cent loss over the 1990-1992 period, but increased from 2.0 per cent to 2.6 per cent operating profit in the 1996-1998 period.[226]

249. Petitioners in the 1993 case argued that USITC should concentrate its analysis on the merchant market, but these arguments were rejected. USITC provided a break-out of the sales quantity and value of captive production, but did not calculate market share or financial data for the merchant market alone in its actual decision. To have done so would have been fundamentally inconsistent with its finding that "two-thirds of the production in this industry is shielded to a large extent from any potential adverse effects of subsidized and LTFV imports.[227]

250. In this case, however, four of the six Commissioners abandoned the traditional approach epitomized by the 1993 case, ignoring captive consumption as an important condition of competition, and instead emphasizing merchant market data to varying degrees. The three Commissioners applying the captive production provision primarily focused their analysis on the merchant market[228], and a fourth Commissioner who found the provision inapplicable nevertheless considered the same merchant market data in parallel with data on the industry as a whole.[229] The captive production provision fundamentally distorted the analytic approach even for this Commissioner who professed to

[226] *Compare 1993 Flat-Rolled Steel Case,* USITC Pub. 2664 at 22-23, I-51 (**Exh. JP-59**) *with USITC Final Injury Determination,* USITC Pub. 3202 at 17, III-6, and VI-6 (**Exh. JP-14**).

[227] *1993 Flat-Rolled Steel Case,* USITC Pub. 2664 at 21 (**Exh. JP-59**).

[228] *USITC Final Injury Determination,* USITC Pub. 3202 at 35 (Views of Vice Chairman Miller, Commissioner Hillman, and Commissioner Koplan concerning captive production: "Because we have found the captive production provision to apply in this case, we have focused primarily on the merchant market in assessing market share and the factors affecting financial performance.") (**Exh. JP-14**).

[229] *Id.* at 29 (Views of Chairman Bragg, Commissioner Crawford, and Commissioner Askey regarding the captive production provision: "{Though the captive production provision does not apply,} we have examined data both for the domestic industry as a whole and for merchant market operations for purposes of our determination.") (**Exh. JP-14**). Commissioner Crawford and Commissioner Askey dissented from this portion of the opinion. *Id.* at 29, n. 21 and n. 23 (**Exh. JP-14**).

be looking at the industry as a whole, but who refused even to acknowledge the shielding effect of captive consumption.[230]

(2) Commissioner Askey's dissent further demonstrates that the captive production provision fundamentally distorted the analysis of the majority

251. Commissioner Askey declined to focus on merchant market data because the captive production provision did not apply.[231] She noted in her dissenting views that captive production shielded the domestic industry from import competition.[232] Commissioner Askey's recognition of this economic reality led inexorably to her negative determination on present material injury.[233]

252. First, she found that the increase in import volume was not significant relative to the size of the US market.[234] Second, she found that average unit values did not decline significantly[235], and that sales and production for the industry overall increased over the full period.[236] Third, she found that industry financial performance was positive, though fluctuating, over the period; significantly, 1998 performance exceeded 1996 performance.[237] Finally, captive production shielded nearly two-thirds of the industry from import competition. Therefore, if the four other Commissioners had considered domestic producers as a whole, it would have had a significant impact on their analysis and should have led to a different conclusion.[238]

(c) The specific determination downplaying or ignoring the domestic industry as a whole violates Articles 3 and 4 of the Anti-Dumping Agreement

253. USITC's application of the captive production provision violated Articles 3 and 4 in two ways. First, USITC inappropriately focused its analysis on a market segment, rather than the

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[230] *Id.* at 9-11 (factor not mentioned in conditions of competition), 29 (factor not mentioned in main text of views of Chairman Bragg, Commissioner Crawford and Commissioner Askey regarding the captive production provision) (**Exh. JP-14**).

[231] *Id.* at 29 n.23 ("Commissioner Askey believes it is inappropriate to focus on the merchant market if the captive production provision does not apply.") (**Exh. JP-14**).

[232] *Id.* at 51 ("I note that significant captive consumption effectively protects the domestic industry by providing integrated producers with a guaranteed market in which they do not compete with imports or with non-affiliated domestic producers." (**Exh. JP-14**)).

[233] Commissioner Askey did find the existence of a threat to the domestic industry as a whole. *Id*. at 51-52 (**Exh. JP-14**). Commissioner Crawford applies a unique analysis framework that differs from that of the other Commissioners. *See id.* at 39 (**Exh. JP-14**). She finds injury whenever the domestic industry would have been better off without unfairly trade imports.

[234] Import penetration was only from 9.3 per cent, including domestic producers as a whole but was significantly inflated, to 21.0 per cent in the merchant market. *Id.* at 49-50, C-5 (**Exh. JP-14**).

[235] *Id.* at 50 (**Exh. JP-14**).

[236] *Id.* at 51 (**Exh. JP-14**).

[237] USITC's focus on the merchant market yielded an even steeper decline in industry financial performance: 1998 operating profit margins were 2.6 per cent for the industry as a whole, but only 0.6 per cent for the merchant market. *Id.* at 18, 51 (**Exh. JP-14**). An operating profit margin of 2.6 per cent is respectable for a mature industry like steel. The USITC has rendered negative determinations in several investigations concerning steel products in which the domestic industry's operating margin was less than 2.6 per cent in the final full year of the period of investigation, including *Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Ins. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000) at VI-6 (1.5 per cent); *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*, Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194 at VI-2 (May 1999) (2.4 per cent); and *Certain Carbon Steel Butt-Weld Pipe Fittings From France, India, Israel, Malaysia, Korea, Thailand, the United Kingdom, and Venezuela*, Inv. Nos. 701-TA-360-361 (Final) 731-TA 688-695 (Final), USITC Pub. 2870 (Apr. 1995) at II-30 (-0.3 per cent).

[238] While Commissioner Askey did make an affirmative threat determination, the five Commissioners finding material injury did not consider threat.

domestic industry as a whole. The definition of domestic industry in Article 4.1 requires analysis to be focused on "domestic producers as a whole of the like products." Consequently, the USITC did not make an objective examination as required by Article 3.1. USITC's focus on the merchant market import penetration figure violates Article 3.2, which requires import penetration to be measured relative to all production and all consumption. USITC's focus on the merchant market segment's higher import penetration, and weaker financial performance, violates Article 3.4, which requires an examination of these very factors bearing on the state of domestic producers as a whole. Because its affirmative material injury determination was predicated on the industry's financial performance in the merchant market, USITC violated Article 3.5, which requires a finding of injury to be based on domestic producers as a whole. Finally, USITC's focus on the effects of dumped imports on the merchant market segment violates Article 3.6, which requires that these effects be assessed with respect to domestic producers as a whole.

254. Second, USITC failed to consider key relevant factors relating to captive production in its analysis of causation and injury. The skewed analytic framework applied by USITC also violates Article 3 in that key aspects of a proper assessment of causation were ignored or marginalized. Foremost, USITC overlooked the fact that captive production is insulated from import competition, even though this condition of competition was pivotal in the 1993 case, and was reaffirmed in the recent cold-rolled steel case.[239] USITC also ignored the fact that domestic producers had increased their captive consumption of hot-rolled steel to realize the higher profit margins on downstream products relative to merchant market sales. By committing more of their production to captive production, the domestic mills created room in the market for imports of hot-rolled product.[240] Finally, USITC failed to conduct an objective examination of the impact of imports on the domestic industry's overall operations, according undue importance to the merchant market segment.

255. USITC's non-consideration of these various factors relating to captive production violates Articles 3.4, 3.5, and 3.6. USITC failed to evaluate "all relevant economic factors bearing on the domestic industry," as required by Article 3.4. The benefits accorded to the hot-rolled steel industry by captive production is a relevant economic factor USITC failed to evaluate. USITC did not demonstrate a "causal relationship between dumped imports and injury" with "an examination of all relevant evidence before the authorities," as required by Article 3.5. Again, the benefits of captive production constitute relevant evidence ignored by USITC. Finally, USITC did not assess "the effect of the dumped imports . . . in relation to the domestic production of the like product," as required by Article 3.6. It failed to consider that the effect of imports is different on captive production, which accounts for nearly two-thirds of the hot-rolled steel industry.

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[239] It is worth noting here USITC's inconsistent treatment of captive domestic production and captive imports in the hot-rolled steel case. Although four of the six commissioners chose to focus their analysis of the domestic industry to the merchant market, none of the commissioners sought to similarly limit imports that were captively consumed by affiliated importers. *USITC Final Injury Determination*, USITC Pub. 3202 at IV-11-12 (**Exh. JP-14**). Such imports are no different from captive production: they are shielded from competition in the merchant market. Yet, USITC never sought to reconcile their differential treatment. As a result, in the analysis of import penetration, while the denominator was deflated by application of the captive production provision, the numerator was inconsistently inflated by inclusion of captive imports. The irony in this is particularly stark with respect to CSI's imports of KSC product: the non-arm's length nature of these sales due to their exchange between affiliated parties was the very reason why USDOC applied adverse facts available in calculating KSC's dumping margin.

[240] *USITC Final Injury Determination*, USITC Pub. 3202, at 25-30 (views of Chairman Bragg and Commissioners Crawford and Askey), 31-35 (views of Vice Chairman Miller and Commissioners Hillman and Koplan) (**Exh. JP-14**). The USITC ignored data presented in the staff report, which shows an increase from 1996 to 1998 of US producers' internal transfers of hot-rolled steel. *See id* at III-6 to -7 (**Exh. JP-14**).

4. The captive production provision violates Article XVI:4 of the WTO Agreement

256. In 1994, when it should have been bringing its law into compliance with the new Uruguay Round, the United States yielded to intense political pressure and created an inconsistency with its obligations under the Anti-Dumping Agreement and the WTO Agreement. In place of the old statute that properly confined itself to the industry as a whole, the new US statute mandated an analytic approach to focus primarily on a narrow industry segment in a way that ignored the plain meaning of Articles 3 and Article 4 of the Anti-Dumping Agreement. This new statute thus created an additional violation of Article XVI:4 of the WTO Agreement.

B. USITC'S FINDING OF INJURY AND CAUSATION IS INCONSISTENT WITH ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

257. In addition to its application of the WTO-illegal captive production provision, USITC also ignored a host of important factors in its effort to find injury and causation in the hot-rolled steel case. These omissions also violate Article 3 of the Anti-Dumping Agreement, which contains strict disciplines governing the analysis of causation.

1. The requirements of Articles 3.1, 3.4, and 3.5.

258. Article 3.1 sets forth the overall structure of an authority's injury analysis:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

259.. Article 3.4 establishes specific requirements regarding the examination of factor (b) in Article 3.1. It requires an authority to examine "all relevant economic factors and indices," including (but not limited to):

> actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

The Panel in *Mexico—High Fructose Corn Syrup* recently confirmed that Article 3.4 requires an authority both to consider and make apparent in the written determination its consideration of the factors listed in Article 3.4.[241]

260. Article 3.5 requires authorities to demonstrate causation "based on all the relevant evidence before the authorities." It goes on to say:

> The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and injuries caused by these other factors must not be attributed to the dumped imports.[242]

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[241] *Mexico—High Fructose Corn Syrup*, at 7.128.

[242] This represents a significant strengthening of the Tokyo Round Anti-Dumping Code's causation standard. Article 3.4 of the Code merely observed that "{t}here may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports." BISD 26S/171 at 174 (Mar. 1980) (footnote omitted). USTR has recognized that the Anti-Dumping Agreement

It also provides a non-exhaustive list of relevant factors:

> the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

2. USITC failed properly to consider relevant data

261. USITC's final injury determination fails to comply with the Anti-Dumping Agreement's strengthened causation disciplines, and departs from USITC's own traditional approach to establishing causation. Specifically, USITC focused on data for only two years of its three-year period of investigation and ignored or marginalized alternative causes of injury, including non-subject imports, contractions in demand, and technological developments. As demonstrated below, these actions violate Articles 3.1, 3.4, and 3.5 of the Anti-Dumping Agreement.

(a) USITC improperly diverged from its practice of analyzing industry trends over three years, in violation of Articles 3.1, 3.4, and 3.5

262. USITC's normal practice is to examine imports, prices, and US industry performance over a three-year period. This practice is consistent with the recently adopted Recommendation of the WTO Committee on Anti-Dumping Practices, which declared:

> the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation . . . .[243]

This recommendation makes sense. Trends are only apparent when three or more annual data sets are available. With only two annual data sets, one cannot know whether a high level for the first year is anomalous or not.

263. If applied in the hot-rolled steel case, a three-year analysis revealed that virtually all the major domestic industry performance indices improved. Between 1996 and 1998, total industry shipments increased from 63.6 million tons to 64.0 million tons; operating income increased from $430.8 million to $560.5 million, and operating margins increased from 2.0 per cent to 2.6 per cent.[244] Such facts would typically demonstrate an absence of material injury by reason imports.

264. USITC, however, eschewed its traditional three year analysis, and instead compared 1998 with 1997. In this case, however, the 1997 baseline for the USITC's two-year trend analysis happened to be the best year the industry had experienced in a decade, with shipments peaking at 64.5 million tons, operating income at $1.25 million, and operating margins at 5.5 per cent.[245] A

"strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry." *See* Office of the US Trade Representative web site, <www.ustr.gov>(visited 19 Feb. 1996) (**Exh. JP-64**).

[243] Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, adopted by the Committee on 5 May 2000, G/ADP/6, at para. 1(c) (16 May 2000). The United States does not, and cannot, claim that the Japanese respondents had been in operation for less than three years, the only authorized exception to consideration of three years of data.

[244] *USITC Final Injury Determination*, USITC Pub. 3202 at III-6, VI-6 (**Exh. JP-14**).

[245] *Id.* (Exh. JP-14).

comparison of this record-breaking year to the following year virtually guaranteed an affirmative determination.[246]

265. The investigation of hot-rolled steel from Japan was unique. Of the 133 final injury determinations issued from January 1990 to June 1999, this was the only case in which the first year of the period was ignored.[247] In fact, USITC had previously refused to examine a two-year period alone. In *Elastic Rubber Tape From India*, the USITC found that a comparison of 1998 with 1997 would be less appropriate than a comparison of 1998 with 1996, because industry performance in 1997 was unusually strong, bolstered by an unanticipated high volume of orders.[248] In *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*, USITC found that although industry performance declined between 1997 and 1998, certain industry indices improved between 1996 and 1998, concluding that industry performance had been "steady" while subject imports increased.[249] In *Certain Carbon Steel Plate From China, Russia, South Africa, and Ukraine*, USITC rendered a negative present material injury determination after finding that the industry's performance had improved from 1994 to 1996, although its performance had declined between its peak in 1995 and 1996.[250] Each of these cases illustrates the traditional analytic approach used by USITC, an approach ignored in the hot-rolled steel case.

266. The lone commissioner — Commissioner Askey — who applied USITC 's traditional three-year analysis reached a dramatically different conclusion from her colleagues. Commissioner Askey found that when domestic producers as a whole are considered over a three year period, together with alternative sources of declining industry performance, there could be no finding of material injury by reason of imports. She found that most industry indicators, including production, shipments, and profitability, improved between 1996 and 1998, if not between 1997 and 1998. She acknowledged that most indicators peaked in 1997, but properly followed USITC practice and predicated her determination on the entire period of investigation rather than focusing on 1997 and 1998 like the other commissioners.[251]

267. In manipulating its traditional three year period of investigation, USITC violated Article 3.1 by failing to predicate its material injury determination upon "positive evidence" and an "objective examination." USITC's analysis departed from its long-standing practice of examining trends over a three year period. In other cases, USITC has relied explicitly on the disconnect between trends in import levels and trends in operating performance to find the absence of causation. Commissioner Askey's dissent makes clear that when the traditional three-year period is considered, the domestic industry's performance improved while subject imports increased, making an affirmative material injury determination inappropriate. USITC's decision to ignore logic and prior practice cannot represent an "objective" examination of injury and causation, as required by Article 3.1.

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[246] USITC tried to justify its analysis by explaining that consumption had increased to record levels from 1996 and 1997 and from 1997 to 1998, such that industry performance should have improved between 1997 and 1998. *Id*. at 18 (**Exh. JP-14**). This explanation only underscores USITC's failure to adequately analyze the other market factors depressing industry performance in 1998, as discussed below.

[247] There was one other case among these 133 in which the final two years constituted the primary basis for the affirmative determination. *Fresh Garlic From the People's Republic of China*, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-27 (Nov. 1994). But, in that case, the USITC noted that the domestic industry had been experiencing declines in profitability throughout the period examined. *Id.* A summary of the final determinations from January 1990 - June 1999 is attached as **Exh. JP-65**.

[248] *Elastic Rubber Tape From India*, Inv. No. 731-TA-805 (Final), USITC Pub. 3200 (June 1999) at 14.

[249] *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*, Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194 (May 1999) at 16-17.

[250] *Certain Carbon Steel Plate From China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), USITC Pub. 3076 (Dec. 1997) at 22 (rendering an affirmative determination on threat).

[251] *USITC Final Injury Determination*, USITC Pub. 3202. at 51-52 ("Certainly the industry's financial indicators were worse in 1998 than they had been in 1997, but in 1998 the industry remained profitable, and its profitability generally exceeded 1996 levels.") (**Exh. JP-14**).

268. In addition, USITC's conduct violated Article 3.4. In *Mexico—High Fructose Corn Syrup,* the Panel found that "consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative . . . Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority."[252] Here, USITC failed both to consider and to make "apparent" its consideration of the Article 3.4 factors for the first year of the period. USITC's incomplete consideration of these factors violated Article 3.4.

269. USITC's determination was also inconsistent with Article 3.5. In *Argentina—Footwear* , the EC had argued that Argentina improperly limited its analysis to a comparison of the first and last year of its five year period of investigation, and ignored intervening trends, to support its finding of serious injury.[253] The Panel agreed, holding that "the *relationship* between the movements in imports (volume and market share) and the movements in injury factors . . . must be central to a causation analysis and determination."[254] Argentina's comparison of two years, without consideration of other years over the period of investigation, was inappropriate, because it did not permit an adequate comparison of import and injury trends. This failure to conduct a proper causation analysis violates Article 3.5.

270. By mistreating the record evidence, USITC failed to (i) conduct an "objective examination" of the "positive evidence," as required by Article 3.1; (ii) properly consider and make apparent its consideration of the factors required by Article 3.4; and (iii) demonstrate causation as required by Article 3.5.

(b) USITC inadequately analyzed other alternative causes of injury, effectively attributing their impact to subject imports, in violation of Article 3.5

271. USITC's disregard of the domestic industry's improved performance between 1996 and 1998 was but one of an array of omissions. Among the alternative sources of injury ignored or slighted were non-subject imports, the prolonged strike at General Motors, (the largest steel consumer in the United States), greatly increased capacity and production by low-cost mini-mills, and faltering demand for pipe and tube due to collapsing oil prices. When it addressed these factors at all, USITC made no effort to distinguish carefully between their impact and the impact of subject imports.

272. Article 3.5 requires consideration of "the volume *and prices* of imports not sold at dumping prices" (emphasis added). USITC made no effort to consider the price effects of non-subject imports. Instead, it only collected information on the volume of non-subject imports, and used this volume in addition to the subject import volume and domestic industry volumes to calculate market shares. Furthermore, USITC refused to disaggregate non-subject import sources, a necessary step in considering their volume and price effects.[255]

273. Article 3.5 of the Anti-Dumping Agreement also requires that authorities analyzing causation do more than merely mention relevant issues. The authority must reconcile the facts and arguments

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[252] *Mexico—High Fructose Corn Syrup,* at para. 7.128.

[253] *Argentina Footwear*, at para. 8.230. The causation requirement under the Safeguards Agreement Article 4.2 is analogous to the causation requirement under the Anti-Dumping Agreement Article 3.5, though somewhat stricter. Article 4.2 of the Safeguards Agreement provides, in relevant part: "the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry . . . {a serious injury or threat finding} shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports . . . and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

[254] *Id.* para. 8.237 (emphasis in original).

[255] *USITC Final Injury Determination*, USITC Pub. 3202 at 10, 12-16, IV-11-14 (**Exh. JP-14**).

presented by the parties to the decision being made. USITC failed to do this with respect to several other sources of injury.

274. With regard to mini-mills, USITC merely asserted that most mini-mill capacity had been commissioned by 1997, while industry performance improved between 1996 and 1997.[256] This explanation ignores commercial reality. As demonstrated by respondents, the new mini-mill capacity commissioned in 1996 would not have impacted the market until 1998, as mini-mills typically require two years to "ramp-up," break-in their new equipment, and ship at full rated capacity.[257]

275. USITC also ignored the price depressing and suppressing effect of the dramatic increase in mini-mill capacity, resulting from both the tremendous expansion of US hot-rolled steel supply, and the lower cost structure of mini-mills (which permits lower prices).[258] This omission is especially glaring given the magnitude of the mini-mill capacity expansion: 17 million tons of new mini-mill capacity was commissioned during the period of investigation, according to public sources[259], equal to 78 per cent all domestic industry merchant market shipments in 1998.[260]

276. USITC conducted a similarly perfunctory analysis of the General Motors strike. The record showed that the strike left 685,000 tons of flat-rolled product normally produced for the car maker available for other sources. This dislocation of a significant quantity of product clearly impacted the price of hot-rolled steel. Of the 57 purchasers that completed questionnaires, 34 replied that they experienced price effects from the strike, with eleven of them saying that those effects were strong.[261] The data bore this out, as prices fell immediately following the strike.[262]

277. USITC concluded that the effects of the General Motors strike were "not large enough to explain the kind of price declines that occurred in 1998."[263] Yet, it made no effort to distinguish the effects of the General Motors strike from the effects of subject imports. Furthermore, it did not consider the impact of the General Motors strike in the proper context — the second half of 1998. An appropriate analysis would have compared the first half and second half of 1998 given that the strike, which started in June and ended in late July, primarily affected the second half of 1998. However, USITC minimized the impact of the strike by limiting its analysis to full years, comparing 1998 to 1997. This approach sharply contrasts with USITC's recognition that the price declines were most precipitous in the third and fourth quarters of 1998.[264]

278. Finally, USITC made no effort whatsoever to analyze the recession in the pipe and tube industry — the largest consumer of hot-rolled steel — caused by the collapse in oil prices. Not only did this argument figure prominently in the respondents' briefs[265], but USITC itself collected

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[256] *Id.* at 19 (**Exh. JP-14**).

[257] Respondents' USITC Prehearing Brief, at 96-98 (29 Apr. 1999) (excerpts in **Exh. JP-30**). Indeed, as respondents argued, start up problems meant that minimill capacity utilization in 1998 had hit only about 55 per cent. *Id*. (excerpts in **Exh. JP-30**).

[258] Indeed Commissioner Askey noted this point. She found that the decline in hot-rolled steel prices over the period was not clearly attributable to subject imports, given the rapid emergence of low-cost domestic mini-mill competition. *USITC Final Injury Determination,* USITC Pub. 3202 at 52 (**Exh. JP-14**).

[259] Respondents' USITC Prehearing Brief, at 85 (excerpts in **Exh. JP-30**).

[260] *USITC Final Injury Determination,* USITC Pub. 3202 at IV-12 (1998 merchant market shipments were 21.8 million short tons) (**Exh. JP-14**).

[261] *Id*. at II-4 (**Exh. JP-14**).

[262] *Id*. at 16 (**Exh. JP-14**).

[263] *Id*. (Exh. JP-14).

[264] *Id*. (Exh. JP-14).

[265] Respondents' USITC Prehearing Brief, at 126-28 (excerpts in **Exh. JP-30**).

disaggregated data on sales to pipe and tube manufacturers in anticipation of this issue.[266] Though clearly relevant[267], the pipe and tube industry's declining demand for hot-rolled steel was not mentioned once in USITC's determination.[268]

279. USITC's perfunctory — or outright lack of — consideration of alternative causes of injury to the domestic industry violates the explicit requirement in Article 3.5 that an authority examine "all relevant evidence" and "any known factors other than the dumped imports which at the same time are injuring the domestic industry."

280. The violations here are analogous to the violations found by the Panel in *Argentina—Footwear* . There, the EC alleged that Argentina had failed to consider adequately three alternative causes of injury to the footwear industry, and therefore wrongfully attributed their effects to imports.[269] The Panel agreed, finding that the Safeguards Agreement requires that "a sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any such injury caused by such other factors can be identified and properly attributed."[270] The Panel considered the extent to which each alternative cause had been considered by the Argentine authorities, and found that two of the three alternative causes had not been sufficiently considered.[271] The Appellate Body upheld the Panel's findings on this point.[272]

281. USITC likewise violated Article 3.5 of the Anti-Dumping Agreement, by failing to examine all relevant evidence, including known factors other than dumped imports that were injuring domestic producers at the same time. USITC conducted a perfunctory analysis of the impact of mini-mills and the General Motors strike on the industry, which was insufficient to properly attribute the injury resulting from them, as required by the Panel's approach in *Argentina—Footwear*. USITC completely ignored the impact of non-subject imports and the pipe and tube recession, though both alternative causes of injury were "known factors." USITC therefore failed to establish causation between subject imports and injury in the manner required by Article 3.5.

IX. THE UNITED STATES HAS VIOLATED ARTICLE X:3 OF GATT 1994 BECAUSE THE USDOC AND USITC INVESTIGATIONS WERE NOT CONDUCTED, AND THE DETERMINATIONS WERE NOT MADE, IN A UNIFORM, IMPARTIAL OR REASONABLE MANNER

282. The WTO regulates not only the substance of Members' anti-dumping regimes, but also their administration, demanding adherence to the fundamental international law principle of good faith. Article X:3(a) of GATT 1994 reflects this obligation, requiring a Member to "administer {its measures} in a uniform, impartial and reasonable manner."

283. The United States violated its Article X:3(a) obligation in the hot-rolled case as follows:

- USDOC took the unusual step of accelerating all aspects of the proceeding, despite the extraordinarily complicated nature of this case;

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[266] *See* USITC US Producers' Questionnaire, *Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808 (Final), at question II-21 (excerpts in **Exh. JP-66**). (This information was also relevant to USITC's consideration of the captive production provision.).

[267] *See Preston Pipe & Tube Report* (Nov. 1998) (excerpts in **Exh. JP-67**); *Preston Pipe & Tube Report* (Sept. 1998) (excerpts in **Exh. JP-67**).

[268] *See, e.g., USITC Final Injury Determination,* USITC Pub.3202 at 10-11 (conditions of competition) (**Exh. JP-14**).

[269] *Argentina—Footwear,* at para. 8.265.

[270] *Id.* para. 8.267.

[271] *Id.* paras. 8.268-74.

[272] *Argentina Safeguard Measures on Imports of Footwear*, 14 Dec. 1999, WT/DS121/AB/R, at paras. 140-47.

- During the proceeding, USDOC revised its policy regarding issuance of critical circumstance determinations and used the revised policy to take the unprecedented action of retroactively imposing provisional measures prior to making its preliminary determination of dumping;

- USDOC deviated from its regulations and prior practice, when it failed to correct immediately its own calculation error in NKK's preliminary dumping margin;

- While USDOC repeatedly resorted to adverse "facts available" in all instances where Japanese respondent companies made even the most minor, inadvertent mistake or submitted data that were verifiable but deemed untimely, USDOC and USITC took no adverse action against a petitioner and other US steel companies that refused to provide highly material information;

- USITC deviated from its prior practices by ignoring the US industry's financial performance early in the period of investigation and instead comparing the most recent year's performance with the previous year (the industry's most profitable year in recent history).

284. The pattern of the US anti-import bias is pervasive. Were there but a few isolated incidents, one might be willing to be tolerant. But the pattern of bias had a tremendous impact on this case. The US has therefore violated its obligations under Article X:3(a) to administer its law in a uniform, impartial, and reasonable manner.

A. THE OBLIGATIONS IMPOSED BY ARTICLE X:3(A) OF GATT 1994

285. Unlike most provisions of GATT 1994, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of GATT 1994 focuses on the administration of those laws, regulations, decisions and rulings.[273] Article X articulates the basic principles of what is widely known as due process or fundamental fairness.[274] According to Article X:3(a):

> 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. (Emphasis added.)[275]

286. The words "uniform," "impartial" and "reasonable" form the essence of the Article X:3(a) obligations.[276] They are to be interpreted "in good faith in accordance with the ordinary meaning to

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[273] The Appellate Body referenced this distinction in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, 9 Sept. 1997, WT/DS27/AB/R, at para. 200 ("Article X applies to the *administration* of laws, regulations, decisions and rulings." (emphasis in original)).

[274] The term "due process" has been used extensively in WTO dispute settlement proceedings. *See, e.g., India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 19 Dec. 1997, WT/DS50/AB/R, at para. 94; *United States—Tax Treatment For "Foreign Sales Corporations*," 8 Oct. 1999, WT/DS108/R, at para. 6.3.

[275] The GATT *Analytical Index* notes that Article X was based, in part, on the 1923 International Convention Relating to the Simplification of Customs Formalities and, in part, on US proposals. *See* 1 GATT, *Analytical Index: Guide to GATT Law and Practice 309* (6th ed., 1995). The 1923 Convention is printed in *30 League of Nations Treaty Series 373* **Exh. JP-68**). The due process obligation was set out at Article 1 of the Simplification Convention: "{t}he Contracting States … undertake that their commercial relations shall not be hindered by excessive, unnecessary or arbitrary Customs or other similar formalities."

[276] The *New Shorter Oxford Dictionary* defines these important terms as:

"impartial" — Not partial; not favouring one party or side more than another; unprejudiced, unbiased; fair.

"reasonable" — 1. Endowed with the faculty of reason, rational. 2. In accordance with reason; not irrational or absurd. 3. Proportionate. 4. Having sound judgment; ready to listen to reason, sensible. Also, not

be given to the terms of the treaty in the context of its object and purpose."[277] With respect to the administration of laws which Article X:3(a) governs, "impartial" ensures that authorities do not favor particular parties over others, "reasonable" is directed at the nature of the administration itself and ensures that authorities do not administer a law in an inappropriate manner, such as applying a penalty in a disproportionate manner, while "uniform" ensures that authorities do not administer laws in different ways under similar circumstances. Collectively, these obligations ensure due process.

287. The Appellate Body gave meaning to the due process standards set forth in Article X:3 in *US—Shrimp*, where it emphasized the standards of good faith as regards the obligations placed upon Members in other GATT 1994 articles:

> Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of treaty rights of other Members.[278]

288. Thus, the Appellate Body considers the standards contained in Article X:3 to represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process."

289. The Article X:3(a) due process rights may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit*. *Abus de droit* or abuse of law prohibits a state from engaging in an abusive exercise of its rights.[279]

290. This principle was recognized by the Appellate Body in the *US—Shrimp* case. "It noted that good faith" is a "general principle of law and a general principle of international law {that} controls the exercise of rights by states"[280] and that *abus de droit* is one application of this general principle.[281]

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asking for too much. 5. Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate.

"uniform" — "1. Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times, . . . 4. Of the same form, character, or kind as another or others; conforming to one standard, rule, or pattern; alike, similar."

[277] Vienna Convention, art. 31.1. Article 26 also establishes the concept of *pacta sunt servanda* stating "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." *Id.* The Vienna Convention governs the interpretation of the provisions of the WTO Agreements, including GATT 1994. *See* DSU Article 3.2; *see also* Anti-Dumping Agreement, Art 17.6 (i) (requiring Members' authorities to evaluate facts in "an unbiased and objective manner"); Art. 17.6(ii) (directing Panels interpreting the Agreement to use "customary rules of interpretation of public international law," *i.e.*, the Vienna Convention). Most recently, the Panel in *Korea—Measures Affecting Government Procurement* recognized the implicit development of Vienna Convention Article 26 *pacta sunt servanda* in respect of the GATT 1947 and the WTO Agreements. Circulated on 1 May 2000, WT/DS163/R, at para. 7.93.

[278] *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* 12 Oct. 1998, WT/DS8/AB/R, at para. 182 (emphasis in original) ("US—Shrimp").

[279] *See, e.g.*, Sir Robert Jennings, 1 *Oppenheim's International Law* 407 (9th ed. 1992) (an abuse of right occurs when a state avails itself of a right in an arbitrary manner) (**Exh. JP-74**).

[280] *US—Shrimp* , at para. 158; *see also United States—Tax Treatment for "Foreign Sales Corporations,"* 24 Feb. 2000, WT/DS108/AB/R, at para. 166; *United States—Standard for Reformulated and Conventional Gasoline,* 29 Apr. 1996, WT/DS2/AB/R, at 18. This principle is set out at Article 26 ("pacta sunt servanda") of the Vienna Convention, which requires states bound by treaties to perform them in good faith. Also, the principle is recognized by the International Court of Justice (*see, e.g., Lighthouse Case* (1934), France/Greece, S.O. by Sefriaders, A/B 62, at 47 (**Exh. JP-75**) and by US law (*see, e.g.*, U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement") (**Exh. JP-76**).

291. The *US—Shrimp* case is particularly applicable to the hot-rolled case. Similar to the circumstances in *US—Shrimp*, the US agencies administering the dumping statutes afforded favourable treatment to the domestic petitioners over the foreign respondents. As in *US—Shrimp*, when several parties are subject to the same set of supposedly neutral rules, it is of the utmost importance that there be a "rigorous compliance with the fundamental requirements of due process."[282]

292. In this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations.

293. These principles prove even more crucial when a particular law endows a national authority with discretion.[283] An exercise of discretion in good faith must include a consideration of the parties' interests. In this way, the concept of good faith imposes a duty upon Members to implement the provisions in a reasonable and equitable manner.

294. The US Government ignored this principle, and did not act in a reasonable and equitable manner in the hot-rolled case. The US Government essentially decided the case in the favor of the domestic industry before it even began its investigation. This bias surfaced repeatedly when the US Government manipulated the facts and adopted impermissible legal interpretations.

295. Having established the extent of the Article X:3(a) obligations, we turn now to the various ways in which the United States breached its obligations under that Article. As demonstrated below, in each case and as a totality, the Article X:3(a) violations committed by the United States were so egregious that they fundamentally compromised the ability of the Japanese companies to defend themselves in the US proceeding. Thus, apart from indicating a pattern of bias against the Japanese companies, the "procedural" violations took a substantive toll. This being the case, Japan asks the Panel not to view these claims as subsidiary complaints, but as independent claims.

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[281] As the Appellate Body concluded, "{a}n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the Treaty obligation of the Member so acting." *US—Shrimp*, at para. 158.

[282] *US—Shrimp*, at para. 182. The United States itself has confirmed that Article X applies when a Member administers a statute so as to favor one party over another. The United States recognized this applicability of Article X in its arguments in the 1984 *Japan Leather* case under the GATT 1947. *Panel on Japanese Measures on Imports of Leather*, L/5623, adopted 15/16 May 1984. There, the United States challenged Japan's administration of its import quota system as "unreasonable" under Article X:3(a). Specifically, the United States argued:

If a contracting party were to administer an import quota — even a GATT-legal one — by systematically and knowingly granting import licenses only to domestic producers of competing products who had every incentive not to import, this would clearly fall outside the scope of "reasonable" conduct under Article X:3.

Id. para. 28.

[283] The same leading treatise used by the Appellate Body in *US—Shrimp* explains, "wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused. . . . Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others." Cheng at 133. *B. Cheng, General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, p. 133.

B. USDOC'S AND USITC'S ACTIONS WERE NON-UNIFORM, PARTIAL AND UNREASONABLE

1. USDOC accelerated all aspects of the proceeding despite its extraordinarily complicated nature

296. At every stage of the proceeding, USDOC acted with unprecedented haste. USDOC initiated its investigation 15 October 1998, five days earlier than normal.[284] The speed of these ministerial acts was a precursor of what was to follow. Indeed, on 7 October 1998, a week before even initiating its investigation, USDOC Secretary Daley promised members of the Congressional Steel Caucus that he would order that the investigation be expedited.[285] He was true to his word. USDOC staff sent initial questionnaires to the respondent companies on 19 October 1998, only four days after initiation rather than thirty days thereafter as they normally do.[286]

297. This was just the beginning. As promised by Secretary Daley, USDOC rushed to issue its preliminary determination on 12 February 1999 – 120 days after initiating its investigation (135 days after receipt of the petition).[287] This is 25 days less than normal for even the simplest proceeding and 75 days less than normal for highly complex proceedings like the hot-rolled steel case – a 36 per cent reduction in the time available.[288]

298. This acceleration was unprecedented. Since the enactment of the Uruguay Round Agreement, the USDOC has never reached a preliminary determination in an anti-dumping investigation less than 120 days after initiation.[289] The unprecedented speed is further highlighted by the fact that prior to the issuance of the preliminary determinations in the hot-rolled investigations and since the effective date of the Uruguay Round Agreement, USDOC has extended the preliminary determination in 70 out

[284] *USDOC Initiation of Investigation*, 63 Fed. Reg. at 56613 (**Exh. JP-6**). In addition, the USITC initiated its investigation the day after the petition was filed. *See USITC Institution of Investigation*, 63 Fed. Reg. at 53926 (**Exh. JP-2**).

[285] After stating in September 1998 that "{w}e at the Department of Commerce will use every weapon at our disposal to ensure that our essential US industries, like steel are not jeopardized by foreign unfair trade practices," Secretary Daley vowed in early Oct. 1998 to "do whatever he can to expedite the {steel anti-dumping} cases." *See* "Commerce Signals Support for Steel Industry Demands in New Cases," *Inside US Trade* (9 Oct. 1998) (**Exh. JP-19**); Tsukasa Furukawa, "Steel's Trade Complaints Stir Reactions," *American Metal Market* (14 Sept. 1998) (**Exh. JP-20**).

[286] *See* **Exh. JP-69**, which summarizes the timing of questionnaires and responses in other US anti-dumping proceedings in 1998. The Section A Questionnaire is extensive, requesting information on the total quantity and value of subject sales, corporate structure and affiliations, product distribution, sales processes (including sales to affiliated companies), and accounting/financial practices, among other issues. *See* USDOC Standard Questionnaire for Antidumping Investigations (19 May 2000), <http://ia.ita.doc.gov/library.htm>. The Section B questionnaire requests a narrative description and computerized listing of all sales transactions for use in determining normal value, including data on product and customer identifiers, sale dates, quantities, prices, and price adjustments. *See id.* The Section C questionnaire requests the same information for US sales transactions for use in determining export price. *See id.* The Section D questionnaire requests cost of production and constructed value information for the subject merchandise. *See id.* The Section E questionnaire requests information about further manufacturing or assembly in the United States prior to delivery to unaffiliated US customers. *See id.*

[287] *USDOC Preliminary Dumping Determination*, 63 Fed. Reg. at 8299 (**Exh. JP-11**).

[288] Preliminary dumping determinations are normally due 140 days after USDOC initiates its investigation. *See* 19 U.S.C. § 1673b(b)(1) (**Exh. JP-4**). USDOC may extend its preliminary determination until no later than 190 days after initiation for extraordinarily complicated cases. *See* 19 U.S.C. § 1673b(c) (**Exh. JP-4**).

[289] *See* USDOC *AD and CVD Case History Tables 1980-1999: Investigations*, (last modified 31 Dec. 1999), <http://www.ita.doc.gov/import_admin/records/stats/case.list.txt> (**Exh. JP-24**). There are four situations where expedition is authorized and they are: (1) short life cycle merchandise (19 U.S.C. §§ 1673h(b)(4), 1673b(b)(1)(B)); (2) waiver of verification (19 U.S.C. § 1673b(b)(2)); (3) cases initiated after monitoring (19 U.S.C. § 1673a(a)(2); and (4) merchandise previously subject to an order (19 U.S.C. § 1673a(c)(1)(C)) (**Exh. JP-4**). None of these exceptions apply in this proceeding.

of 76 anti-dumping investigations in which the USDOC reached a preliminary determination.[290] Only one case involving multiple respondents did not receive an extension over the minimum 140 days.[291] This proceeding fit within the US statutory definition of "extraordinarily complicated" (by virtue of the number and complexity of the transactions and adjustments) and thus should have been extended under authority of 19 U.S.C. § 1673b(c)(1), rather than accelerated.[292]

299. These unprecedented accelerations are not "uniform." The rareness of previous accelerations, and concomitant prevalence of extensions in comparable proceedings, demonstrates the lack of uniformity. As evidenced by hundreds of prior cases, USDOC uniformly allows the maximum time under the statute to issue its preliminary dumping determination — not less than the full time allowed in this case. The accelerated schedule was not "impartial." Secretary Daley's pre-initiation commitment to the Congressional Steel Caucus in the context of the US industry's concerted lobbying efforts most clearly demonstrates this partiality. The accelerated schedule was not "reasonable." This proceeding was extraordinarily complicated, involving hundreds of thousands of pages of data from each of the responding companies. To demand all this, and to require that it all be perfect under penalty of hair-trigger application of "facts available," within significantly accelerated deadlines, is the epitome of unreasonable government action.

300. In fact, USDOC's expedited schedule resulted in the imposition of early, error-ridden provisional measures. NKK and NSC found clerical errors in USDOC's calculation of their preliminary dumping margins, inflating the margins by twelve and six percentage points, respectively.[293] Petitioners found three other errors that disfavoured NKK to a lesser degree.[294] USDOC's haste to issue its preliminary determination thereby resulted in collection of anti-dumping duty deposits at excessively and unjustifiably high rates.[295]

301. Thus, USDOC's actions to accelerate deadlines violate all three of the obligations of Article X:3. Moreover, they are stark violations of the fundamental international law principles that Article X:3 enshrines. They constitute a pattern of abusive exercise of rights and violation of the obligation of good faith administration of the anti-dumping remedy. Even if USDOC had the administrative discretion to accelerate certain deadlines, regardless of its invariable practice of not doing so, the significant acceleration of all deadlines in this highly politicized attack on steel imports tramples Japan's (and the exporting Japanese steel companies') international legal rights to a fair proceeding and thus Japan's international legal rights under Article X:3(a).

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[290] *See* USDOC *AD and CVD Case History Tables 1980-1999: Investigations*, (last modified 31 Dec. 1999), <http://www.ita.doc.gov/import_admin/records/stats/case.list.txt> (**Exh. JP-24**).

[291] *See id*. (**Exh. JP-24**); *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Collated Roofing Nails From the People's Republic of China*, 62 Fed. Reg. 25899 (12 May 1997); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Collated Roofing Nails From Korea*, 62 Fed. Reg. 25895 (12 May 1997); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Collated Roofing Nails From Taiwan*, 62 Fed. Reg. 25904 (12 May 1997).

[292] The US statute defines "extraordinarily complicated" in terms of "(I) the number and complexity of the transactions to be investigated or adjustments to be considered, (II) the novelty of the issues presented, or (III) the number of firms whose activities must be investigated." 19 U.S.C. § 1673b(c)(1)(B) (**Exh. JP-4**).

[293] NKK Letter to USDOC of 18 Feb. 1999 (setting forth clerical errors) (**Exh. JP-70**); NSC's Case Brief, at 49-54 (13 Apr. 1999) (describing the clerical error) (**Exh. JP-29**).

[294] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24369 (**Exh. JP-12**).

[295] *Compare id*. at 24370 (**Exh. JP-12**) *with USDOC Preliminary Dumping Determination*, 64 Fed. Reg. at 8299 (**Exh. JP-11**).

2. USDOC refused to follow its normal practice for correcting ministerial errors following preliminary determinations, thus subjecting NKK product to critical circumstances and requiring its importers to pay inflated and retroactive provisional measures

302. Shortly following the issuance of USDOC's preliminary dumping determination, NKK's counsel discovered a serious clerical error in the calculation of its dumping margin. This error inflated NKK's dumping margin by twelve percentage points. Given that NKK's published preliminary margin was 30.63 per cent, the error would not only reduce the margin by 40 per cent, but also eliminate the basis for USDOC's affirmative critical circumstances determination with regard to this respondent.

303. USDOC's regulations set forth procedures for correcting such clerical errors. Specifically, if an interested party informs USDOC of an error in a timely fashion (usually five days after release of disclosure documents), USDOC is instructed to issue a correction within 30 days of publication of its preliminary determination if the error is deemed "significant."[296] The regulations further define "significant" to include errors that result in a change of at least five percentage points.[297]

304. Upon finding the error in USDOC's preliminary determination, NKK followed USDOC's regulations and filed timely comments bringing the error to USDOC's attention.[298] Although the error NKK identified clearly met the standard under which USDOC would normally correct ministerial errors, USDOC declined to make the correction within the 30-day time period set forth in its own regulations. Instead, USDOC decided to make the change in the final determination.[299]

305. Such an unexplained departure from USDOC's established practice lacks the uniformity, impartiality, and reasonableness mandated by Article X:3(a). It was not uniform because it represented a departure from normal practice — a practice defined in USDOC's regulations. It was not impartial because it maintained a high margin that triggered critical circumstances, and therefore favoured the interests of petitioners at the expense of NKK and its customers. Finally, its was not reasonable: there was no sound reason for USDOC to ignore its own regulations. USDOC therefore failed to abide by its obligation under Article X:3(a) to apply its laws and regulations in a uniform, impartial and reasonable manner.

3. USDOC revised its policy on critical circumstances and then took the unprecedented action of ordering retroactive imposition of provisional measures prior to the preliminary dumping determination

306. On 8 October 1998, one week after it initiated the hot-rolled investigation, USDOC issued a "Policy Bulletin" announcing that it was "revising its critical circumstances practice." The new policy permitted USDOC to issue preliminary determinations of critical circumstances prior to preliminary determinations of dumping.[300]

307. Using this new policy, USDOC issued its preliminary determination of critical circumstances on 23 November 1998[301], eleven weeks before issuing its preliminary determination of dumping on 12 February 1999.[302] As discussed in the previous section presenting Japan's specific claim on the

[296] 19 C.F.R. 351,224 (e) (**Exh. JP-5**).
[297] 19 C.F.R. 351.224 (g) (**Exh. JP-5**).
[298] NKK Letter to USDOC of 18 Feb. 1999 (**Exh. JP-70**).
[299] Indeed, in the final determination, USDOC not only made the change, but applied it retroactively to thirty days following NKK's allegation. *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24368 (**Exh. JP-12)**. While this provided NKK with some vindication, it was largely meaningless given that the harmful effects of an erroneous preliminary critical circumstances determination had already served its purpose.
[300] *USDOC Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (**Exh. JP-3**).
[301] *USDOC Preliminary Determinations of Critical Circumstances*, 63 Fed. Reg. at 65751 (**Exh. JP-9**).
[302] *USDOC Preliminary Dumping Determination*, 63 Fed. Reg. at 8299 (**Exh. JP-11**).

critical circumstance determination, USDOC relied on the margin allegations in the petition (which, as was the case here, are always highly inflated). Its justification for doing so was "since we have not yet made a preliminary finding of dumping, the most reasonable source of information concerning knowledge of dumping is the petition itself."[303] This was a ludicrous attempt to fulfill the mandate in the newly issued Policy Bulletin that early issuance was permissible only where there was "adequate evidence of critical circumstances."[304] Petition allegations are not "adequate evidence."

308. USDOC's basis for imputing to importers knowledge that there was likely to be material injury by reason of the investigated imports is equally unsound. As detailed previously, USDOC ignored the findings of USITC that there was no present injury. Rejecting the findings of the agency statutorily mandated to determine whether the domestic industry was materially injured, USDOC imputed knowledge of injury on the basis of press reports that were speculative, did not refer to Japanese hot-rolled steel, and were not specific as to timing of a possible petition.

309. The timing of the release of the Policy Bulletin and the preliminary critical circumstances determination, and the substance of that determination, were inconsistent with the US obligation to administer its trade laws in a "uniform, impartial, and reasonable" manner under Article X:3(a). The timing was not "impartial." USDOC abruptly changed its practice in response to the loud and public demands of petitioners and their Congressional supporters for instant relief in this particular investigation.

310. The timing also was not "reasonable." The early determination of critical circumstances was made in a vacuum, before any facts were gathered about actual dumping. There was no legitimate purpose in issuing the finding early since, under its anti-dumping law, the US Government cannot collect retroactive duties until 90 days prior to the preliminary determination of dumping.[305] Rendering an early decision on critical circumstances served only the purpose of chilling further imports with no evidentiary support – a purpose that USDOC achieved in this instance, as reflected by the dramatic drop in US imports of Japanese hot-rolled steel after this determination was made.[306]

311. The substance of the decision was not "uniform." Unlike all previous cases, the period for measuring imports was not before and after the date of the petition or initiation. Instead, USDOC selected an arbitrary date months earlier by which, they claimed, importers "should have known" an investigation was likely. The standard is not transparent, but varies from case to case in an outcome-determinative manner.

312. On the question of injury, the early finding also was not "uniform" in that it did not conform to one standard, rule or pattern. USITC had already preliminarily found no present injury during the period USDOC chose to examine, but USDOC found injury during that period anyway. Two agencies of the US government thus rendered injury determinations that were inconsistent with one another and thus not "uniform."

313. Insofar as it was based solely on allegations in the petition, including petitioners' selected news articles, the decision was not "impartial" because it favoured one party or side. USDOC had not yet solicited or obtained information on actual dumping margins or shipments from the importers or Japanese producers. To assume the veracity of one party's allegations without giving other parties the opportunity to build a record cannot be deemed impartial.

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[303] *USDOC Preliminary Determinations of Critical Circumstances*, 63 Fed. Reg. at 65750 (**Exh. JP-9**).
[304] *USDOC Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (**Exh. JP-3**).
[305] 19 U.S.C. § 1673b(e)(2) (**Exh. JP-4**). *See also* Anti-Dumping Agreement Art. 10.6.
[306] USDOC, Import Statistics (**Exh. JP-71**).

314. For these reasons, the early issuance of the preliminary critical circumstance determination violates all three of the obligations of Article X:3 and also constitutes an abusive exercise of any administrative discretion that might have been provided by the Policy Bulletin.

4. While USDOC resorted to "facts available" in each instance where Japanese respondent companies made even the most minor, inadvertent mistake, USDOC and USITC took no adverse action when domestic companies refused to provide highly material information

315. As described in detail above, USDOC punished KSC for the failure of another interested party — petitioner CSI — to turn over resale and further manufacturing information regarding KSC's sales. Yet, when petitioner and interested party CSI refused to turn over its downstream product and price data, USDOC applied facts available less favourable to KSC rather than CSI. In this way, USDOC allowed CSI, as a petitioner in the investigation, to manipulate the system so as to inflate its adversary's margin. Application of its facts available provision in this manner is inconsistent with the requirement to administer all laws in an "impartial" manner under Article X:3(a).

316. Similarly, USDOC's choice of adverse facts available was a disproportionate penalty to apply to KSC under the circumstances, thereby contravening the Article X:3(a) requirement that administration of laws be "reasonable." KSC tried repeatedly to convince CSI to turn over its data, but CSI repeatedly refused. Despite KSC's efforts, USDOC chose the harshest penalty that it could find to apply to KSC — the second highest margin of any transaction for which there existed a dumping margin out of KSC's entire sales database. USDOC chose this harsh penalty despite the existence of several more proportionate and reasonable alternatives. Application of such a severe penalty bears no rational relationship to the factual circumstances surrounding the failure to provide the information.

317. USDOC's administration of its facts available and adverse inference provisions with respect to NSC and NKK also was "unreasonable."[307] This punishment is highly disproportionate to the good faith actions taken by NSC and NKK. First, this harsh penalty punished the respondents for failure to provide a minor piece of data that applied to only a handful of sales, despite the fact that both respondents substantially cooperated throughout the investigation and turned over complete data on all other (more important) issues. Second, both companies submitted acceptable data concerning the weight conversion factor prior to the time that USDOC came to Japan for verification; USDOC had the actual or estimated data in front of them, placed on the record by both companies and made open for verification. In short, for both NSC and NKK, USDOC could have verified and used the actual data. Therefore, USDOC's harsh penalties in the form of adverse facts available were "unreasonable" within the meaning of Article X:3(a).

318. When the punitive treatment of the three Japanese respondents is compared to the highly lenient treatment accorded the domestic petitioners, the US actions exhibit a fundamental inconsistency with Article X:3(a). The US Government applied its facts available provisions in very different ways during the proceeding depending upon whether the affected party was a domestic petitioner or a foreign respondent. As described above, USDOC punished all three respondents by applying facts available and adverse inferences in the harshest manner possible. In stark contrast, USDOC and USITC decided not to apply facts available at all to petitioners, let alone adverse inferences, under circumstances far more deserving of punishment.

[307] USDOC attributed to NKK's home market sales made on a theoretical weight basis, the highest normal value found for any other transaction of the same CONNUM (*i.e.*, product type). With respect to NSC, USDOC simply decided not to calculate an export price and instead attributed to those theoretical weight sales the highest margin found by CONNUM.

319. In the USITC's initial questionnaire, the domestic petitioners were instructed to report financial information for internally transferred products using a particular valuation methodology.[308] This information was readily available information which headquarters and sales staff at any of the domestic companies could have easily gathered. However, several petitioners refused to comply with USITC's request. Petitioners recognized that this data would be particularly important to determining the applicability of the captive production provision, a decisive element of the injury side of the hot-rolled case.

320. USITC staff admonished US producers in its Prehearing Staff Report for failing to respond properly to USITC's questions concerning internal transfers.[309] At the injury hearing, USITC Commissioners issued a harsh rebuke concerning the withholding of the requisite data by the petitioners.[310] After the hearing and nearly a month and a half after the producer questionnaire response deadlines, petitioners finally agreed to submit the requisite information. USITC accepted and utilized this untimely data, even though, since it was submitted after USITC's hearing, the responding Japanese companies had inadequate opportunity to review and challenge the data. USITC imposed no penalty on the domestic petitioners whatsoever.

321. When these facts are compared to USDOC's actions, as summarized below, the overall behaviour of the US Government, quite simply, can only be seen as favoring the domestic parties under a supposedly neutral statute.

Non-Uniform Treatment of Respondents and Petitioners		
Issue	USDOC vis-à-vis Respondents	USITC vis-à-vis Petitioners
Cooperation	Respondents cooperate throughout entirety of investigation. NSC and NKK report missing conversion factor in time for verification and as soon as they learn of their mistake/misunderstanding. KSC acts in good faith to convince adverse petitioner CSI to provide data.	Petitioners affirmatively refuse to disclose readily available information in their questionnaire responses until USITC's public rebuke. Revised questionnaires filed just before the USITC vote.
Withholding Information	No respondent withheld information. NSC and NKK make an honest mistake, but correct before verification. KSC never had physical possession of the information that petitioner CSI was actually withholding.	Petitioners affirmatively refuse to report data as requested until USITC 's public rebuke. Revised questionnaires filed just before the USITC vote.

[308] USITC US Producers' Questionnaire, *Certain Hot-Rolled Steel Products from Brazil, Japan, and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808 (Final), at 8 (excerpts in **Exh. JP-66**).

[309] *Certain Hot-Rolled Steel Products from Brazil, Japan, and Russia: Prehearing Report to the USITC of Investigations Nos. 701-TA-384 and 731-TA-806-808* (Final) at VI-7 (22 Apr. 1999) (excerpts in **Exh. JP-72**).

[310] *See* USITC Hearing Transcript, at 8-9, 65-68, 82-83, 176-177, 180, 274-275 (4 May 1999) (comments by Chairman Bragg, Vice Chairman Miller, and Commissioners Koplan, Askey and Crawford) (excerpts in **Exh. JP-73**).

Non-Uniform Treatment of Respondents and Petitioners		
Issue	USDOC vis-à-vis Respondents	USITC vis-à-vis Petitioners
Timeliness	KSC was never late; instead, it simply had no access to the requested data and could not report it without petitioner CSI's cooperation. NSC and NKK report missing figure after the due date for initial questionnaire response, but before the record is closed and prior to verification. Petitioners have plenty of time to comment.	Petitioners' data filed late, after the public hearing and just in time for the USITC vote, giving other parties inadequate time to comment.

322. The contradictory applications of the US facts available provision was inconsistent with the fundamental right to due process guaranteed by Article X:3(a). When compared with the lenient treatment accorded the domestic petitioners by USITC, it is clear that USDOC's actions were not "uniform" or "impartial" as mandated by Article X:3. The application of facts available was not "uniform" because despite the similar circumstances noted above, only USDOC ultimately applied adverse facts available. The application of facts available also was not "impartial" because the US Government applied it in such as way as to accord favourable treatment to the domestic parties in the case. USDOC punished the foreign respondents for alleged "infractions" that were arguably not infractions at all, while USITC refused to apply adverse facts available under the US statute to the domestic industry. This was not "reasonable." Moreover, the inconsistent application of facts available was patently an abusive exercise of any rights that USDOC or USITC might have had – a blatant failure to conduct the proceeding in good faith as required under international law.

5. USITC deviated from its prior practice by ignoring the US industry's financial performance early in the period of investigation and instead contriving declining financial performance by comparing only two years

323. As detailed earlier, USITC's normal analytic approach would have demonstrated the absence of material injury by reason of subject imports, given that virtually all the major domestic industry performance indices improved over the three year period of investigation. Here, USITC eschewed its traditional three year analysis, and instead compared 1998 only with 1997.

324. USITC's injury analysis was inconsistent with the principles of Article X:(3)(a), being neither "uniform," "impartial," or "reasonable." The truncated analysis of the domestic industry's financial performance is not "uniform" given the absence of a single other case in the past ten years where USITC focused on only the last two years of the period of investigation. Uniformity requires at least one other analogous case, if not significantly more. The analysis also was not "impartial" as it was outcome determinative. As recognized by Commissioner Askey, there was substantial other evidence that the domestic industry's condition improved over a three-year period.[311] Finally, the analysis was not "reasonable" because it relied on a skewed comparison of only two years. The point of USITC's analysis of the impact of subject imports is to establish a trend over time. A two-year period is not reasonable because it is not moderate, proportionate or suitable under the circumstances.

CONCLUSION

325. For the reasons discussed above, Japan respectfully requests the Panel:

[311] *USITC Final Injury Determination*, USITC Pub. 3202 at 51-52 (dissenting views of Commissioner Askey) (**Exh. JP-14**).

(a) to find that the specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are inconsistent with various provisions of the Anti-Dumping Agreement, as follows:

- USDOC's application of adverse facts available to KSC's dumping margin was inconsistent with Articles 2.3, 6.8, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NKK's dumping margin were inconsistent with Articles 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NSC's dumping margin were inconsistent with Articles 2.4, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's inclusion of margins based on partial facts available in the calculation of the "all others rate" was inconsistent with Article 9.4;
- USDOC's exclusion and replacement of certain home market sales in the calculation of normal value through use of the unreasonable 99.5 per cent arm's length test was inconsistent with Articles 2.1, 2.2, and 2.4;
- USDOC's application of a new policy with respect to preliminary critical circumstances determinations was inconsistent with Articles 10.1, 10.6, and 10.7;
- USITC's application of the captive production provision was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1;
- USITC's finding of a causal connection between imports and the domestic industry's injury was inconsistent with Articles 3.1, 3.4, and 3.5;

and to recommend that the DSB request the United States to bring these measures into conformity with the Anti-Dumping Agreement.

(b) to find that the following actions undertaken by the United States were inconsistent with GATT 1994 Article X:3, including:

- USDOC's accelerated proceeding;
- USDOC's application of a revised critical circumstances policy;
- USDOC's failure to correct the clerical error committed in calculating NKK's preliminary margin;
- USDOC's resort to adverse facts available with respect to respondents, coupled with USDOC's and USITC's decisions against applying facts available with respect to petitioners;
- USITC's limited analysis to two years of the three-year period of investigation, in abandonment of its normal policy to analyze all three years;

and to recommend that the DSB request the United States to bring these actions into conformity with the GATT 1994;

(c) to find that the United States' anti-dumping laws, regulations, and administrative procedures governing:

- the use of adverse “facts available” are inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement;

- the calculation of an “all others” rate based on partial facts available are inconsistent with Article 9.4 of the Anti-Dumping Agreement;

- the exclusion and replacement of certain home market sales in the calculation of normal value by the unreasonable arm's length test are inconsistent with Articles 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement;

- "critical circumstances," including the generally applicable interpretations reflected in the Policy Bulletin issued on 8 October 1998, are inconsistent with Articles 10.1, 10.6 and 10.7 of the Anti-Dumping Agreement;

- the focus on the merchant market sales to the exclusion of the remainder of the domestic industry when determining injury by reason of imports are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the Anti-Dumping Agreement;

and to recommend that the DSB request the United States to ensure, as stipulated in Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, the conformity of the above-listed elements of its anti-dumping laws, regulations, and administrative procedures with its obligations under the Anti-Dumping Agreement; and

(d) to recommend that, if the Panel's findings result in a determination that the imported product was either not dumped or that it did not injure the domestic industry, the DSB further request that the United States revoke its anti-dumping duty order and reimburse any anti-dumping duties collected;

(e) to recommend that, if the Panel's findings result in a determination that the imported product was dumped to a lesser extent than the duties actually imposed, the DSB further request that the United States reimburse the duties collected to the extent of the difference.

ANNEX A-2

First written submission of the United States

(24 July 2000)

This first submission of the United States, filed in response to the submission of the Government of Japan ("Japan"), dated 3 July 2000, is divided into four separate parts, each of which is separately paginated and has its own series of paragraph and exhibit numbers.[1] Part A responds to Japan's description of the purported "Summary and Context" of the anti dumping measures at issue, and clarifies the applicable standard of review. Part A also raises preliminary objections and urges the Panel to disregard (1) evidence that was not made available to US authorities during the course of the anti-dumping investigation at issue, and (2) Japan's claim concerning the United States's general practice with respect to "facts available", which was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference.

In accordance with paragraph 12 of the Panel's working procedures we request that the Panel set a deadline of 3 August 2000, for any responses to these preliminary objections, and we request that the Panel rule on these preliminary objections at or before the first substantive meeting of the Panel on 22 August.

Part B of this submission demonstrates that Japan's claims relating to the calculation of anti-dumping duty margins (the use of "facts available", the calculation of the "all others" rate of anti-dumping duties, and the exclusion of home market sales that are out of the ordinary course of trade) and critical circumstances, are baseless, and shows that both the US law and the decisions of US Department of Commerce are entirely consistent with the requirements of the Anti-Dumping Agreement.

Part B also notes that certain specific information on which the US Department of Commerce based its "facts available" decision was submitted in confidence to the Department by Kawasaki Steel Corporation ("KSC") during the anti-dumping investigation, and is not now before the Panel. This information, identified in Part B, includes the minutes of three CSI Board of Directors meetings, confidential portions of the KSC sales verification report, the Department's analysis memorandum regarding CSI, and KSC's response to the Department's supplemental section A questionnaire. Under Article 6.5 of the Anti-Dumping Agreement and the Department's rules, the Department cannot disclose this information without the permission of the party submitting it, and so has identified this information through the use of empty double brackets("[[ ]]"). While the United States has been discussing this matter with KSC and expects that it will be resolved promptly, we nevertheless reserve the right to ask the Panel to request that authorization to disclose be granted, at or before the first Panel meeting, currently scheduled for 22 August 2000.

Part C of this submission shows that Japan is incorrect in claiming that the US International Trade Commission's ("USITC's") injury determination -- and the "captive production" provision

[1] Therefore, references to pages or paragraph numbers in this submission should reference the part (A, B, C or D), as well as the page or paragraph number.

itself -- is inconsistent with the Anti-Dumping Agreement. It shows that, in trying to support its claim, Japan has misrepresented the law, the USITC's practice, and the USITC determination in this particular investigation.

Finally, Part D shows that Japan's claims under Article X:3 of the GATT 1994 – which are based on the same actions alleged incorrectly to violate the Anti-Dumping Agreement – are groundless, and represent an attempt by Japan to ignore the rights and obligations of the Anti-Dumping Agreement. Part D also requests that the Panel deny Japan's request for a specific remedy, as contrary to the DSU and long-standing WTO practice.

Requested Deadlines

As provided for by paragraph 12 of the Panel's working procedures, the United States requests that the Panel set a deadline of 3 August 2000, for any responses to these preliminary objections identified above, and requests that the Panel rule on these preliminary objections at or before the first substantive meeting of the Panel on 22 August.

Business Confidential Information

Part B of this submission contains information in brackets ("[]") that Japan has identified as Business Confidential. This information will be omitted from any versions of this submission that is released to the public. Part B omits Business Confidential information in double brackets ("[[]]") for which the United States has requested permission, from Japan and the pertinent Japanese producer, to release to the Panel under its working procedures. Exhibits to this submission which contain BCI are noted accordingly.

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PART A: INTRODUCTION; PRELIMINARY OBJECTIONS; STANDARD OF REVIEW

I. INTRODUCTION

1. In its first written submission, the United States responds to the arguments presented by the Government of Japan ("Japan") in its first written submission. Japan argues that the Determination of the US Department of Commerce ("Commerce" or "the Department") that exports of certain hot-rolled flat-rolled carbon-quality steel ("hot-rolled steel") from Japan were being dumped in the United States[1] and the Determination by the US International Trade Commission ("USITC") that those imports were injuring the US domestic producers of such steel[2] were, in various respects, inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Agreement"). Before turning to the merits of Japan's individual claims, however, we respond to the extensive and extraordinary introduction in Japan' s submission, which attempts to prejudice this Panel by persuading it that the Department and the USITC deliberately conducted investigations that were biased and unfair.

2. According to Japan, Secretary of Commerce William Daley fixed the investigation even before it was initiated, by promising the US steel industry that the Department would accelerate the proceeding and would be "very aggressive" in handling it.[3] Allegedly, Secretary Daley "kept his promise" by "accommodating the domestic industry"[4] in the following ways: accelerating the schedule for the investigation; making a determination of critical circumstances at an earlier point than normal on the basis of mere allegations and despite the fact that the USITC had found only threat of injury; failing to correct clerical errors in the preliminary determination; and, most importantly, extensively applying adverse facts available to the respondents. Finally, Japan alleges that the USITC

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[1] *See Notice of Final Determination of Sales at Less Than Fair Value of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan ("LTFV Final Determination")*, 64 Fed. Reg. 24,329 (6 May 1999) **(Exh. JP-12)**.

[2] *Certain Hot-Rolled Steel Products from Japan, Notice of USITC Final Injury Determination ("USITC Final Determination")*, 64 Fed. Reg. 33514 (23 June 1999) **(Exh. JP-12)**.

[3] First Written Submission of the Government of Japan to the World Trade Organization, Doc. No. WT/DS184 (3 July 2000) at para. 27, n. 25 and para. 30 (hereinafter "First Submission of Japan").

[4] *Id.* at paras. 30 and 31.

joined in, improperly limiting its analysis of the domestic industry to two years of the period investigated.[5]

3. All this makes interesting reading - - everyone loves a conspiracy. And, like many interesting conspiracy theories, Japan's begins (although selectively) with facts that are well-known. Also like many conspiracy theories, however, it then amplifies those facts through conjecture and, finally, jumps to conclusions that are utterly unsupported. We address each of the elements of the supposed conspiracy below.

A. BIRTH OF THE SUPPOSED CONSPIRACY

4. As noted, the conspiracy theory begins with established facts. It is well known that, in response to the unprecedented surge in steel imports from Russia, Japan, and (to a lesser extent) Brazil that began in the spring of 1998, the US domestic steel industry conducted a "stand up for steel" campaign in the United States in the fall of that year. This effort (and the articles Japan cites which relate to it) concerned steel as a whole, rather than hot-rolled steel. As Japan comes close to acknowledging, the campaign was directed overwhelmingly at the US Congress, with the goal of securing the application of quotas on steel imports and amendments to the US anti-dumping law.[6] As is also well known, both efforts failed.

5. At Commerce, the US industry simply pressed the Department to accelerate its investigation and the point at which it determined whether critical circumstances existed, so that, if an order were entered, anti-dumping duties would become effective in time to prevent at least a portion of the export surge from escaping the duties. As we explain below, this acceleration was perfectly consistent with the Agreement and with US law. Although Japan attempts to expand the acknowledged acceleration of the proceeding into a pervasive pattern of bias, there is no such pattern and, indeed, no general connection between the various elements in the determinations about which Japan complains. In fact, the only ways in which the Department departed from its standard practice in the investigation were by accelerating the investigation in certain respects and in not correcting the clerical error in its preliminary determination before the final determination.

6. The "smoking gun" in Japan's conspiracy theory seems to be Secretary Daley's reported promise to enforce the anti-dumping laws aggressively in this proceeding. This is frivolous. Every Secretary of Commerce routinely promises to enforce all of the laws within the Department's jurisdiction. No Secretary could ever say, in any context, that he or she would *not* vigorously enforce those laws. The Secretary's recital is not evidence of a conspiracy or of bias against Japan or Japanese steel exports. It was a standard affirmation that he would do his duty as a public servant.

B. ACCELERATION OF THE INVESTIGATION

7. According to Japan, the Department accelerated its investigation *for the specific purpose of prejudicing the respondents*, by denying them adequate time to comply with the Department's requests for information.[7] This is both inaccurate and highly misleading. The total time by which the investigation was shortened was 20 days.[8] These 20 days were taken from the time that the

[5] *Id.* at para. 32.
[6] Id. at para. 27.
[7] Id. at para. 6.
[8] The normal length of an investigation is 215 days. 19 U.S.C. 1673d(a)(1) **(Exh. JP-4)**. This investigation was initiated on 15 October 1998, *Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan* (hereinafter "*LTFV Preliminary Determination*"), 64 Fed. Reg. 8291, 8292 (19 February 1999) **(Exh. JP-11)**, and completed on 28 April 1999, for a total of 195 days. The final determination was published on May 6, 1999. *LTFV Final Determination*, 64

Department allowed itself to reach a preliminary determination *after* receiving the respondent's submissions.[9] None of the respondents' standard time-periods for submitting information was shortened.[10]

8. Most importantly, the respondents were given the normal time in which to answer the most detailed sections of the Department's questionnaire[11] -- 37 days.[12] In addition, all of the respondents asked for, and received, the standard fifteen-day extension of this period[13], so that they had a total of 52 days to respond – the standard time for respondents in the Department's investigations and substantially more than the Agreement requires.[14] Second, as explained below, although the acceleration of the case may have *inconvenienced* the Japanese respondents, there is *no evidence whatsoever* that it prevented them from submitting necessary information.

9. By claiming that the Department accelerated its investigation to prejudice the exporters, Japan seeks to draw attention away from the real, and perfectly legitimate, reason for the acceleration -- because the massive surge in steel imports from Japan and Russia threatened to seriously undermine the relief that the anti-dumping law could provide. As the Department explained in its critical circumstances determination, this import surge began in the spring of 1998.[15] Over the period from May to September 1998, the volume of imports of hot-rolled steel from Japan exceeded the volume for the previous six months by 100 per cent.[16] By way of comparison, this increase is more than *six times* the increase in the volume of imports (15 per cent) required to find critical circumstances under the US anti-dumping regulations[17], a standard that Japan has not challenged here. With Japanese steel

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Fed. Reg. at 24329 **(Exh. JP-12)**; *see also Hot-Rolled Flat-Rolled Carbon-Quality Steel Products AD Investigation Timetable* (Oct. 27, 1998); *Annex III – Deadlines for Parties in Anti-Dumping Investigations*, 19 C.F.R. part 351.

[9] Section 733(b)(1)(A) requires that a preliminary determination be made "within 140 days after the date on which the administering authority initiates an investigation." 19 U.S.C. 1673b (b)(1)(A) **(Exh. JP-4)**. This investigation was initiated on 15 October 1998, and the preliminary determination was made on 12 February 1999, for a total of 120 days. The preliminary determination was published on 19 February 1999. *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 **(Exh. JP-11)**.

[10] In fact, the Department provided the Japanese respondents with a significant amount of extra time to respond to the Section A supplemental questionnaire. Specifically, the Department "issued supplemental questionnaires for section A to NSC, NKK, and KSC on 4 December 1998. On 11 December 1998, the Department issued a letter to respondents informing them that the Department would consider these supplemental questions for section A to have been issued on January 4, 1999, in order to adhere to the schedule provided to all interested parties at the time of initiation." *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**. Therefore, the Japanese respondents had an extra month to prepare responses to the Section A supplemental questionnaire. The section B-E supplemental questionnaire was distributed to the Japanese respondents on 4 January 1999, and responses were received by the Department, after a seven-day extension, on 25 January 1999. In contrast, the petitioners had only one week to file comments on NSC's, NKK's, and KSC's section B-D questionnaires. *See id.*

[11] Sections B through E request data on US and home market prices and on the cost of production.

[12] This refers to the most burdensome part of the questionnaires – Sections B, C, and D. Section A requests more general information about the respondent and is less burdensome. Respondents normally receive 21 days to respond to Section A, with the possibility of a seven-day extension. Such was the case here, as the Department issued Section A on 20 October 1998, and received responses from NSC, NKK, and KSC on 16 November 1998. *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

[13] *See id.* ("[O]n 30 October 1998, the Department issued sections B-E of an anti-dumping questionnaire to NSC, NKK, and KSC." and "On 21 December 1998, we received responses to sections B, C, and D of the questionnaire from NSC, NKK, and KSC.")

[14] *See* Article 6.1.1 of the Agreement.

[15] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 (30 Nov. 1998) **(Exh. JP-9)** and accompanying memorandum to the file (23 Nov. 1998) ("*Preliminary Critical Circumstances Memo")* **(Exh. US/B-42)**.

[16] *Id.*

[17] 19 C.F.R. § 351.206(h)(1)(iii) **(Exh. JP-5)**.

exports pouring into the United States in such quantities, the US domestic industry had a perfectly legitimate reason to request that whatever relief could be obtained under the statute be provided as promptly as possible.

10. Finally, Japan fails to acknowledge that, although the Department accelerated its investigation in the context of the massive import surge from Japan involved here, the new procedures are by no means confined either to this proceeding or to Japan. They have been applied in other investigations[18]and will be applied uniformly whenever comparable export surges occur.[19]

C. CRITICAL CIRCUMSTANCES

11. The next piece of the supposed conspiracy was the critical circumstances determination. Here again, Japan begins with an acknowledged fact -- like the general acceleration of the case, the acceleration of the critical circumstances determination was the direct result of the export surge. According to Japan, however, there are several aspects of the early determination that cannot be so easily explained: basing the preliminary determination on information from the petition and a preliminary determination of threat of injury by the USITC; and moving the period that was examined in order to determine whether there was an import surge. We address the substance of these arguments in the body of our submission, but offer some general considerations here relating to whether these actions should be seen as part of a general effort to prejudice the Japanese exporters.

12. To begin with, it is essential to recall the purpose of the critical circumstances provision, which is to preserve the effectiveness of anti-dumping measures in the face of import surges. In the normal course of events, provisional measures may be applied no sooner than 60 days after the initiation of the investigation.[20] The critical circumstances provision provides an exception to this rule where (among other conditions) there have been massive imports.[21] The reason for the exception is clear -- to prevent exporters from flooding a targeted market with a large volume of dumped goods before anti-dumping duties can be applied. The remedy is imperfect, because the domestic industry in the importing country cannot file a case until it has enough evidence to sustain an injury determination. While the industry is waiting to be injured, the importers may be able to stockpile enough dumped imports to last them for a year or more. Consequently, a critical circumstances determination often will not cover all of the imports in such a surge. By advancing the onset of duties by two or three months, however, it can provide some relief.

1. Accelerated Date of Critical Circumstances Determination

13. The Department made its preliminary determination that critical circumstances existed on 23 November 1998, -- 46 days after initiating the investigation. At that time, Commerce did not impose any provisional measures (such as withholding appraisement) whatsoever. Provisional measures were not imposed until 81 days later, when the Department made its preliminary determination of dumping.[22] These provisional measures were then made retroactive by 90 days, *exactly* as if the preliminary determination of critical circumstances had accompanied the

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[18] *See Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 64 Fed. Reg. 60422 (5Nov. 1999) **(Exh. US/B-47)**; *Preliminary Determination of Critical Circumstances: Certain Cut-to-Length Carbon-Quality Steel Plate from Japan*, 64 Fed. Reg. 20251 (26 Apr. 1999); *Preliminary Determination of Critical Circumstances: Certain Non-Frozen Apple Juice Concentrate from the People 's Republic of China*, 64 Fed. Reg. 61835 (15 Nov. 1999).

[19] *See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, 63 Fed. Reg. 55364 (15 October 1998) **(Exh. JP-3)**.

[20] Article 7.3 of the Agreement.

[21] Article 10.6 of the Agreement. Article 10.8 provides that in no case may anti-dumping duties be imposed upon imports prior to the date the investigation was initiated.

[22] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9).**

Department's preliminary determination of dumping. Commerce's delay in withholding appraisement was more favourable to Japanese exporters than Article 10.7 of the Agreement required. Article 10.7 would have allowed the Department to begin withholding appraisement as soon as it made the preliminary determination of critical circumstances.

14. Japan's argument that the Department could not modify its practice to accommodate the special circumstances of this investigation implies that, once the Department had decided to accelerate the investigation and stated that it would enforce the anti-dumping law vigorously, it was no longer free to introduce changes to its procedures or methodology in the investigation, even if those procedures and changes in methodology were directly attributable to the unique circumstances before it. There is no basis for such a claim.

15. Japan claims that the *early preliminary determination* of critical circumstances shut down exports of hot-rolled steel to the United States[23], but this claim is utterly unsupported. The Department initiated its investigation on 15 October 1998, and promptly announced that it would issue its preliminary determination 120 days later. The petitioners had *alleged* critical circumstances in their application for initiation[24], so that the exporters would have been well aware from the outset that anti-dumping duties potentially could be applied beginning 90 days before the date of the preliminary determination. Once the exporters knew that the preliminary determination was scheduled for 12 February 1999 (and would be published about one week later), they had only to subtract 90 days from the publication date to know that their exports could become subject to anti-dumping duties beginning around 21 November 1998 (about five weeks after the investigation was initiated).[25] This would have been equally true had the Department *not* made its preliminary determination of critical circumstances early. Thus, the acceleration of the preliminary determination simply confirmed what the exporters already knew - - that the application of anti-dumping duties as of about 21 November 1988, was a possibility.[26]

16. Of course, the possibility that retroactive duties would be applied was always fairly remote (and remained so after Commerce's early preliminary determination of critical circumstances) because of the well-known fact that the USITC rarely makes affirmative determinations on critical circumstances.[27] This being the case, the Department's early preliminary determination of critical circumstances simply put importers on notice that, if the Department confirmed its finding in its final determination, and if the importers' steel were found to have been dumped, and if the USITC determined that there was injury and that imports during the period covered by the critical circumstances determination were likely to undermine seriously the remedial effect of the order, their exports would become subject to anti-dumping duties as of approximately 21 November 1988. As it turned out, of course, the USITC did not make an affirmative finding on the issue and no duties ever were or will be collected for the period before the preliminary determination.

17. In sum, the Department's early preliminary determination had no effect whatsoever, other than making a fairly remote possibility -- that in fact never occurred -- a bit less remote. The investigation itself and the *allegation* of critical circumstances led the Japanese exporters to reduce their exports (presumably, because they knew they could not sell in the United States without dumping), not the early determination of critical circumstances.

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[23] First Submission of Japan at para. 171.

[24] *Petition for the Imposition of Ant-Dumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan* (Sept. 30, 1998) **(Exh. US/B-40(a)(b)&(c))**.

[25] 19 U.S.C. 1673b(e)(1).

[26] This possibility was real, because the final margin for KSC was well over the 25 per cent threshold for critical circumstances.

[27] The USITC has made affirmative determinations of critical circumstances in only three investigations since 1988.

2. Knowledge of Dumping and Injury

18. Japan next criticizes the Department's determination that the importers were, or should have been, aware that the exporters practiced dumping that would cause injury before its own preliminary determination of dumping and on the basis of the USITC's preliminary determination that found only a threat of injury.[28] Japan has three complaints.

19. First, Japan argues that the Department "blindly accepted" mere allegations of dumping in the petition.[29] This is highly misleading. As we show below, the allegations in the petition were backed up with very substantial evidence.

20. Second, Japan complains that the Department's reliance on press articles as evidence that there was widespread knowledge that an anti-dumping petition would be filed was unreasonable. In fact, the press articles reflect what plainly was common knowledge in the industry. In any event, Japan's implication that its exporters were caught off-guard[30] is misplaced given that, earlier in its submission, Japan observes that there has been an epidemic of anti-dumping petitions in the steel industry since 1997, so that anti-dumping orders now cover 80 per cent of Japan's steel exports to the United States.[31] If anti-dumping petitions against Japan are so endemic and so routinely successful, then it would seem that any Japanese steel exporter could be expected to figure out that becoming the subject of an anti-dumping investigation and order in the United States was a realistic possibility.

21. At the very least, the well-known situation in the steel industry makes it inconceivable that the Japanese exporters were not closely monitoring the situation in the United States. These exporters are hardly mom-and-pop operations. They are large and sophisticated corporations with ample resources to monitor market conditions, including the probability that anti-dumping proceedings will be initiated in the United States and succeed.

22. Third, Japan complains that the USITC's preliminary determination that there was threat of injury was not evidence that the importers knew or should have known that the dumping would cause injury. This argument rests on an interpretation of the Agreement that is simply wrong. A determination that there is threat of injury is an affirmative determination of injury, pursuant to which anti-dumping duties may be assessed under the Agreement. We address this argument in detail below.

3. Periods Compared to Determine Whether Imports were Massive

23. Japan's next charge is that it was somehow improper or unfair for the Department to change the periods it examined to determine whether there was an export surge. In Japan's view, the fact that the anti-dumping petition was filed after the export surge began, rather than just before it began, required the Department to proceed as if that massive import surge had never happened and was not continuing.

24. This argument is utterly specious. The Agreement simply provides that the massive dumped imports must have occurred "in a relatively short period of time".[32] It does not stipulate any precise

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[28] First Submission of Japan at para. 26.

[29] First Submission of Japan at para. 182.

[30] *Id.* at para. 202.

[31] *Id.* at para. 41. Of course, Japan omits the obvious explanation that this has been a perfectly legitimate response to an epidemic of dumping. Repeated recourse to anti-dumping measures in response to repeated dumping is not an abuse of such measures.

[32] Article 10.6(ii) of the Agreement.

periods. Presumably, there is no question that a 100 per cent increase in imports from one six-month period to the next is a massive increase over a relatively short period, regardless of whether that increase is sustained.

25. Japan argues, however, that, having established a different time period as the "normal" (but by no means the absolute) rule in its regulations[33], the Department was somehow prevented from changing that period. There is no basis for this claim. The Department's regulations provide that it will "normally" compare the three months following initiation to the three months preceding initiation.[34] This covers the situation where the exporters learn of the investigation when it is initiated, and then try to beat the preliminary determination with an export surge. In the steel industry, however, dumping cases are common (as Japan has been at pains to point out) and the large and sophisticated exporters are well aware of the possibility of anti-dumping investigations well before petitions are filed. In this case, the Japanese exporters simply launched the export surge in the spring of 1998 (apparently because their domestic demand declined) and continued exporting in high volumes until after the investigation was initiated.

26. Had the Department confined itself to the "normal" period in these circumstances, it would have missed the surge altogether, because it had been underway for more than three months when the investigation was initiated. Most likely, the reason why the petition was not filed as soon as the surge began was that the domestic industry needed data for another quarter of a year to establish its case for injury. Whatever the reason, there is no basis in either the Agreement or the Department's regulations for punishing the domestic industry for the delay in applying for the initiation of an investigation by depriving it of the critical circumstances provision.

27. Japan's argument implies that it was somehow "cheating" for Commerce to take account of the fact that the massive export surge occurred slightly before its "normal" period of enquiry. In effect. Japan argues that it is entitled to create a loophole in the critical circumstances rule by turning a discretionary guideline in the Department's regulations into an absolute rule, notwithstanding that there is nothing in the Agreement to require such a rule. To top it off, Japan implies that refusing to create such a loophole must have been an element of a broad conspiracy, rather than simple common sense.

D. FAILURE TO CORRECT THE CLERICAL ERROR IN THE PRELIMINARY DETERMINATION

28. First of all, it is worth noting that the United States is the only country in the world that has a procedure (other than final determinations) for correcting clerical errors in preliminary determinations. The United States provides this procedure so that respondents will not be unnecessarily disadvantaged in the few months between the preliminary and final determinations. The reason that no other country offers this extraordinary protection for foreign respondents is that the Agreement does not come close to requiring that such protection be granted.

29. Japan claims that NKK was prejudiced by the Department's omission because the Department would not have found critical circumstances for NKK if it had corrected the error earlier. But this claim of harm is based on the presumption that NKK would not have stopped exporting, had the error been corrected. As we have seen, however, NKK had to make its decision about whether to stop exporting (or stop dumping) before 21 November 1998. Once the preliminary determination was made, 90 days later, it was too late for NKK to change its decision and make up for the lost exports, regardless of whether the margin had been less than 25 per cent to begin with, or lowered below

[33] 19 C.F.R. § 351.206(i) **(Exh. JP-5)**. The US statute, 19 U.S.C. § 1677(e) also does not provide an exact time, simply paraphrasing the requirement of the Agreement that the imports should have been made "over a relatively short period".

[34] *Id.*

25 per cent as the result of the correction of a clerical error. So Japan's claim is not based on any *real* harm - - it simply provides "atmosphere" for the conspiracy theory.

E. APPLICATION OF THE FACTS AVAILABLE

30. Although Japan highlights the fact that the investigation was accelerated, and claims that the acceleration prejudiced the respondent companies[35], it has failed even *to allege* that a single instance in which the Department resorted to the facts available was attributable to the acceleration of the case. Japan complains of only two instances in which the Department resorted to facts available in the investigation[36], and time demonstrably was not a factor in either instance. In the case of the sales from KSC's joint venture CSI, Japan has emphasized that CSI absolutely refused to supply the missing data. This means that CSI would not have supplied the data, even if it had been given six months to do so. In the case of the actual/theoretical weight problem (which affected a small number of sales for NKK and NSC and had a *tiny* effect upon the margin), Japan acknowledges that those companies' failure to submit conversion factors was based on their mistaken belief that this was impossible[37], not because there was not time in which to calculate the factors. Neither company had any trouble calculating conversion factors quickly, once it had decided to do so.[38]

31. When Japan's ultimate argument on application of the facts available is considered, the reason why it wants the Panel to view these determinations as tainted by bias, and particularly by the acceleration of the investigation, becomes clear. Japan candidly asks the panel to interpret Article 6.8 of the Agreement so that it cannot be used "to induce respondents to provide complete and accurate information".[39] The consequences of agreeing to this request are obvious -- with no incentive to cooperate, respondents will not cooperate. Anti-dumping investigations therefore will become impracticable. Given that it effectively is asking this Panel to render the entire Agreement inoperable, it is easy to see why Japan wants the Panel to believe that it is dealing with investigating authorities who are biased and unfair.

F. THE INJURY DETERMINATION

32. Last, Japan suggests that the conspiracy to deprive the Japanese respondents of their rights under the Agreement in this investigation extended to the USCIT and its injury determination.[40] Japan presents absolutely no basis for concluding that the USITC decision was biased. The newspaper articles upon which Japan relies to suggest that the Department was biased do not even mention the USITC. As will be discussed below, the USITC is an independent agency of the US Government, not part of the Department of Commerce. Accordingly, to the extent that Japan seeks to misread Secretary Daley's statements as reflecting some improper motivation, Japan cannot impute such a motivation to the USITC Commissioners.

33. As we will demonstrate below, Japan's contentions that the USITC's determination employed methodologies inconsistent with its decisions in other cases are entirely misplaced. In fact, as the record of USITC's most recent decision on cold-rolled steel demonstrates, those methodologies are analytically neutral and were not used to favour the US steel industry. The USITC's decision in *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and*

[35] First Submission of Japan at para. 25.
[36] First Submission of Japan at paras. 61 - 72 and paras. 91 - 102.
[37] First Submission of Japan at para. 93 and para. 95.
[38] First Submission of Japan at paras. 97 - 98.
[39] First Submission of Japan at para. 59.
[40] *Id.* at para. 32.

Thailand[41], puts the lie to Japan's insinuations that the USITC adopted the methodologies used in the hot-rolled steel investigation in order to assist the US steel industry. In *Cold-Rolled Steel*, decided less than a year after its decision on *Hot-Rolled Steel Products* at issue here, the USITC reached a negative conclusion, denying the US industry relief, using many of the same analytical techniques that Japan alleges demonstrates the USITC's bias in the current case.

34. For example, although the USITC found the captive production provision not to be applicable, nevertheless the USITC in *Cold-Rolled Steel*, like Commissioner Bragg in this case, made parallel findings concerning both captive production and merchant-market sales.[42] There, however, the USITC simply found that the evidence did not support an affirmative determination.

35. Likewise, the USITC's determination in *Cold-Rolled Steel*, as here, relied on the most recent trends for many factors, not only on trends over the entire investigatory period. In that case, although many trends over the entire period showed some decline, the more recent trends for many factors showed industry recovery at the end of the period.[43] Thus, the same approach which Japan alleges favours US steel producers in the current case disadvantaged them in that case. Contrary to Japan's allegations, the analytical approaches that the USITC adopted in the *Hot-Rolled* investigation are not in the least unusual, nor do they in any way favour an affirmative result. Rather, the USITC determinations demonstrate that the USITC, in making both affirmative and negative determinations concerning steel production, simply adjudicated the facts as they appeared

36. The *Cold-Rolled Steel* decision also demonstrates how misplaced is Japan's contention that the USITC's findings on other asserted causes reflects bias. As will be discussed in more detail below, in that case, the USITC, as it did here, examined the effects on price declines of a strike at General Motors Corporation (GM). In both cases, the USITC found that the GM strike did have effects on the relevant industry, but in both it carefully analyzed the role that those effects had to assure that it did not ascribe to the dumped imports the effects of the strike. In the current case, the USITC concluded that the GM strike could only be regarded as a partial explanation of the fall in prices for hot-rolled products, which occurred as low-priced dumped imports surged.[44] In *Cold-Rolled Steel*, in contrast, the USITC found that the timing of the work stoppage corresponded more closely with the drop in domestic prices that did the largest increase in subject imports.[45]

37. That decision, furthermore, belies the Japanese assertion that the USITC did not conduct an unbiased analysis of the effects of competition within the domestic industry. As is discussed below,

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[41] Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. No. 3283 (March 2000) (" *Cold-Rolled Steel Report*") **(Exh. US/A-3)**. The USITC reached a similar affirmative determination relying on the same investigative record in *Certain Cold-Rolled Steel Products from Turkey and Venezuela*, Inv. Nos. 731-TA-839-840, USITC Pub. No. 3297 (Final) (May 2000) **(Exh. US/A-4)**. All but one of the Commissioners who made the more recent decision were the same as those who rendered the earlier decision at issue in the present proceeding. While the affirmative determination in the *Hot-Rolled* case was unanimous, only one Commissioner dissented from the negative determination in the *Cold-Rolled* case. US steel producers have sued in the United States Court of International Trade to challenge these negative determinations.

[42] *See Cold-Rolled Steel Report* at 20-21 (reflecting import shares of total consumption and merchant market), 24 (reflecting parallelism in merchant market and total market domestic industry operating income) **(US/A-3)**.

[43] *See Cold-Rolled Steel Report* at 20-21 (though dumped import total volume and shares of total consumption and merchant market rose over period, they fell at end of period); 25 (though US industry suffered overall market share loss, US shipments grew at end of period; though capital expenditures declined, they showed strong growth in interim 1999) **(US/A-3).**

[44] *See* Inv. No. 731-TA-807 (Final), USITC Pub. No. 3202 (June 1999) at 16 (hereinafter "USITC Views ") **(US/C-1)**.

[45] *See Cold-Rolled Steel Report* at 24 **(US/A-3)**.

the USITC rejected the argument that increased competition within the domestic industry caused by non-integrated producers ("minimills" or " EAF" producers) led to the industry's reduced performance. Rather, it found that minimills, more sensitive to import competition than integrated producers, suffered worse during the industry downturn of 1998 and that the increases in their capacity did not correspond with the asserted effects in 1998.[46] In *Cold-Rolled Steel*, the USITC also addressed the influence of competition within the domestic industry. There, the USITC found that falling hot-rolled prices had been beneficial to re-rollers, who purchase rather than produce, hot-rolled steel for cold-rolling, and found that, in part through them, the decline in hot-rolled steel prices put a downward pressure on cold-rolled steel prices.[47] In short, the USITC Commissioners did not bring closed minds to such issues; in each case, they made the decision to which they believed an objective analysis of the evidence should lead them.

38. Moreover, the face of the decision before this Panel demonstrates that none of the analytical approaches of which Japan complains was adopted for the purpose of reaching a particular outcome. Japan complains, for example, that four of the six USITC Commissioners relied either primarily or secondarily on analysis specific to merchant market sales. As will be shown below, Japan is simply wrong in arguing that this analysis caused the USITC Commissioners to ignore effects on the industry as a whole. In any event, the USITC determination shows that such findings concerning the merchant market segment cannot reasonably be used to suggest bias, since those Commissioners who made no such findings also made affirmative determinations. One, Commissioner Crawford, found material injury, and one, Commissioner Askey, found threat of material injury. Japan challenges neither of their findings. Japan cannot contend that findings specific to the merchant market were necessary to reaching an affirmative determination supporting the imposition of anti-dumping measures.

39. Similarly, contrary to Japan's complaint, as will be shown below, the USITC acted completely consistently with prior decisions in relying on the most recent trends. Quite apart from the inaccuracies of Japan's portrayal of the USITC decision, however, the report shows that the Commissioners did not choose to rely on such trends as a pretext in order, as Japan alleges, to "create some rational basis for its decision".[48] As Japan points out, Commissioner Crawford's analysis did not rely on such trends. Yet she reached an affirmative injury determination.

40. Commissioner Askey, who found that three-year trends did not support a present injury determination, found the accelerating trends of imports at the end of the period established a threat of material injury. In short, no manipulation of the facts was needed in this case in order to reach an affirmative determination. The Commissioners found that result to be required by the facts regardless of the method they used for examining the evidence.

G. THE "ECONOMIC CONTEXT" OF THE INVESTIGATION

41. Japan's demonstrably false accusations that the USITC ignored such factors as minimill competition and the GM strike, as well as the growth in US demand, amount to an attempt to distract the Panel from the clear demonstration of the adverse effects of the dramatic increase in dumped imports on the US industry. Although the USITC's findings will be discussed more thoroughly below, a brief summary here is a necessary corrective to the thoroughly unobjective view that Japan offers. Although Japan makes much of the US steel industry's efforts to publicize its sense of crisis due to the increasing levels of dumped imports, the USITC's findings show that, by quite objective measures, that sense of crisis was not misplaced.

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[46] *See* USITC Views at 11, 15, 18, 19 **(US/C-1)**.
[47] *See Cold-Rolled Steel Report* at 23 **(US/A-3)**.
[48] First Submission of Japan at para. 32.

42. US imports of hot-rolled flat products from Japan surged. They increased by 419.8 per cent from 1996 to 1998 and 132 per cent from 1997 to 1998 alone.[49] This rise was not simply in keeping with the rise in consumption in the United States. The dumped imports' share of US sales and consumption also surged. Their share of the merchant market held by dumped imports quadrupled, rising from 5.0 per cent in 1996 to 21.0 per cent in 1998; their share of total consumption almost quintupled, rising from 2.0 per cent to 9.3 per cent.[50] While dumped imports rose, they increasingly undersold the US product and shifted to the sale of more commodity grade products.[51] Both US and imported prices decreased most precipitously in 1998 when the volume of dumped imports reached their greatest level.[52]

43. The USITC found that this dramatic rise in dumped imports prevented the US industry from participating in the growth in demand.[53] Over the entire investigative period, domestic producers' shipments remained essentially flat. In the most recent period, from 1997 to 1998, when total US consumption rose 6.0 per cent, the US industry's shipments *fell* by 1.0 per cent.[54] The domestic producers' share of total consumption fell from 92.3 per cent in 1996 to 84.8 per cent in 1998, and their share of merchant market sales fell from 80.4 per cent in 1996 to 65.6 per cent in 1998.[55]

44. The effects of the surge in dumped imports on the US industry were immediate and dramatic. The US industry had increased its capacity at a rate largely commensurate with the rise in demand. Nevertheless, the USITC found that "due to the rapid increase in the volume and market share of subject imports, the domestic industry's increased capacity almost immediately became excess capacity".[56] Capacity utilization plummeted. The industry's performance experienced serious declines. Operating income fell by more than half and the ratio of operating income to net sales declined dramatically as import volumes, market share and underselling reached their peak.[57] Industry employment fell, capital expenditures declined, and two firms filed for bankruptcy.[58]

45. The USITC considered and rejected the argument that Japan makes here -- namely, that the increase in dumped imports was simply a response to a US domestic shortage in 1998. The USITC found that argument simply not consistent with the conditions in the market place. The declining capacity utilization of the domestic industry and the plummeting prices of imported steel made it clear that the influx was supply-driven.[59]

46. Likewise, the USITC rejected the arguments that Japan makes here in alleging that the US industry had a strong performance in 1998, simply declining from a "banner year".[60] As the USITC found, in a year in which US consumption reached record levels and the US industry increased its productivity and lowered its costs, 1998 should have been a highly successful year for the industry. Instead, however, as the USITC's analysis demonstrates, the US industry's 1998 performance deteriorated sharply, as measured by almost all performance indicators.[61] It is noteworthy that the USITC found that, as operating income for the whole industry declined significantly both for

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[49] USITC Views at 12, *citing* record information at Table C-1 **(Exh. US/C-1)**.
[50] *Id.* (*citing* record information at Tables C-1 and C-2).
[51] *Id.* at 14-15.
[52] *Id.* at 14.
[53] *Id.* at 12.
[54] *Id.* at 13.
[55] *Id.* at 12.
[56] *Id.* at 17.
[57] *Id.* at 18.
[58] *Id.* at 18, n.101.
[59] Id. at 13.
[60] First Submission of Japan at para. 34.
[61] USITC Views at 17-20 **(Exh. US/C-1)**.

merchant market sales and overall production, those producers most exposed to import competition found their ratio of operating income to net sales declining to negative levels.[62]

47. In brief, an objective analysis of the relevant economic factors demonstrated to the USITC that dumped imports caused material injury to the US industry. Japan may want the United States investigative authorities to have ignored the very real effects that dumped Japanese imports were having in the United States market. The fact that they did not do so is no evidence, however, of bias. Rather, it reflects administration of anti-dumping laws entirely in accordance with the Agreement. Japan's allegations of bias are simply an attempt to distract the Panel from the merits of the authorities' decisions.

H. THE SUPPOSED CONSPIRACY, REVIEWED

48. The only established facts of any significance are that, in response to a massive surge in imports from Japan, Commerce agreed with the US industry that it was necessary to accelerate its investigation by 20 days and to make its preliminary determination on the issue of critical circumstances about two months before its preliminary determination of dumping. Japan's problem is that the real targets of its case are the Department's use of facts available and the USITC's determination of injury, and there is no evidence whatsoever that this acceleration of the investigation had any effect on the outcome of either issue.

49. Japan's answer to this problem was to attempt to construct a conspiracy in which the pervasive influence of the US industry led the Department and the USITC to use unfair means to reach biased determinations. As evidence of the conspiracy, Japan offers the simple fact of the acceleration of the case itself, which was plainly in answer to its own export surge, and Secretary Daley's pledge to vigorously enforce a law that he is charged with administering. On this flimsy basis, this Panel is supposed to view the objective merits of this case with a jaundiced eye, and punish the Department and the USITC for their supposed transgressions.

I. THE "INTERNATIONAL RAMIFICATIONS" OF THE PROCEEDING

50. In a final flourish, Japan broadly hints to the Panel that, given the widespread use of anti-dumping measures among WTO Member States, it should "discipline" their application to make them less effective.[63] Japan asks the Panel members to keep in mind that US Federal Reserve Chairman Greenspan evidently would prefer an anti-dumping regime that addresses only sales made below marginal cost (rather than average cost).[64] The "international ramifications" of this little reminder are plain. Since "right thinking" people do not agree with the Agreement negotiated by the WTO Member States, this Panel should interpret the Agreement so that the results permitted are those of which such "right thinking" people would approve - - minimal, if any, anti-dumping measures.

51. This is a blatant call for the Panel to do whatever it can to eviscerate the Agreement, rather than to follow its clear mandate to enforce only those restrictions on the application of anti-dumping measures to which the WTO Member States have agreed. It is well-known that Japan opposes *any* application of anti-dumping measures. As Japan knows (or should know), however, this Panel's proper role is to apply the Agreement *as agreed* between the Member States, not to interpret the Agreement as the Japanese Government would have preferred to see it.

52. To provide nominal legal cover for this effort, Japan raises once again the long-discredited notion that the Agreement is an "exception" to the liberal trade principles of the WTO Agreements,

[62] *Id.* at 19.
[63] *Id.* at para. 44.
[64] *Id.* at para. 43, n. 49.

and so should be subject to special scrutiny. The Panel should reject this notion. The Appellate Body has made clear that the status of a provision as a so-called exception: (1) does not shift the burden of proof (*Wool Shirts*[65] and *Hormones*[66]); and (2) does not warrant a different approach to interpreting the provisions (*Hormones*). As the Appellate Body said in *Hormones*:

> 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.[67]

53. Anti-dumping measures do not constitute exceptions from the rest of the WTO framework. They are subject to the same rules of interpretation as any other provision of the other WTO Agreements, except in that they enjoy a more deferential standard of review. Therefore, the Panel should reject Japan's suggestion that this discredited notion should serve as cover for eviscerating the Agreement.

J. CONCLUSION

54. The Panel should reject in the most unequivocal terms possible Japan's unseemly efforts to taint this Panel's deliberations by unfounded allegations of bias, and should decide each of the issues strictly upon its merits under the Agreement.

II. PRELIMINARY OBJECTIONS

55. The United States has two preliminary objections. First, Japan improperly asks the Panel to examine extra-record testimony and evidence which has only now been submitted to the Panel and which was not made available to the investigating authorities during the course of the anti-dumping investigation. Second, Japan's first submission asks the Panel to examine claims which are outside the Panel's terms of reference -- *i.e.*, that were not set forth in Japan's request for the establishment of a panel.[68] The United States objects to both of these actions by Japan and requests that the Panel rule on these preliminary objections at or before its first meeting with the parties, and that the Panel disregard the extra-record testimony and evidence and decline to examine the claim in question.

A. THE PANEL MAY NOT CONSIDER EXTRA-RECORD POST-INVESTIGATION EVIDENCE

56. Japan seeks to have the Panel review post-investigation testimony and evidence which was not originally made available to the Department or the USITC. Under the Anti-dumping Agreement, a panel examines the decisions of the investigating authorities in light of the facts available to it – and

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[65] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 16.

[66] *EC - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

[67] *Id.* at para. 104.

[68] *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Request for the Establishment of a Panel* (Feb. 11, 2000) (hereinafter "*Panel Request*") **(Exh. US/A-1)**.

not new facts revealed for the first time to the panel. The Panel should therefore disregard this extra-record evidence.

1. Article 17.5(ii) of the Anti-Dumping Agreement Limits the Panel's Review

57. Article 17.5 of the Agreement provides that the Panel shall examine the matter based upon:

> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

58. This provision directs the Panel to limit its review to the "facts made available" that were before the Department when it made its determination (*i.e.*, the evidence contained in the administrative record).[69] The panel in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R, Report of the Panel issued 14 January 2000 (hereinafter "*HFCS*") stressed this point, stating:

> {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.[70]

And,

> Mindful of the standard of review and Article 17.5(ii), we note that we may consider in our examination of this issue only what was actually available to the investigating authority at the time . . . .[71] (Emphasis added).

59. The *HFCS* panel also stated:

> Our approach in this dispute will similarly be to examine whether the evidence before SECOFI at the time . . . 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 . . . . We . . . also take into account information that was before SECOFI at the time of its determination . . . .[72](Emphasis added).

60. Likewise, in describing the panel's role, the panel in the *Wool Shirts* case stated in part:

> {P}anels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such {} panels . . . do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective

[69] The administrative record is the information presented during the investigation, in accordance with Article 17.5(ii) of the Anti-Dumping Agreement. The "appropriate domestic procedures" of the United States investigating authorities -- the Department and the USITC -- are detailed in 19 U.S.C. §1516a(b)(2)(A), which states that the record consists of all information "presented to or obtained by ... the administering authority ... during the course of the administrative proceeding, ...; and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register."

[70] *HFCS* at para. 7.43.

[71] *HFCS* at para. 7.105.

[72] *HFCS* at para. 7.95.

> assessment as to whether the United States respected the requirements of {Article 17.5(ii)} at the time of the determination.[73] (Emphasis added).

61. Similarly, the Panel in the *Korean Dairy Products* case stated:

> {W}e consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected.[74] (Emphasis added).

2. The Panel Must Disregard Japan's Four Affidavits

62. Japan has included affidavits by the American attorneys for NSC[75], NKK[76], and KSC[77], as well as one by statisticians hired by the counsel for NKK[78], with their first submission. These represent sworn testimony by attorneys and experts which was not presented to the Department during the investigation and therefore not made part of its administrative record. Consistent with Article 17.5(ii), the Panel may not base its review on any of this evidence.

63. These affidavits contain egregious and belated attempts to supplement the Department's administrative record, and should be dismissed *in toto*. For example, Mr. Plaine testifies that the Department's use of facts available was improper based in part on unspecified conversations with unnamed Department officials.[79] Mr. Porter also relies on undocumented personal conversations with Department officials to substantiate his testimony.[80] It is not clear that such conversations ever took place. Even if they did, the substance of these conversations is not part of the administrative record and therefore should not be before the Panel. Furthermore, Mr. Porter explicitly acknowledges that the information he is urging the Panel to consider is not part of the record.[81] Mr. Huey arranged for a post-determination margin analysis based on different assumptions, and based on his firm's computer programme runs, for comparison with the Department's final margin results.[82] Since this inappropriate analysis is obviously not part of the record before the Panel, it must be considered new evidence and excluded. Finally, the statisticians could just as well have engaged in their discussion regarding appropriate statistical methodologies during Commerce's investigation. At that time, their testimony would have gone on the administrative record for Commerce to analyze and petitioners to rebut. They did not do so. Again, the Panel must disregard their belated appraisal.

64. Further, the Panel's mission under Article 17.6(i) is to determine whether the establishment of the facts was proper and its evaluation of those facts unbiased and objective. If no violation is alleged concerning the way in which interested parties were able to present evidence and argument, then the only question is whether the authorities' evaluation of the evidence and argument before them was

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[73] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (*United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21. (This case involved the Agreement on Textiles and Clothing; however, the language of Article 17.5(ii) is substantially the same as the corresponding ATC language.)

[74] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30.

[75] Affidavit of Daniel J. Plaine, Counsel to NSC **(Exh. JP-46)**.

[76] Affidavit of Daniel L. Porter **(Exh. JP-28)**.

[77] Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44)**.

[78] Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians **(Exh. JP-56)**.

[79] Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians **(Exh. JP-56)**.

[80] Affidavit of Daniel L. Porter at paras. 10, 14, 28 **(Exh. JP-28)**.

[81] *See id.* at para. 23 (discussing matters which did not form part of the NKK Sales Verification Report).

[82] Affidavit of Robert H. Huey, Counsel to KSC at paras. 5-7 **(Exh. JP-44)**.

unbiased and objective. Presenting new testimony that was not before the authority seeks to have the Panel go beyond its assigned task.

65. The policy that an authority's final determination will be evaluated only in terms of the arguments and facts that were presented to it during its investigation is also embodied in Article 12.2.2's description of what the authority's public report will contain. The report is to contain "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." If the exporters or importers did not make some argument or claim, that cannot be taken as a basis for finding that the authority did not evaluate the evidence and argument before them on an unbiased and objective basis. Thus, the Panel should not allow exporters or importers to try to impugn the authority's decision by new argument.

66. Finally, for the Panel to consider this new testimony is to undermine the guarantees of the Anti-Dumping Agreement. The Agreement guarantees to interested parties rights of participation and response. Article 6.1 guarantees that all interested parties will have ample opportunity to present in writing all evidence which they consider relevant. The Panel, whose proceedings are confidential and in which only Members are parties, cannot provide that assurance. Under Article 6.2,

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.

Since DSB proceedings do not offer non-Member interested parties these rights, to allow some interested parties to present argument to the Panel undermines the due process rights afforded by the Anti-Dumping Agreement. By admitting such presentation, the Panel will be undermining the stated purposes of the DSB of "providing security and predictability to the multilateral system" and to "preserve the rights and obligations of Members under the covered agreements".[83]

67. In sum, Japan, with these affidavits, is trying not only to bolster its arguments with assistance from attorneys in the United States, but also to allow its steel companies, through their American lawyers, to fabricate extra-record post-investigation evidence and present it to the Panel as if they were legitimate parties to the dispute. The Panel may not allow it and must confine its scope to the evidence relied upon by the Department in order to determine whether the determinations were permissible under the Anti-Dumping Agreement.

3. The Panel Must Disregard Japan's Newspaper Articles

68. The Government of Japan's written submission relies upon numerous pieces of alleged evidence concerning the state of the US industry which were not part of the original record before Commerce or the USITC, and, accordingly, these pieces of extra-record evidence should not be allowed to be used in support of Japan's arguments before this panel. Article 6.1 of the Anti-Dumping Agreement provides that interested parties should be given "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question". Japan does not, and indeed cannot, allege that the United States violated this obligation. Japanese respondents were given ample opportunity to put information on the record during the course of the investigation, and they availed themselves of this opportunity. The extra-record evidence that Japan now proffers goes to issues that were before the investigating authorities in the proceedings below. For example, the evidence pertains to the political climate in the United States resulting from the

[83] *See* DSU Article 3.2.

surge of Japanese imports[84], the consumption of hot rolled steel in the United States[85], the performance of minimills[86], and pricing of hot rolled steel in the US market.[87] If the Japanese respondents understood these pieces of evidence to be more probative of these issues than the evidence which they had already put before the agencies and the evidence that their staffs had collected, then they should have offered them as exhibits in the course of the proceedings as well. Likewise, had they wished to engage either investigating authority in an academic discussion of the merits of the anti-dumping law, they could also have submitted such articles or treatises in the course of the proceedings.[88] They did not, and this Panel now should refuse to consider all of these pieces of information.

B. THE PANEL MUST FIND THAT JAPAN'S IMPROPER FACTS AVAILABLE CLAIM IS OUTSIDE THE PANEL'S TERMS OF REFERENCE

69. The Panel must dismiss Japan's challenge to the Commerce Department's facts available practice[89] as outside the Panel's terms of reference. Japan was *very* clear in its panel request that it was asking the Panel to examine the Department's determination "in its application of 'facts available'" specifically to KSC, NSC, and NKK corporations. The panel's terms of reference are "to examine ... the matter referred to by the DSB in [ ]".[90] Since Japan never referred the Department's general practice of facts available, which is based on the United States statute, to the DSB, but only referred the specific application to these companies, this general practice is outside the Panel's terms of reference.

70. The United States notes that, where Japan wanted the Panel to examine the law or a general practice on its face, Japan's panel request made that request specific. Japan was careful to specify that it was challenging the United States' statute in the claims pertaining to Commerce's all others rate and critical circumstances statutory provisions, as well as the Commission's captive production statutory provision.[91] Plainly, Japan's panel request did not include a similar reference to the Department's "general practice" concerning facts available.

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[84] First Submission of Japan at n.32 (*citing* Nancy E. Kelly, "*House Steel Import Vote Sends Message*," American Metal Market, at 2 (Oct. 19 1998)**(Exh. JP-27)**).

[85] First Submission of Japan at n.38 (*citing* a Graph of Hot-Rolled Industry Composite - Profit From Operations **(Exh. JP-33)**; and *World Bank Annual Report 1999* **(Exh. JP-33)**); *see also* First Submission of Japan at n.267 mentioning the *Preston Pipe & Tube Report* (Nov. 1998) and *Preston Pipe and Tube Report* (Sept. 1998) **(Exh. JP-67)**, and articles regarding US mills' purchases of semi-finished steel **(Exh. JP-32)**).

[86] First Submission of Japan at n.40 citing PaineWebber, "*Steel: A Gauntlet for All, Rewards for the Select*," Steel Strategist #24 at 117 (June 1998) and Charles Yost, "Thin Slab Casting/Flat-Rolling: New Technology to Benefit US Steel Industry," in United States International Trade Commission, *Industry Trade and Technology Review*, 1996 ITC Lexis 428, *52, *65, Table 1 (Oct. 1996) (Exh. JP-34); *see also* First Submission of Japan at n.42 (*citing* Donald Barnett and Robert Crandall, "Steel: Decline and Renewal," in *Industry Studies* (2nd ed. Larry Duetsch, ed. 1998)**(Exh. JP-35)**).

[87] First Submission of Japan at n.46 (*citing* Transaction Pricing Service, *Purchasing Magazine* **(Exh. JP-36)**).

[88] First Submission of Japan at n.49 (*citing* Greenspan remarks (Exh. JP-37); and n. 50 *citing* trade protection treatises **(Exh. JP-38)**). Similarly, the series of press articles which Japan has included at exhibits 16-23 and 25-26 and cited in the introduction of its First Submission, represents a further potpourri of extra-record material, selectively chosen to advance Japan's arguments. This Panel must reject Japan's attempts to draw it and the parties in this case into a battle of extra-record newspaper clippings.

[89] *See* First Submission of Japan at 19-21.

[90] The Panel's scope of authority is governed by Article 7 of the Dispute Settlement Understanding ("DSU"), regarding the terms of reference of panels. That provision authorizes panels to examine the "matter" referred to them by the DSB.

[91] *Panel Request* at 4 and 5, paras. A-3, A-5, and B-2. In each of these three instances, Japan stated: "In addition, section .... of the Tariff Act of 1930, as amended ... is inconsistent with" the pertinent provision of the Agreement concerning the three issues for which Japan challenged US statutory provisions – all others rate,

71. Yet, in its first submission, Japan has two sections specifically, and appropriately, entitled "In Applying Adverse Facts Available to [KSC, NSC, or NKK], USDOC Violated ..., " but has a third, separate section, entitled "USDOC's Established Practice of Applying Adverse Facts Available To Punish Respondents Is Inconsistent With Article 6.8 and Annex II of the Anti-Dumping Agreement". This latter section, and the previous "background" section, contain numerous citations to investigations that were not the subject of any consultations and which were not referred to the DSB in Japan's panel request. This is not a matter that this Panel should examine under its terms of reference.

72. The only possible way in which Japan might try to justify including the US law and general practice as to facts available in its first submission is that, in the panel request, Japan included a very broad and ambiguous count of conformity.[92] This stated that the United States contravened Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement. In the section of its brief challenging Commerce's general facts available practice, Japan cites these provisions as justifications.[93] These provisions, however, do not specify claims. Article XVI:4 of the Marrakesh Agreement states:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Nothing in that article indicates that it may be used as a means to challenge a specific practice which was not mentioned in the panel request. Similarly, Article 18.4 merely states,

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Again, nothing in that article suggests that it may authorize a challenge to a specific practice not mentioned in the panel request. If Japan wanted to challenge the Department's general facts available practice under this provision, it should have cited the practice specifically in the panel request. In fact, its failure to do so has prejudiced the United States, which could have sought the participation of other Members as third parties, which also use adverse inferences in their facts available practices, had the United States known, when it received Japan's panel request, that the challenge involved so much more than mere company-specific claims.

73. The Appellate Body examined this issue in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body issued 14 December 1999 (hereinafter "*Korean Dairy Products AB Report*"), stating:

> Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request.[94]

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critical circumstances, and captive production. This additional "In addition" paragraph is notably absent from Japan's facts available claim, set forth at paragraph A-2 of its panel request. It is likewise absent from Japan's other claims – affiliated companies (A-1) and injury (B-1) for which Japan has not included challenges to United States' statutory provisions or general practice.

[92] *Panel Request* at 5, para. E **(Exh. US/A-1)**.

[93] First Submission of Japan at para. 60 and n.58.

[94] *Korean Dairy Products AB Report* at para. 139.

74. Finally, the Appellate Body faced this general issue in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the Appellate Body decided 2 November 1998 (hereinafter "*Mexican Cement*"). There, the Appellate Body found:

> "The matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[95]

75. The Appellate Body emphasized this point, stating:

> Where a complaining Member wishes to make any claims concerning an action taken, or not taken, in the course of an anti-dumping investigation under the provisions of the Anti-Dumping Agreement, Article 6.2 of the DSU requires "the specific measures at issue" to be identified in the panel request.[96]

76. In sum, Japan's apparent attempt to hide its unexpected general attack on Commerce's facts available practice behind Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement must fail. The Panel must therefore reject as outside its terms of reference Japan's challenge to the United States' facts available practice generally.

III. STANDARD OF REVIEW

A. STANDARD OF REVIEW

77. The Anti-dumping Agreement is unique among the WTO agreements in providing its own standard for a WTO panel's review of an anti-dumping determination by an investigating authority.[97] That standard is set forth in Article 17.6 in two parts: the first concerns review of questions of fact and the second concerns review of issues of law. In its brief, Japan acknowledges this concept.[98] However, in discussing the pertinent provisions of the Agreement dealing with these standards, Japan omits critical phrases, thereby distorting the standard of review which this Panel is to apply. The proper standard is that described below.

1. Review of an authority's establishment and assessment of the facts: Panel's may not engage in *de novo* review

78. Article 17.6(i) of the AD Agreement provides that:

> (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*

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[95] *Mexican Cement* at para. 72 (emphasis in original), reversed on other grounds before the Appellate Body.

[96] *Id.* at para. 77 (emphasis added).

[97] The Ministerial Declaration on AD/CVD Dispute Settlement also applies the standard of review set forth in Article 17.6 of the AD Agreement to matters pertaining to subsidies and countervailing measures, in view of "the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

[98] First Submission of Japan at para. 47.

> *though the panel might have reached a different conclusion, the evaluation shall not be overturned*. (Emphasis added.)

79. In other words, the panel may not conduct its own *de novo* evaluation of the facts if the authority's establishment of the facts is proper and if its evaluation of the facts is unbiased and objective. This applies even if the panel -- had it stood in the shoes of that authority originally -- might have decided the matter differently. Japan ignores this last concept, by omitting the critical phrase -- "even though the panel might have reached a different conclusion" -- from its quotation of Article 17.6(i).[99] Omission of this phrase distorts a core principle of this provision -- that panels should not re-evaluate the relative weight which the domestic fact-finder, in its discretion, decides to accord to particular pieces of evidence.[100] After all, the investigating authority is the entity which gathers, hears, and weighs the evidence in the first place; its evaluation deserves deference.

80. Moreover, it is well-established that panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority. For example, in *HFCS*[101], adopted earlier this year, the WTO panel stated that when reviewing an anti-dumping determination, a panel's proper role is to examine whether the evidence before the investigating authority was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination. In its reasoning, the panel quoted the following language from an earlier decision:

> [T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.[102]

81. Therefore, in interpreting subparagraph (i) as to factual determinations, Article 17.6 makes clear that the matter before the Panel is not whether there was injury or dumping, but rather whether the investigating authority properly established the facts and evaluated them in an unbiased and objective way. Article 17.6 further makes clear that a Panel does not conduct the required assessment of that question if it evaluates what findings it would make if presented with the same evidence.

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[99] *Id*. para. 48.

[100] Japan apparently believes that this phrase is irrelevant because it intends to prove that all of the Commission's and Commerce's factual determinations were improper, biased, and non-objective. *Id.* at para. 49. It errs, as the remainder of this brief demonstrates.

[101] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R (28 Jan. 2000) at paras. 7.94 - 7.95. In its discussion, the HFCS panel quoted from the panel report in Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico, WT/DS60/R (19 June 1998) at paras. 7.54 - 7.57. Moreover, the HFCS panel noted that, while the Appellate Body reversed the Guatemala - Cement panel report on other grounds, the HFCS panel noted that the Guatemala - Cement panel report set out a standard of review that was "instructive." See HFCS, at para. 7.94.

[102] The quoted language is actually taken from *United States – Measures affecting Import of Softwood Lumber from Canada*, SCM/162, BISD40S/358, adopted 27-28 October 1993, at para. 335, as quoted in *Guatemala – Cement* at para. 7.56. In fact, the *Guatemala – Cement* panel, in a section of its report quoted in *HFCS*, stated that "We believe that the approach taken by the Panel in the *Softwood Lumber* dispute is a sensible one and *is consistent with the standard of review under Article 17.6(i).*" *See HFCS* at para. 7.94 (quoting *Guatemala – Cement* at para. 7.57). *See also United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, para. 4.443 (29 January 1999) (refusing to perform a *de novo* review of evidence before the US Commerce Department with regard to an econometric study which Commerce determined was based on unrealistic assumptions and contradictory evidence).

82. 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 Panel to limit its review to the facts that were before the investigating authority when it made its determination (*i.e.*, the evidence contained in the administrative record).[103] This concept is consistent with the fact that the Panel may not act as a trier-of-fact in the first instance. In its first submission, Japan has ignored this principle by attaching extra-record evidence, including affidavits from US attorneys for certain Japanese steel mills. We have objected to these affidavits and other extra-record evidence in our Preliminary Objections, above.

2. Review of an authority's interpretation of the Agreement: Panels must respect multiple, permissible interpretation

83. In reviewing legal questions that turn on the proper meaning to be ascribed to the Anti-Dumping Agreement, subparagraph (ii) of Article 17.6 provides that, where a relevant provision of the Agreement is subject to more than one permissible interpretation, a WTO panel shall find the Anti-dumping measure in question to be in conformity with the Agreement if it is based on any of those permissible interpretations. Japan ignores this concept, by omitting the second sentence of Article 17.6(ii).[104] That provision, quoted in full, 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.* (Emphasis added.)

84. The negotiators of the Anti-Dumping Agreement, uniquely among negotiators of the WTO Agreements, saw fit to make specific provision for the possibility that customary rules of interpretation would not resolve disputes concerning the meaning of the Anti-dumping Agreement. This very fact provides context for the interpretation of that Agreement. It reflects the negotiators' understanding that they had left a sufficient number of issues ambiguous such that they needed to make special provision for cases in which customary rules would not provide an unequivocal result. The drafters of the Agreement wisely recognized that they could not possibly foresee, and write rules for, the precise methodology to be applied to every issue that would arise in the conduct of highly technical and complex anti-dumping proceedings. Equally wisely, they understood that, with regard to many of these complex issues, national authorities already did things differently, and that the Agreement should allow sufficient flexibility for authorities to continue such variations on the anti-dumping theme.

85. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care, as reflected in Articles 3.2 and 19.2 of the DSU, not to add to the obligations of Members. The reference to "customary rules of interpretation of public international law" is not specific. While we may presume that it refers to the Vienna Convention, the panel may not apply the Convention in a manner which renders any of the express language of the Agreement a nullity. Thus, Japan's contention that Articles 31 and 32 of the Convention require or even permit a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation[105], renders a nullity

[103] *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.").

[104] First Submission of Japan at para. 50.

[105] First Submission of Japan at para. 50 and n.51. Japan cites "two noted scholars" for its contention that there can be only one permissible interpretation of an Anti-dumping Agreement provision. *Id.* (*citing*

the second sentence of Article 17.6(ii) of the Agreement. That sentence expressly acknowledges that the drafters of the Agreement were aware that they had fashioned language that allowed of more than one permissible interpretation, and they expressly directed that panels were not to resolve such ambiguities in favour of only one interpretation.

86. Moreover, in interpreting subparagraph (ii) as to legal questions, the Panel should take note of Article 31(3) of the Vienna Convention on the Law of Treaties, which specifically provides that, in interpreting international agreements:

> There shall be taken into account, together with the context: . . .
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Thus, where the Anti-Dumping Agreement is ambiguous or silent with respect to a particular methodology, but that methodology has been subsequently adopted as standard practice by a number of signatories to the Agreement, the practice of those parties must be taken into account, with regard to determining whether that methodology constitutes a "permissible interpretation" of the Agreement. For example, the practice of countries with regard to the arm's-length test under Article 2 of the Agreement, discussed below, varies: some countries exclude all sales to affiliated parties, and some countries, like the United States, use them if they pass a certain test. This practice may be taken into account by the Panel in determining whether the practice of the United States -- at issue in this particular case -- is consistent with the Agreement. The varying practices of other countries may likewise suggest that there are, in fact, multiple permissible interpretations of this provision of the Agreement.[106]

87. In sum, Article 17.6(ii) makes clear that a Panel fails to make the required assessment of the applicability or conformity of an authority's action with the Anti-dumping Agreement when, if the terms of the Agreement admit of multiple permissible interpretations, a Panel decides that an authority's action fails to conform with the Anti-dumping Agreement when it conforms to one of those interpretations. Thus, 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). Moreover, in determining whether an interpretation is permissible, the Panel should take into account the

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Steven P. Croley and John H. Jackson, *WTO Dispute Procedures: Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 192, 201 (1996)). However, even Jackson and Croley recognize that the second prong of Article 17.6(ii) uses terms nearly identical to those of US administrative law, which allows for multiple, permissible interpretations of a statutory provision which is silent or ambiguous on a specific point. *See* Croley and Jackson, 90 Am. J. Int'l L. at 203-204.

[106] *See also New Zealand - Electrical Transformers from Finland*, GATT Doc. L/5814 - 32S/55 (18 July 1985), para. 4.3, where a Panel noted with regard to the anti-dumping methodology used by New Zealand in calculating cost-of-production:

subsequent practice of signatories to the Anti-dumping Agreement. If the challenged determination does in fact rest upon a permissible interpretation, then this Panel must uphold the determination.

3. Japan's Argument Concerning the Standard of Review under Article X:3 is Irrelevant

88. Finally, Japan contends that its GATT Article X:3 claims are not covered by the deferential standard of review in the Anti-dumping Agreement.[107] This argument is simply not relevant. As demonstrated below, Japan is complaining about actions that are authorized as reasonable and unbiased under the Anti-Dumping Agreement, and are reviewed under the deferential standard of review of Article 17.6. These same actions cannot be found to be inconsistent with Article X:3.

[107] First Submission of Japan at para. 52. Since GATT Article X:3 is outside the Anti-dumping Agreement, Japan's argument is that the general standard of review provision of Article 11 of the Dispute Settlement Understanding governs the Article X:3 claims.

PART B: ANTI-DUMPING MARGINS AND CRITICAL CIRCUMSTANCES (PART B CONTAINS BCI IN BRACKETS)

FACTUAL BACKGROUND

I. THE COURSE OF THE PROCEEDING

1. On 30 September 1998, the Department of Commerce received an anti-dumping petition from a group of domestic steel producers alleging that hot-rolled steel from Japan and other countries was being dumped in the United States, and was thereby injuring a US industry.[1] In addition to alleging injurious dumping the petition provided information demonstrating reasonable grounds to believe or suspect that sales in Japan were made at prices below the fully allocated cost of production ("COP").[2] The petition also alleged that critical circumstances existed as to imports from Japan, and supported the elements required for a finding of critical circumstances with information readily available.[3]

2. On 7 October 1998, the USITC initiated its investigation of hot-rolled steel from Brazil, Japan and Russia.[4] Based on an examination of the information presented in the petition, the Department published, on 22 October 1998, its notice of initiation of the anti-dumping investigation at issue.[5] At the same time, Commerce initiated country-wide cost and critical circumstances investigations with respect to Japanese hot-rolled steel.[6] In accordance with its newly adopted policy.[7] Commerce stated that it would make a critical circumstances determination "as soon as practicable".[8]

3. On 19 October 1998, Commerce issued Section A of its antidumping questionnaire to the six Japanese steel producers identified in the petition.[9]

4. Based on production-volume information received from these six producers, and because it was not practicable for the Department to examine all the Japanese producers fully, Commerce selected Nippon Steel Corporation ("NSC"), NKK Corporation ("NKK") and Kawasaki Steel Corporation ("KSC") NSC, NKK and KSC as respondents on 30 October 1998, and advised the remaining companies that they were excused from responding to Section A.[10] On the same day, Commerce issued sections B-E of its ant-dumping questionnaire to NSC, NKK and KSC.[11]

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[1] *Initiation of Antidumping Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Japan, and the Russian Federation (hereinafter "Commerce Initiation Notice*"), 63 Fed. Reg. 56607, 56607 (22 October 1998) **(Exh. JP-6)**.

[2] *Id*. at 56610, 56612.

[3] *Id*. at 56612-13.

[4] *Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia*, 63 Fed. Reg. 53926 (7 October 1998) **(Exh. JP-2)**.

[5] *Commerce Initiation Notice* at 63 Fed. Reg. at 56607, 56613 **(Exh. JP-6)**.

[6] *Id*. at 56612-13.

[7] See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations, 63 Fed. Reg. 55364, 55364 (15 October 1998) **(Exh. JP-3)**.

[8] *Commerce Initiation Notice*, 63 Fed. Reg. at 56613 **(Exh. JP-6)**.

[9] Cf. Id., 63 Fed. Reg. at 56610 with Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan (hereinafter "LTFV Preliminary Determination"), 64 Fed. Reg. 8291, 8292 (19 February 1999) **(Exh. JP-11)**.

[10] *Id*.

[11] *Id*.

5. On 16 November the USITC notified the Department of its affirmative preliminary finding of threat of material injury in this case.[12] On 30 November 1998, Commerce published its affirmative preliminary critical circumstances determination.[13]

6. The Department issued its Preliminary Determination of Sales at Less Than Fair Value ("LTFV Preliminary Determination") on 12 February 1999.[14] The dumping margins reflected in the LTFV Preliminary Determination were: NSC, 25.14 per cent; NKK, 30.63 per cent; KSC, 67.59 per cent; "All Others," 35.06 per cent.[15] The "all others" margin was the weighted average of the margins calculated for NSC, NKK and KSC.[16] Three days later, on 22 February 1999, NSC and NKK untimely submitted weight-conversion factors.[17]

7. Once the LTFV Preliminary Determination was published, the Department, pursuant to its earlier preliminary critical circumstances finding, ordered suspension of liquidation for entries made 90 days prior to the 19 February 1999 publication of the preliminary determination of sales at less than fair value.[18]

8. During February and March of 1999, Commerce conducted sales and cost verifications of NSC's, NKK's and KSC's responses to the antidumping questionnaires.[19] On 26 March 1999, Commerce issued verification reports for all three responding companies.[20] On 12 April 1999, Commerce returned the untimely submissions containing the conversion factors and their supporting data.[21]

9. Petitioners and respondents submitted case and rebuttal briefs on 12 April and 19 April respectively, and a public hearing was held on 21 April 1999.[22]

10. On 6 May 1999, Commerce published its Final Determination of Sales at Less Than Fair Value ("LTFV Final Determination").[23] The dumping margins in the LTFV Final Determination

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[12] *Id*.; *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, 63 Fed. Reg. 65221 (25 November 1998) **(Exh. JP-7)**.

[13] *Preliminary Determination of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation ("Critical Circumstances Preliminary Determination"*), 63 Fed. Reg. 65750, 65751 (30 November 1968) **(Exh. JP-9)**.

[14] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 **(Exh. JP-11)**.

[15] *Id*. at 8299.

[16] *Id*.

[17] *See* NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (14 April 1999), at 6 of the redacted 22 February 1999 submission **(excerpts at Exh. US/B-1)**,; *see also* NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (19 April 1999), at 4-8 of the redacted 22 February 1999 submission **(excerpts at Exh. US/B-2)**. NSC and NKK submitted additional untimely conversion-factor data on 1 March and 4 March 1999, respectively. *See* NSC Letter (14 April 1999), at 3 and Exh. 8 of the redacted 1 March 1999, submission **(excerpts at Exh. US/B-1)** and NKK Letter (April 19, 1999), at the redacted 4 March 1999 submission **(excerpts at Exh. US/B-2)**.

[18] LTFV Preliminary Determination, 64 Fed Reg. at 8299 **(JP-11)**.

[19] *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan ("LTFV Final Determination"*), 64 Fed. Reg. 24329, 24330 (May 6, 1999) **(Exh. JP-12)**.

[20] *Id.*

[21] Letter from Programme Manager to NSC rejecting NSC factor information, at 3 (12 April 1999) **(Exh. US/B-3(a))**; Letter from Programme Manager to NKK rejecting NKK factor information at 3 (12 April 1999) **(Exh. US/B-3(c))**; *see also*, *LTFV Final Determination*, 64 Fed. Reg. at 24361 (NSC) and 24363 (NKK) **(Exh. JP-12)**.

[22] *LTFV Final Determination*, 64 Fed. Reg. at 24361 **(Exh. JP-12)**.

[23] *Id*. at 24329.

were: NSC, 19.65 per cent; NKK, 17.86 per cent; KSC, 67.14 per cent; "All Others, " 29.30 per cent.[24]

11. The LTFV Final Determination included a final negative determination of critical circumstances for NSC and NKK.[25] Therefore, the Final Determination stated that cash deposits or bonds posted by NSC and NKK for the critical circumstances period were to be refunded or released, respectively.[26] However, the Department continued to find that critical circumstances existed as to KSC and the "all others" group, taking into consideration their final margins and the evidence of record as to importer knowledge of injury and as to massive imports.[27]

12. On 23 June 1999, the USITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[28] The USITC also found that critical circumstances did not exist for these products.[29]

13. On 29 June 1999, Commerce published its antidumping duty order in this case. Therein, Commerce stated that it would order the release of all entries made prior to the preliminary determination of sales at less than fair value (*i.e.*, the "critical circumstances" entries).[30]

14. On 18 November 1999, the Government of Japan formally invoked the dispute settlement provisions of GATT 1994, by requesting consultations with the US Government with respect to this case. Japan has set forth, at paragraphs 9-13 of its brief, the procedural background of the dispute resolution process with respect to this case.

15. For the convenience of the Panel, further facts relating to the underlying administrative case have been organized in terms of the issues raised for review and set forth below. In addition, each section of argument pertaining to each issue covers the facts as necessary to the argument of that issue.

II. APPLICATION OF FACTS AVAILABLE WITH REGARD TO KSC

16. On 19 October 1998, Commerce issued Section A of its antidumping questionnaire to KSC[31], concerning its general corporate structure. This was followed by sections B-E of its questionnaire on 30 October 1998, which covered, among other matters, the prices of KSC's sales to the United States, including its affiliated further manufacturers. During November and December of 1998 and January of 1999 – prior to Commerce's preliminary determination -- the Department received responses to these initial and supplemental questionnaires.[32]

17. During this time, an issue arose with respect to the Department's request that KSC provide it with data on sales to affiliates located in the United States. In letters to the Department dated 10 November, 3 December and 18 December 1998, KSC requested that it be excused altogether from

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[24] *Id*. at 34780.

[25] Id. at 24337; Memorandum from Roland L. MacDonald to Joseph A. Spetrini: Final Determination of Critical Circumstances (hereinafter " Final Critical Circumstances Memo"), at 2 (April 28, 1999) **(Exh. US/B-4)**.

[26] *LTFV Final Determination*, 64 Fed. Reg. at 24370 **(Exh. JP-12)**.

[27] *Id*. at 24337-38; *Final Critical Circumstances Memo* **(Exh. US/B-4)**.

[28] *Certain Hot-Rolled Steel Products From Japan ("USITC Final Determination"*), 64 Fed. Reg. 33514 (23 June 1999) **(Exh. JP-13)**.

[29] *Id*.

[30] *Anti-Dumping Duty Order: Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products From Japan (hereinafter, "Hot-Rolled Steel Order"*), 64 Fed. Reg. 34778 (29 June 1999) **(Exh. JP-15)**.

[31] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291, 8292 (19 February 1999), **(Exh. JP-11)**.

[32] *Id.*

reporting sales to affiliates located in the United States that further manufactured subject hot-rolled steel into non-subject merchandise.[33] These two US affiliates were California Steel Industries ("CSI") and VEST, Inc. ("VEST").[34] With regard to CSI, KSC explained that it was a 50/50 joint venture between KSC and a Brazilian company, Companhia Vale de Rio Doce ("CVRD"). Moreover, KSC explained that CSI was a petitioner in the investigation and that a CSI executive was a witness for the petitioners in the preliminary injury conference at the International Trade Commission, claiming that CSI was injured by hot-rolled steel from Japan.[35]

18. Domestic interested parties contested KSC's request for exemption from reporting these sales in their comments dated 25 November 1998[36], and KSC rebutted these comments on 27 November 1998. In further questionnaires issued 4 December 1998 and 4 January 1999, the Department continued to request that KSC report the necessary data concerning its sales through the affiliated manufacturers.[37] On 25 January 1999, instead of responding to Commerce's Section E questionnaire (which requests information on further manufacturing by affiliated companies), KSC reiterated that it was unable to do so because CSI refused to cooperate and because VEST did not have computerized records and lacked a systematic method of tracing further manufactured sales.[38] KSC did not allege that CSI was unable to provide the requested information.[39]

19. The Department issued its Preliminary Determination of sales at less than fair value on 12 February 1999.[40] The Department preliminarily determined to disregard KSC's sales made through VEST, because they accounted for less than 5 per cent of KSC's US sales.[41] With regard to KSC's sales through CSI, the Department preliminarily determined that it was inappropriate to disregard these sales because they accounted for a substantial portion of KSC's US sales.[42] The Department further preliminarily determined that KSC and CSI had failed to cooperate by not acting to the best of their ability to comply with the Department's request for information as to these sales. Therefore, the Department based its preliminary margin for the KSC/CSI sales upon adverse facts available.[43] As facts available, Commerce applied the highest product-specific weighted-average margin for KSC to the quantity of subject merchandise KSC sold through CSI during the period of investigation (" POI").[44] The margins for the KSC/CSI sales were weight-averaged with the calculated margins for the KSC sales for which the required data had been reported. KSC's overall preliminary margin was the result of that calculation.

20. Commerce conducted its cost verification and sales verifications of KSC in late February and early March of 1999.[45] At the KSC sales verification, Commerce devoted significant time to gathering evidence of KSC's efforts to obtain the necessary data concerning the sales made through CSI.[46] Commerce examined documents relating to KSC's sales through CSI and KSC's interactions

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[33] Letter from KSC to Secretary of Commerce (10 November 1998) **(Exh. JP-42(i))**; Letter from KSC to Secretary of Commerce, 3 Dec. 1998, **(Exh. US/B-5)**; Letter from KSC to Secretary of Commerce 18 (December 1998) **(JP-42(n))**; *see also KSC Preliminary Analysis Memo* (12 February 1999) **(Exh. US/B-6)**.

[34] *Id*.

[35] *Id.*

[36] Letter from Bethlehem Steel, *et. al.*, to Secretary of Commerce, (25 November 1998) **(Exh. US/B-7)**.

[37] KSC Supplemental Questionnaire (4 December 1998) **(Exh. JP-42(k))**, and KSC Supplemental Questionnaire, Section E (4 January 1999) **(Exh. US/B-8)**.

[38] KSC Supplemental Questionnaire (January 25, 1999) **(Exh. JP-42(v))**.

[39] *Id*.

[40] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291, **(Exh. JP-11)**.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *LTFV Final Determination*, 64 Fed. Reg. at 24330 **(Exh. JP-12)**.

[46] KSC Sales Verification Report at 20-22 **(Exh. JP-42(y))**.

with CSI with respect to the Department's request for the data necessary to calculate antidumping margins for those sales. These inquiries revealed, among other things, that, although KSC had made a series of requests to CSI, KSC did not act to the best of its ability to obtain the requested information. Specifically, KSC never raised the issue before the CSI Board, never discussed the matter with its co-owner and joint venture partner, and never attempted to enforce its rights with respect to this matter under its Shareholder's Agreement.[47] On 26 March 1999, Commerce issued its verification report for KSC.[48]

21. On 6 May 1999, Commerce published its Final Determination.[49] As in the Preliminary Determination, the Department found that the absence of the necessary information concerning the KSC/CSI sales required the use of facts available. The Department further determined that the use of an adverse inference was warranted because KSC and CSI, collectively, failed to cooperate with the Department by not acting to the best of their ability to comply with requests for information.[50] Commerce stated that:

> KSC and CSI have neither provided the data on CSI's sales, as requested by the Department, nor demonstrated to the Department's satisfaction that this is not possible. Therefore, the Department finds that KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's request for information with respect to the CSI sales. Therefore we have used an adverse inference in selecting the facts available with respect to the CSI sales.[51]

In addition, the Department found that KSC had "limited its efforts to merely requesting the required data and otherwise took a 'hands-off' approach with respect to CSI's alleged decision not to provide this data".[52]

22. Commerce selected as facts available for the KSC/CSI sales the second-highest, rather than the highest, product-specific margin for KSC's other US sales, after further examination of the appropriateness of the highest product-specific margin.[53] When the margins for the KSC/CSI sales were weight-averaged with the calculated margins for the US sales for which KSC had provided the requested information, the overall final margin for KSC was 67.14 per cent, slightly lower than the Preliminary Determination margin.[54]

III. APPLICATION OF FACTS AVAILABLE TO NSC AND NKK FOR CONVERSION FACTORS

23. On 30 October 1998, Commerce issued Sections B (home market sales) and C (US sales) of its questionnaire to NSC, NKK and KSC. The questionnaire included a request for weight conversion factors so that export sales and home market sales could be compared on a common weight basis. Specifically, the Department's questionnaire clearly stated that if respondents report both actual weights of hot-rolled steel on some sales and weights expressed on a different basis on other sales,

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[47] *Id*.
[48] *LTFV Final Determination*, 64 Fed. Reg. at 24330 **(Exh. JP-12)**. *See also* KSC Sales Verification Report at 1 **(Exh. JP-42(y))**.
[49] *LTFV Final Determination*, 64 Fed. Reg. 24329 **(Exh. JP-12)**.
[50] *Id*.
[51] *Id*. at 24368
[52] *Id*.
[53] *Id*. at 24369.
[54] *Id*. at 24370.

they "must" provide the Department with the conversion factor used to arrive at a uniform quantity of measure, as well as the converted quantity for such sales.[55]

24. Steel can be sold on a dollar per actual ton basis or on a dollar per ton theoretical weight basis. The former is based on the actual weight of the product sold. The latter is uses a calculated weight, based on the dimensions of the product and its theoretical mass. These are, in effect, different unit measures: a $300 per actual ton price may be less than or greater than a $300 per theoretical weight price, and there can be significant differences between the two. It is impossible to meaningfully compare a $300 per actual ton price in the US market to a $300 per theoretical ton price in the home market without some conversion factor to put the prices on the same basis.

25. Commerce gave respondents 52 days to respond to the questionnaire, after granting their requests for a two-week extension beyond the original deadline.[56] Respondents replied to the questionnaire on 21 December 1998.[57] KSC stated that it did not measure actual weight when the order was placed on a theoretical weight basis, but nevertheless provided factors for use in converting theoretical weight to actual weight for various categories of subject merchandise.[58] NSC declined to provide the factor Commerce had requested, stating (incorrectly, as the Department later learned) that "NSC quantity types are consistent within product type" (in other words, claiming that the conversion factor was not necessary).[59] After stating that "[i]t is not possible to convert a theoretical weight into an actual weight," NKK claimed (incorrectly, as the Department later learned) that none of its home market theoretical weight transactions corresponded to products matched to US sales; accordingly, NKK did not submit a conversion factor for the theoretical weight sales.[60]

26. On 4 January 1999, Commerce renewed its request that NSC and NKK provide a factor for converting actual and theoretical weight sales to a common basis.[61] Commerce gave both companies an additional 21 days to provide the requested conversion factors, after granting their requests for a one-week extension beyond the supplemental questionnaire's original deadline.

27. In their 25 January 1999, responses to the Department's second request for conversion factors, both companies again declined to provide the requested data. NSC claimed (again incorrectly) that it did not weigh merchandise sold on a theoretical weight basis, and thus had "no way

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[55] Department's Initial Section B-E questionnaire, at B-19 and C-17 (October 30, 1998) **(Exh. JP-45(a))**.

[56] *See* Letter from Programme Manager to law firm of Gibson, Dunn & Crutcher (19 November 1998) (granting extension to NSC) **(Exh. US/B-9)** and Letter from Programme Manager to law firm of Willkie Farr & Gallagher (1 December 1998) (granting extension to NKK) **(Exh. US/B-10)**.

[57] *See* KSC Initial Section B Responses at B-23-24 and Exh. B-6 (21 December 1998) **(Exh. JP-45(e))**, and KSC Initial Section C Questionnaire Responses at C-26-27 and Exh. C-6 (21 December 1998) **(excerpts at Exh. US/B-11)**; NSC Initial Section B-D Questionnaire Response at B-22 (21 December 1998) **(excerpts at Exh. JP-29(a))**; NKK Initial Section B-D Questionnaire Response at B-30 (21 December 1998) **(excerpts at Exh. JP-45(b))**.

[58] KSC Initial Section B Questionnaire Response at B-23-24 and Exh. B-6 (21 December 1998) **(JP-45(e)**; KSC Initial Section C Questionnaire Response at C-26-27 and Exh. C-6 (21 December 1998) **(Exh. US/B-11)**.

[59] NSC Initial Questionnaire Response at B-22 (21 December 1999) **(excerpts at Exh. JP-29(a))**. NSC later acknowledged that a small number of its US sales of hot-rolled coil were made on a theoretical weight basis, whereas all home market sales of hot-rolled coil were made on an actual weight basis. NSC Section B-D Supplementary Questionnaire Response at B-24-25 (25 January 1999) **(excerpts at Exh. US/B-12)**.

[60] NKK Initial Section B-D Questionnaire Response at B-30 (21 December 1998) **(excerpts at Exh. JP-45(b))**

[61] NSC Section B-C Supplementary Questionnaire at 5 (4 January 1999) **(Excerpts at Exh. US/B-13)**; NKK Section B-D Supplementary Questionnaire at 2 (4 January 1999) **(Excerpts at Exh. US/B-14)**.

of calculating" the requested conversion factor.[62] In its response of the same date, NKK reiterated that it would be impossible to convert theoretical weight to actual weight and impractical to do the inverse and that none of the theoretical weight transactions was associated with a product matched to US sales.[63]

28. NSC had a small quantity of US sales reported on a theoretical weight basis that had to be compared, for dumping purposes, to reported home market sales made on an actual weight basis. Similarly, although NKK reported all of its US sales on an actual weight basis, a small number of its home market sales that had to be compared to US sales were reported on a theoretical weight basis. Thus, a price per actual ton in one market would have to be compared to a price per theoretical ton in the other market. A meaningful comparison required that that Department convert these prices, as closely as possible, to a common basis. But NSC and NKK failed to provide the conversion factors needed to do this. Consequently, in its preliminary dumping determination issued on 12 February 1999[64], Commerce assigned a facts available margin to NSC's and NKK's sales affected by the absence of a weight conversion factor. As facts available for NSC's affected US sales, the Department preliminarily assigned NSC 's highest calculated product-specific margin.[65] For NKK's sales affected by the missing conversion factors, the Department preliminarily used, as normal value for each home market transaction involving a theoretical weight, the highest calculated normal value for any product.[66]

29. On 22 February 1999, ten days after Commerce issued its preliminary determination, NSC submitted a weight-conversion factor, claiming that, "[a]t the time of the previous filing, NSC was unable to determine an appropriate ratio".[67] NKK also submitted a weight-conversion factor on 22 February 1999.[68] NKK explained that what another respondent, KSC, had done was merely to provide a factor to derive a more accurate *estimate* of actual weight than that expressed by theoretical weight; thus, NKK provided such a factor.[69] NSC and NKK submitted additional data relevant to the conversion factor calculations on 1 March 1999 (data supporting a new, corrected conversion factor)

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[62] NSC Section B-D Supplementary Questionnaire Response at B-24-25 (25 January 1999) **(Excerpts at Exh. US/B-12)**.

[63] NKK Section B-D Supplementary Questionnaire Response at BS-14-15 (25 January 1999) **(Excerpts at Exh. US/B-15)**.

[64] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 (Exh. JP-11).

[65] *Id.* at 8298.

[66] *Memorandum from Team to File: Analysis of Data Submitted by NKK Corporation ("NKK") for Final Determination of Investigation* (hereinafter, *"NKK Final Analysis Memo"*), at 3, 5 (28 April 1999) (explaining that, contrary to what inadvertently was indicated in its preliminary determination analysis memorandum, the Department had applied, in both the preliminary and final determination programming, the highest calculated normal value for any product to all of NKK's theoretical weight sales) **(Exh. US/B-16)** . *The LTFV Preliminary Determination* had also inadvertently stated that the Department, in the preliminary determination, had applied the highest calculated normal value on a product-specific basis. 64 Fed. Reg., at 8298 **(Exh. JP-11)**.

[67] *See* NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 14, 1999), at 6 of the redacted 22 February 1999 submission **(excerpts at Exh. US/B-1)**. The original NSC submissions containing weight conversion factors and supporting data, at **Exhibits JP-29(d) and (e)**, are no longer part of the official record in this case; thus, the Panel should not rely upon them.

[68] *See* NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 19, 1999), at 4-8 of the redacted 22 February 1999 submission **(excerpts at Exh. US/B-2)**. The original NKK submissions containing weight conversion factors and supporting data, including **Exhibit JP-45(g)**, are no longer part of the official record in this case; thus, the Panel should not rely upon them.

[69] *Id*. at 5-6 of the redacted 22 February 1999 submission.

and 4 March 1999, respectively.[70] However, Commerce determined that the conversion factor data had been untimely filed, long after the deadlines for the original and supplemental questionnaire responses had passed. Therefore, consistent with its regulations and practice, Commerce returned the submissions containing the conversion factors and their supporting data on 12 April 1999.[71]

30. Because NSC and NKK contested the Department's rejection of the untimely conversion factor data and treatment of sales reported on theoretical weight in their respective case briefs, Commerce explained its position on this issue in the Final Determination. With respect to NSC's US sales reported on a theoretical weight basis, the Department continued to reject NSC's untimely provided conversion factor for the final determination, and assigned a margin to the affected sales based on the facts available.

> In the instant case, NSC failed to submit the requested [conversion factor] information by 21 December 1998 (the deadline for the original Section B and C questionnaire responses), nor did it provide this information by 25 January 1999 (the deadline for submission of information requested in Section B and C supplemental questionnaire). Despite repeated requests for this information, NSC did not provide the requested data until 1 March 1999 (nearly 3 months after the initial questionnaire deadline).
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> NSC's only response was that the data did not exist. While NSC characterizes that statement as a correctable minor error, we disagree. The evidence indicates that the requested information was routinely maintained by NSC in the normal course of business, but that obtaining it was simply not a priority. Regardless of who specifically knew about this information, the sales department or the production department, the data existed and could have easily been obtained. The fact that NSC was able to provide this information shortly after the preliminary determination also supports the conclusion that it could have done so within the time requested. Moreover, it is impossible for the Department to determine whether NSC's claims of inadvertent error are valid or merely self-serving. Thus, they are insufficient to rebut the evidence establishing that the requested information was readily available.
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> Furthermore, timely, accurate conversion information is necessary to the margin calculation and can have a significant impact. In recognition of steel industry practices, the Department routinely requests respondents in proceedings involving steel to provide either the actual and theoretical weights of the transactions in both markets, or in the alternative, to provide conversion factors to ensure apples to apples comparisons on the same weight basis. The need for timely filed, verifiable actual weights or conversion factors is particularly acute with flat rolled steel products in coils, including those at issue. Assuming that the coils meet the specifications of the ordered product, the actual width and the actual thickness of the coils will vary within

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[70] NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 14, 1999) at 3 and Exh. 8 of the redacted 1 March 1999 submission **(excerpts at Exh. US/B-1)**; NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 19, 1999), at the redacted 4 March 1999 submission (removing affected data without narrative) **(excerpts at Exh. US/B-2)** . As noted above, the original versions of these submissions are no longer part of the official record and should not be relied upon by the Panel.

[71] Letter from Programme Manager to NSC rejecting NSC factor information at 3 (12 April 1999) **(Exh. US/B-3(c))**; Letter from Programme Manager to NKK at 3 (12 April 1999) **(Exh. US/B-3(a))**; *see also*, *LTFV Final Determination*, 64 Fed. Reg. at 24361 (NSC) and 24363 (NKK) **(Exh. JP-12)**.

> the allowed tolerances, but the lengths of the coils are not specified in the available sales-related documentation. Therefore, the total actual weight of the coils sold in transactions denominated in theoretical weight can vary by a significant, but unknown amount, as the actual dimensions of the coils cannot be determined. Accordingly, the resulting unit values that would be used in the Department's price-to-price comparisons could also vary by a significant, but unknown amount.[72]

Moreover, Commerce found that "by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, [NSC] failed to cooperate by not acting to the best of its ability".[73] Consequently, the Department applied an adverse inference in selecting the facts available "so as to effectuate the statutory purposes of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner".[74] Commerce used, as the margin for each US sale reported based on theoretical weight (*i.e.*, different weight units from the home market sales to which they had to be compared) the average of the highest calculated sale-specific margins for each of the products involved in the theoretical weight sales.[75]

31. With respect to NKK's home market sales reported on a theoretical weight basis, the Department also continued to reject NKK's untimely provided conversion factor, and assigned a normal value to the affected sales based on the facts available. As with NSC, the Department noted the long delay in submitting the conversion factors.[76] Moreover, after finding that NKK had failed to act to the best of its ability because it could have provided the conversion factor when originally requested, Commerce used an adverse inference in selecting the normal value for those sales.[77] The Department explained:

> NKK's claims that it could calculate a conversion factor in February of 1999, but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NKK argues that it did not understand what the Department wanted when it originally requested a "conversion factor", although this was not stated at the time, and that it lacked the data necessary to calculate one, . . . it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NKK merely dismissed the Department's repeated requests. The fact that NKK ultimately did provide such a factor is the proof that they could have done so much earlier.[78]

As in the preliminary determination, Commerce used, as normal value for each home market transaction involving a theoretical weight, the highest NKK normal value for any product.[79]

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[72] *LTFV Final Determination*, 64 Fed. Reg. at 24361 (citations omitted) **(Exh. JP-12)**.

[73] *Id.*

[74] *Id.* at 24362.

[75] *Id*. Commerce calculated a margin for the affected US sales as follows. First, it isolated the products sold on a theoretical weight basis, and then identified US sales of those same products that were made on an actual weight basis. The Department calculated a margin for each of the actual weight sales, identified the highest margin for each product, averaged these margins, and applied the resulting margin to the US theoretical weight sales. *Memorandum from Team to File: Analysis of Data Submitted by Nippon Steel Corporation ("NSC") for Final Determination of Investigation* (hereinafter, "*NSC Final Analysis Memo*") at 6 (28 April 1999) **(Exh. US/B-17)**.

[76] *LTFV Final Determination*, 64 Fed. Reg. at 24363 **(Exh. JP-12)**.

[77] *Id*. at 24363-64.

[78] *Id.*

[79] *Id*. at 24364; *NKK Final Analysis Memo* at 3 **(Exh. US/B-16)**.

IV. EXCLUSION OF FACTS AVAILABLE MARGINS FROM THE ALL OTHER RATE

32. The petition submitted to the Department in September of 1998 identified six steel producers as possible exporters of hot-rolled steel from Japan.[80] These companies were NSC, NKK, KSC, Sumitomo Metal Industries ("Sumitomo"), Kobe Steel, Ltd. ("Kobe"), and Nisshin Steel Co. Ltd. ("Nisshin").[81] On 19 October 1998, Commerce issued Section A of its antidumping questionnaire to these six Japanese steel producers.[82]

33. Based on production-volume information received from these producers, and because it was not practicable for the Department to examine all the Japanese producers fully, Commerce selected NSC, NKK and KSC as respondents on 30 October 1998 and advised the remaining companies that they were excused from responding to Section A.[83] Commerce therefore issued sections B-E of its antidumping questionnaire only to NSC, NKK and KSC.[84] Commerce's selection of the respondents whose company-specific data would be used to calculate anti-dumping margins was made pursuant to section 777A(c)(2)(B) of the Act, which implements Article 6.10 of the Anti-dumping Agreement. That article permits authorities to limit their examination to "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" when the number of exporters involved is so large as to make it impracticable to determine an individual margin for each exporter.

34. The Department issued its Preliminary Determination of sales at less than fair value on 12 February 1999.[85] The dumping margins in the LTFV Preliminary Determination for the three examined respondents were: NSC, 25.14 per cent; NKK, 30.63 per cent; KSC, 67.59 per cent.[86]

35. In accordance with section 735(c)(5) of the Act, which implements Article 9.4 of the Agreement, and using the Department's normal methodology for this purpose, the Preliminary Determination also provided a margin for the non-selected companies, called the "all others" margin, based on the data submitted by the selected companies.[87] The "all others" margin in the Preliminary Determination, 35.06 per cent, was the weighted average of the margins calculated for NSC, NKK and KSC.[88] This is the methodology provided for in section 735(c)(5)(A) of the Act, which states that the "all others" rate shall be an amount equal to the weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins based entirely on the facts available.[89]

36. During the comment period, no party challenged the methodology the Department had used for calculating the all others rate.[90] Furthermore, no party challenged the manner in which this methodology was applied. This is particularly noteworthy, given the fact that Sumitomo, one of the companies subject to the all others rate, submitted a case brief making arguments with respect to two

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[80] *Initiation Notice*, 63 Fed. Reg. at 56610 **(Exh. JP-6)**.

[81] *Id*.

[82] *Cf. id*. *with LTFV Preliminary Determination*, 64 Fed. Reg. 8291, 8292 **(Exh. JP-11)**.

[83] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**. The three companies selected were those with the largest volume of exports to the United States, according to the production-volume information they submitted in response to the Department's questionnaires. *Id*.

[84] *Id*.

[85] *Id.* at 8291.

[86] *Id*. at 8299.

[87] *Id*.

[88] *Id*.

[89] *Id*.

[90] *LTFV Final Determination*, 64 Fed. Reg. 24329 *et seq.*, *passim* **(Exh. JP-12)**.

other issues, and could easily have commented on the all others rate at the same time if it had concerns with respect to that issue.[91]

37. On 6 May 1999, Commerce published its Final Determination.[92] The dumping margins in the Final Determination for the selected respondents were: NSC, 19.65 per cent; NKK, 17.86 per cent; KSC, 67.14 per cent.

38. In the Final Determination, the Department continued to apply its standard all others rate methodology, calculating that rate as the weighted average of the margins calculated for NSC, NKK and KSC.[93] The final all others rate was 29.30 per cent. Because no party had challenged this methodology in the case briefs, the Department did not include any further explanation in the Final Determination of its uncontested methodology for determining the all others rate.

V. APPLICATION OF THE "ARM'S LENGTH" TEST TO AFFILIATED CUSTOMERS TO DETERMINE NORMAL VALUE

39. In calculating its preliminary dumping margins, the Department excluded from its analysis sales to affiliated customers in the home market which were not made at arm's length prices, because the Department considered them to be outside the ordinary course of trade.[94] The Department described its "arm's length test" as follows:

> To test whether these sales were made at arm's length prices, we compared on a model-specific basis the prices of sales to affiliated and unaffiliated customers net of all discounts, rebates, billing adjustments, movement charges, direct selling expenses, and packing. Where, for the tested models of subject merchandise, prices to the affiliated party were on average 99.5 per cent or more of the price to unaffiliated parties, we determined that sales made to the affiliated party and used those sales in determining NV [normal value]. *See* 19 CFR 351.403(c). In instances where no price ratio could be constructed for an affiliated customer because identical merchandise was not sold to unaffiliated customers, we were unable to determine that these sales were made at arm's length prices and , therefore, excluded them from our LTFV analysis. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37062, 37077 (9 July 1993). Where the exclusion of such sales eliminated all sales of the most appropriate comparison product, we made a comparison to the next most similar product.[95]

40. Following the Preliminary Determination, NKK contested, among other issues, the Department's methodology for determining when sales to affiliated customers in the home market will be deemed to be at "arm's length" ("the arm's length test").[96] With respect to NKK's challenge

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[91] *Id*. at 24337 (Comment 2) and 24364 (Comment 31). Japan's suggestion at para. 134 of its brief that Sumitomo Metal Industries "strenuously argued" against the Department's all others methodology is belied by the very document they rely upon, Sumitomo's case brief **(Exh. US/B-19)**. Sumitomo sought to lower its margin by arguing against adverse treatment of Kawasaki's CSI sales, which affected the Kawasaki's margin and thus the weighted average all others rate.

[92] *LTFV Final Determination*, 64 Fed. Reg. at 24329 **(Exh. JP-12)**.

[93] *Cf. LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(Exh. JP-11)** *with Final Determination*, 64 Fed. Reg. at 24331 ("Changes From the Department's Preliminary Determination," showing no change in this respect) **(Exh. JP-12)**.

[94] *LTFV Preliminary Determination* at 8295, *citing* 19 C.F.R. § 351.102 (definition of "ordinary course of trade") **(Exh. JP-11)**.

[95] *Id*. at 8295.

[96] *LTFV Final Determination*, 64 Fed. Reg. at 24341-42 **(Exh. JP-12)**.

to the Department's arm's length test, the Department continued to use, in its Final Determination, its established methodology, which the Court of International Trade has repeatedly sustained.[97] The Department noted that, although NKK had proposed an alternative methodology based on a statistical approach, it had not demonstrated that the current methodology was unreasonable.[98] The Department also explained that it applies the arm's length test on a customer-by-customer, rather than a product-by-product, basis because "the question underlying the test is whether affiliation between the seller and the customer has (in general) affected pricing".[99]

VI. CRITICAL CIRCUMSTANCES AND RETROACTIVE APPLICATION OF ANTI-DUMPING DUTIES

41. On 30 September 1998, US domestic steel producers filed a petition with the Department of Commerce and the USITC seeking relief from unfairly dumped imports.[100] This petition (including amendments)[101] contained allegations of dumping and injury, along with approximately 800 pages of factual data and support.[102]

42. In response to the allegations and accompanying factual information, the Department of Commerce analyzed the sufficiency of the petition in order to determine whether it was proper to initiate an investigation.[103] Specifically, the Department analyzed the less than fair value and injury allegations, and determined that the petition contained, among other things, sufficient factual support relating to (1) volume and value of imports; (2) US market share (*i.e.*, the ratio of imports to consumption); (3) actual pricing (*i.e.*, evidence of decreased pricing); (4) relative pricing (*i.e.*, evidence of imports under-selling US products); (5) prices or costs and claimed adjustments; (6) home market pricing (market research reports including affidavits); (7) current pricing data (no more than one year old); (8) price and cost data from contemporaneous time periods; (9) correct currency rates used for all conversions to US dollars; and (10) conversion factors for comparisons of differing units of measure.[104] In addition to analyzing the "sufficiency of the allegations," the Department further assessed the reliability of the factual support, by corroborating the evidence with publicly available data.[105]

43. After reviewing the allegations and factual support contained in the petition, the Department determined that there existed reasonable grounds to believe or suspect sales were being made below

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[97] *Id.* at 24342-43.

[98] *Id*. at 24342.

[99] *Id., citing Micron Technology, Inc. v. United States*, 893 F. Supp. 21 (CIT 1995) and *Torrington Co. v. United States*, 960 F. Supp. 339 (CIT 1997).

[100] *See Petition for the Imposition of Antidumping Duties* **(Exhs. US/B-40a, 40b and 40c).**

[101] After receiving the initial petition, the Department sent petitioners a questionnaire requesting additional information and supporting documentation. *See* Letter from the Department to Skadden, Arps, Slate, Meagher & Flom LLP (6 October 1998) **(Exh. US/B-41)**. In the questionnaire, the Department requested, among other things, additional supporting documentation pertaining to claimed import volumes, material injury, and knowledge by Japanese producers of the potential investigation. *Id.* In response to the questionnaire, the petitioners filed amendments to the petition on 9 October 1998 and 14 October 1998 containing additional explanation and supporting documentation as requested.

[102] *See Petition for the Imposition of Anti-Dumping Duties* **(Exhs. US/B-40a, 40b and 40c).**

[103] *Import Administration AD Investigation Initiation Checklist, Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, Brazil and the Russian Federation* at 6-8 (19 Oct. 1998) (hereinafter Initiation Checklist) **(Exh. US/B-18)**.

[104] *See id.*

[105] *See id.* Attachment at 15-16.

cost.[106] As a result, the Department published a notice of initiation of an anti-dumping investigation on 22 October 1998.[107]

44. On 16 November 1998, the USITC notified the Department of its affirmative preliminary finding of threat of material injury in this case.[108]

45. On 30 November 1998, Commerce published its preliminary critical circumstances determination.[109] In reaching its preliminary determination as to whether critical circumstances existed, the Department found, based on the evidence before it, a massive surge in import volumes in which "imports of hot-rolled steel from Japan increased by more than 100 per cent".[110] This was more than six times greater than the 15 per cent increase needed to establish massive imports under the Department's established practice.[111] The Department also found that importers knew or should have known both that the respondents were selling the subject merchandise at less than fair value and that there was likely to be material injury.[112] It based this determination on the fact that the dumping margins documented in the petition were in excess of 25 per cent, on the ITC's preliminary determination of threat of injury, and on other publicly available information, including "numerous press reports . . . regarding rising imports, falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers".[113] The Department also considered comments submitted by the respondents on this issue.[114] Based upon these findings and the arguments presented, the Department determined that it was proper to issue a preliminary affirmative determination of critical circumstances.[115]

46. During November and December of 1998 and January of 1999, Commerce received responses to initial and supplemental questionnaires.[116]

47. On 12 February 1999, the Department issued its Preliminary Determination of Sales at Less Than Fair Value.[117] The dumping margins reflected in the LTFV Preliminary Determination were: NSC, 25.14 per cent; NKK, 30.63 per cent; KSC, 67.59 per cent; "All Others," 35.06 per cent.[118]

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[106] *See id*. at 6-8.

[107] *See Initiation of Antidumping Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, Japan and the Russian Federation*, 63 Fed. Reg. 56607, 56607 (22 October 1998) **(Exh. JP-6).**

[108] *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, 63 Fed. Reg. 65221 (November 25, 1998) **(Exh. JP-7)**.

[109] *Preliminary Determination of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation ("Critical Circumstances Preliminary Determination"*), 63 Fed. Reg. 65750, 65751 (30 November 1998) **(Exh. JP-9)**; see also *The Department's Preliminary Critical Circumstances Memorandum ("Preliminary Critical Circumstances Memo"*) at 2-4 (23 November 1998) **(Exh. US/B-42)**.

[110] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751 **(Exh. JP-9)** ; Preliminary Critical Circumstances Memo, passim **(Exh. US/B-42)**

[111] *Critical Circumstances Preliminary Determination* at 65750 **(Exh. JP-9)**; *see also* 19 C.F.R. § 351.206(h)(2)

[112] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9)** ; see also *Preliminary Critical Circumstances Memo* at 2-4 **(Exh. US/B-42)**.

[113] *Id.*

[114] *See Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**

[115] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751 **(Exh. JP-9)**

[116] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

[117] *Id.* at 8291.

[118] *Id.*

48. Pursuant to its earlier preliminary critical circumstances finding, the Department at this point ordered suspension of liquidation for entries made 90 days prior to the publication of the Preliminary Determination of Sales at Less Than Fair Value.

49. Following the issuance of the LTFV Preliminary Determination, various Japanese respondents filed case briefs contesting, among other issues, the Department's critical circumstances determination.[119] Respondents challenged each aspect of the critical circumstances determination.[120] Specifically, with respect to the Department's determination that importers had knowledge of dumping, respondents argued that the Department erred when it relied on what they called the mere allegations in the petition as a basis for determining the margins of dumping.[121] With respect to the Department's determination that importers had knowledge that the dumping was likely to cause injury to the US domestic industry, respondents argued that, because the USITC preliminary determination of injury did not find current material injury, the Department could not impute knowledge of injury.[122] Finally, with respect to the Department's determination that massive imports existed, respondents argued that the Department incorrectly deviated from its normal practice by selecting a different comparison period for determining the volume of imports.[123] Thus, based upon these contentions, respondents argued that there was insufficient evidence in the record to support the findings leading to the affirmative critical circumstances determination.[124]

50. On 6 May 1999, Commerce published its LTFV Final Determination.[125] The dumping margins reflected in the LTFV Final Determination were: NSC, 19.65 per cent; NKK, 17.86 per cent; KSC, 67.14 per cent; "All Others," 29.30 per cent.[126]

51. The Final Determination also included a final negative determination of critical circumstances as to NSC and NKK, both of which had final dumping margins below the 25 per cent threshold the Department uses to impute importer knowledge of dumping.[127] Therefore, the Final Determination stated that cash deposits or bonds posted by NSC and NKK for the critical circumstances period were to be refunded or released, respectively.[128] However, the Department continued to find that critical circumstances existed as to KSC and the "all others" group, taking into consideration their final margins and the evidence of record as to importer knowledge of injury and as to massive imports.[129]

52. On 23 June 1999, the ITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[130] The ITC found, however, that critical circumstances did not exist for these products.[131]

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[119] *LTFV Final Determination*, 64 Fed. Reg. at 24335-24339 **(Ex. JP-12)**.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id*. at 34780.
[127] *Id*. at 24337; *Memorandum from Roland L. MacDonald to Joseph A. Spetrini: Final Determination of Critical Circumstances* (hereinafter *"Final Critical Circumstances Memo"*) at 2 (28 April 1999) **(Exh. US/B-4)**.
[128] *LTFV Final Determination*, 64 Fed. Reg. at 24370 **(Ex. JP-12)**.
[129] Id. at 24337-38; *Final Critical Circumstances Memo*, passim **(Exh. US/B-4)**.
[130] *Certain Hot-Rolled Steel Products From Japan ("ITC Final Determination"*), 64 Fed. Reg. 33514 (23 June 1999) **(Exh. JP-13)**.
[131] *Id*.

53. On 29 June 1999, Commerce published its antidumping duty order in this case. Therein, Commerce stated that it would order the release of all entries made prior to the preliminary determination of sales at less than fair value.[132]

ARGUMENT

I. THE AGREEMENT PERMITS ADMINISTERING AUTHORITIES TO USE ADVERSE INFERENCES IN SELECTING THE FACTS AVAILABLE WHERE A PARTY HAS NOT COOPERATED IN AN INVESTIGATION

A. INTRODUCTION

54. As we explain in detail below, the Department applied adverse facts available to KSC after KSC failed to compel CSI (the joint venture in which KSC and a Brazilian company each held a 50 per cent interest) to respond to the constructed-export-price portion of the anti-dumping questionnaire. In addition, the Department applied adverse facts available to NSC and NKK when they did not submit information that would have permitted the Department to convert sales based on theoretical weights into actual weights. The decisions affected the margins for NSC and NKK by a *very* small amount.

55. Japan has raised questions about each of these applications in its First Submission, which are addressed individually below. Before getting into the specifics, however, Japan attempts to knock the facts available provision out of the Agreement, by asking the Panel to rule that Commerce may not select the facts available for uncooperative exporters so as to give them any incentive to respond to antidumping questionnaires.

56. Japan argues that "the purpose of any use of facts available is to fill gaps in information *in a manner consistent with existing data".*[133] In other words, if an exporter refuses to report 90 per cent of its sales, the Department must use, as facts available, the "existing data" - - the margin for the remaining 10 per cent of the sales that the exporter selected to report. Of course, this would allow exporters to manipulate the outcome of antidumping investigations at will, by reporting only that information most favourable to them and withholding the rest.

57. Japan does not shrink from this implication. It candidly explains that the problem with Commerce's practice is that the Department, in selecting facts available, "looks for data that are 'sufficiently adverse' so *as to induce respondents to provide complete and accurate information*" (emphasis added), as if that were a deplorable result.[134] Working from the premise that respondents should *not* be required to provide complete and accurate information, Japan asks the Panel to remove this inducement. If the Panel agrees, the result is inevitable - - respondents will refuse to provide such information, and investigating authorities around the world will have no remedy. Therefore, the most important issue in this proceeding is whether the Agreement actually constrains investigating authorities in this manner.

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[132] *Antidumping Duty Order: Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products From Japan (hereinafter, "Hot-Rolled Steel Order"*), 64 Fed. Reg. 34778 (29 June 1999) **(Ex. JP-14)**.

[133] First written submission of Japan, at para. 58.

[134] Id. at para. 59.

B. ARTICLE 6.8 OF THE AGREEMENT AUTHORIZES ADVERSE INFERENCES ABOUT UNCOOPERATIVE RESPONDENTS

58. Article 6.8 of the Agreement provides in part that, where a party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation . . . determinations . . . may be made on the basis of the facts available." Thus, Article 6.8 deals in part with uncooperative parties - - that refuse access to information, submit information late, withhold information, and otherwise impede investigations. In order to deal with such uncooperative parties, Article 6.8 authorizes the application of the "facts available".

59. Article 6.8 does not explicitly provide that the selection of facts available may entail an adverse inference. The inescapable fact, however, is that the use of facts available is the solution to the problem posed by non-cooperative respondents. This strongly implies that administering authorities may employ facts available so as to *solve* the problem which renders their application necessary. Application of the facts available can solve the problem posed by uncooperative respondents *only* if it succeeds in inducing them to cooperate, and the only inducement that will persuade them to cooperate is the prospect of a worse result than if they do not. Investigating authorities have neither the resources nor any legal process (other than the facts available rule) by which they can induce exporters outside their jurisdiction to cooperate in their investigations. Thus, in order to solve the problem that it so clearly identifies, Article 6.8 must authorize the application of adverse inferences to uncooperative respondents.

C. ANNEX II OF THE AGREEMENT AUTHORIZES ADVERSE INFERENCES ABOUT UNCOOPERATIVE RESPONDENTS

60. Annex II of the Agreement contains guidelines and requirements that investigating authorities must observe when applying facts available under Article 6.8. Paragraph 1 of Annex II provides in part that:

> . . . The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

This underscores in two different ways the strong implication of Article 6.8 that administering authorities may make adverse inferences regarding uncooperative respondents.

61. First, Paragraph 1 explicitly requires investigating authorities to *warn* respondents that, if they do not cooperate, the authorities may apply the facts available. This plainly implies that the consequences of failing to cooperate may be adverse. Otherwise, no warning would be required. Japan would have this panel believe that the Member States crafted Paragraph 1 of Annex II to make the following statement: "Warning! If you do not cooperate in an investigation, the investigating authority is authorized to apply neutral information that will yield precisely the same result as if you had cooperated fully!" This is absurd, and would reduce Paragraph 1 (and Article 6.8 itself) to a nullity, in contravention of the well-recognized principle of treaty construction rejecting such interpretations.[135]

62. Second, Paragraph 1 explicitly states that the consequences of failing to cooperate in the investigation include making a determination on the basis of the facts in the application for initiation

[135] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, at p. 23.

filed by the domestic industry. While the information in an application must be substantiated[136], it is generally understood that applicants will document the highest degree of dumping that the available evidence will support. Accordingly, while the information in the application is not *necessarily* adverse to the respondents, it generally is presumed to be adverse. Therefore, the authority given to investigating authorities to apply the information in the petition to uncooperative respondents is generally understood to authorize them to make adverse inferences regarding uncooperative respondents.

63. Paragraph 5 of Annex II provides that "even though the information provided may not be ideal in all respects", investigating authorities nevertheless should not reject that information where the respondent "has acted to the best of its ability". This also makes sense only if investigating authorities can make adverse inferences in selecting the facts available to be applied to uncooperative respondents. In such cases, this tells investigating authorities that adverse inferences can be applied *only* to uncooperative respondents, and that the *inability* to cooperate is not a failure to cooperate. In other words, parties who try their best to cooperate should not be sanctioned. This makes sense.

64. In contrast, if Japan's interpretation of Article 6.8 and Annex II is accepted, Paragraph 5 prohibits investigating authorities from disregarding faulty information provided by respondents who acted to the best of their ability, because that would allow those authorities to substitute purely neutral information. Such a prohibition would be absurd, because it would protect respondents from neutral information, from which no protection is needed.

65. Paragraph 6 of Annex II provides that, where an investigating authority does not accept submitted information, it should inform the party "forthwith of the reasons therefore," and give it the opportunity to provide an explanation. If the investigating authority rejects the explanation, it must explain the reasons for doing so in its published determination. This is another of the comprehensive set of safeguards governing the use of facts available. Again, this safeguard make sense *only* if adverse inferences are permitted. There would be no reason to require investigating authorities to give exporters a "last chance" to explain before their information was rejected, if that information could be replaced only with a neutral gap-filler.

66. Paragraph 7 of Annex II squarely states that, where an interested party has not cooperated, the result may be adverse to that party. The last sentence of paragraph 7 states that:

> It is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party [that did not cooperate] than if the party did cooperate.

67. Although the exact term "adverse" is not used, a result that is "less favourable" to the exporter is equivalent to a result that is adverse to the exporter, according to the ordinary meaning of those terms.[137] In the context of the Agreement, a "less favourable" result for a responding party is a higher

[136] See Article 5.2 of the Anti-dumping Agreement. Applications must include "such evidence as is reasonably available to the applicant" of dumping. There is no requirement that the evidence be complete, and no requirement that applicants strive to obtain exonerating information. Similarly, Article 5.3 requires only that investigating authorities "examine the accuracy and adequacy of the evidence provided . . . to determine whether there is sufficient evidence to justify the initiation of an investigation." Investigating authorities are not required to determine whether the evidence submitted by the applicants is balanced before determining whether to initiate an investigation.

[137] The term "adverse " has been defined as "[a]cting in opposition; actively hostile" and "[h]urtful; injurious." New Shorter Oxford English Dictionary (1993). The term "favourable," on the other hand, means "propitious," "advantageous," and "facilitating one's purpose or wishes." *Id.* The "adverse inference rule" has been defined as " [t]he principle that if a party fails to produce a witness who is within its power to produce and

margin. This means that a party that does not cooperate may receive a higher margin than if it had cooperated - - a margin likely to be higher than its actual margin and higher than the neutral margin that would be given to a cooperative respondent. The logical way for an investigating authority to achieve this result is to apply an adverse inference in selecting the facts available to be applied to uncooperative parties.

68. In sum, a careful reading of Article 6.8 and Annex II demonstrates that the Member States intended to provide investigating authorities a means of inducing respondents in antidumping investigations to cooperate by furnishing necessary information in a timely manner. The means of inducing the necessary cooperation was to authorize adverse inferences to be drawn about the missing information if it was not supplied. The adverse inference must be that the information that was withheld was unfavourable to the party that withheld it.

D. THE APPLICATION OF ADVERSE INFERENCES TO UNCOOPERATIVE PARTIES IS ESSENTIAL TO APPLYING THE AGREEMENT AS A PRACTICAL MATTER

69. The reason why the Member States authorized investigating authorities to draw adverse inferences to induce exporters to cooperate is obvious. Overwhelmingly, the data necessary to calculate dumping margins is within the sole possession of the exporters. These parties are completely beyond the reach or even the threat of any process by which national authorities could compel them to supply the necessary information. Therefore, without the facts available rule, they could refuse with complete impunity to cooperate in antidumping investigations, and would do exactly that. The ability to draw adverse inferences regarding uncooperative foreign parties is therefore an essential tool for investigating authorities - - not just to give effect to Article 6.8, but to give effect to the entire Agreement. Any interpretation of the Agreement as not permitting the application of adverse inferences to uncooperative parties would therefore render the entire Agreement a nullity.[138]

70. The WTO Appellate Body has recognized that adverse inferences are a necessary tool for gathering information. In *Canada - Measures Affecting the Export of Civilian Aircraft*, the WTO Appellate Body concluded that WTO panels are permitted to draw adverse inferences from a party's failure to submit relevant evidence to a panel, noting that this view is "supported by the general practice and usage of international tribunals".[139] The Appellate Body explained the importance of adverse inferences as follows:

> [A] party's refusal to collaborate has the potential to undermine the functioning of the dispute settlement system. The continued viability of that system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement. In particular, a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings –

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who should have been produced, the judge may instruct the jury to infer that the witness's evidence is unfavourable to the party's case." Black's Law Dictionary, 7th ed. (1999)(defining the equivalent term "adverse-interest rule").

[138] "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." *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, at p. 23.

[139] WT/DS70/AB/R, 2 August 1999 at para. 202 (hereinafter *Civilian Aircraft*). (In that case, the Panel's review included *de novo* review of evidence, unlike a Panel's review under the Agreement. *See* Preliminary Objections, above at Part A.)

> that a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld.[140]

71. Similarly, when using an inference against Argentina in *Argentina - Measures_Affecting Imports of Footwear, Textiles, Apparel and Other Items*[141], the WTO Panel recognized the parties' duty of collaboration in the presentation of facts and evidence before a panel, obligating the parties to provide relevant documents which are in their sole possession. The Panel noted that a typical "discovery" process "in its common-law system sense, is not available in international procedures".[142] Commerce, like the WTO panels referenced in the cases discussed above, is without typical discovery tools, and must rely on the cooperation of the parties.[143]

E. THE WTO MEMBER STATES OVERWHELMINGLY INTERPRET ARTICLE 6.8 OF THE AGREEMENT AS PERMITTING ADVERSE INFERENCES ABOUT UNCOOPERATIVE PARTIES IN ANTI-DUMPING PROCEEDINGS

72. Given that interpreting Article 6.8 as permitting the application of adverse inferences to uncooperative respondents is the only interpretation that can be reconciled with the plain language of Article 6.8 and Annex II, and the only interpretation that does not reduce those provisions (and, indeed, the entire Agreement) to a nullity, it is hardly surprising that this is the overwhelming interpretation of Article 6.8 by WTO members that have expressed a view. Adverse inferences have been made, for example, in cases determined by the European Community[144], Canada[145]145

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[140] *Id.* at para. 204.

[141] WT/DS56/R, 25 November 1997 at para. 6.40, as modified on other grounds WT/DS56/AB/R, 27 March 1998. (In that case, the Panel's review included *de novo* review of evidence, unlike a Panel's review under the Agreement. ***See* Preliminary Objections, above at Part A.)**

[142] *Id.*

[143] This has been recognized by the US appeals court reviewing Commerce determinations. *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565,1571 (Fed. Cir. 1990). In affirming the ability of Commerce to use an adverse inference, appellate courts in the United States have cited the need to induce respondent parties to provide timely, complete, and accurate responses so that the agency can calculate accurate dumping margins. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191-92 (Fed. Cir. 1993).

[144] Under its "well-established practice of penalizing exporters who do not cooperate with the enquiry," "the {European} Community will typically select the highest dumping or injury margin which is determined for exports from that country." Edmond McGovern, *European Community Anti-Dumping Law and Practice*, section 444 at 44:9 (1998). *See, e.g., Glycine from China*, Commission Reg. (EC) No. 1043/2000 (5/18/00) (assigning imports from non-cooperating companies a dumping margin based on the highest dumping margin established for the cooperating exporter with representative export volumes); *Certain Unbleached Fabrics from China, Egypt, Indonesia, Pakistan, and Turkey*, O.J. L. 111, 1998, p. 19, rec. 86 (assigning non-cooperating companies a dumping margin based on "the margin of the company with the highest dumping margin in the sample").

In fact, the European Community has assigned facts available margins that exceeded the highest margin calculated for a cooperating party. *See Polyester Staple Fibers from Australia, Indonesia, and Thailand*, Commission Reg. (EC) No. 124/2000, O.J. L. 16, 2000, p.30, p. 34 rec. 35 (since "there is reason to believe that the high level of non-cooperation results from the non-cooperating exporting producers in the country concerned generally having dumped at a higher level than any cooperating exporting producer," the EC set "residual dumping margin for the non-cooperating companies at a level higher than the highest dumping margin established for a cooperating company"). The European Community also has utilized adverse facts contained in the petition. *See Certain Footwear from China*, Council Reg. (EC) No. 467/98, O.J. L. 60, 1998, n. 1, rec. 40 (imposing on uncooperative exporters "the highest margin of dumping alleged in the complaint").

[145] Where a party fails to provide requested information, values are determined according to a Ministerial specification. Special Import Measures Act §29(1). "{A}ny divergence between the values established using the Ministerial specification and the values which would have been calculated had the information been provided should not benefit the exporter. . . . Normal values of the goods will be based on the

Australia[146], and Japan[147], Moreover, Brazil[148], Ecuador[149], the European Community[150], Mexico[151], Panama[152], and Uruguay[153] specifically sanction the use of information contained in the request for initiation and other information submitted by the domestic industry as facts available. It is recognized

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export price determined under section 24 or 25 of SIMA plus an amount equal to the highest margin of dumping (expressed as a percentage of the export price) found for the final determination from exporters who were required to provide information and who fully complied with the Department's request for information." SIMA Handbook Inserts at 5.12.2; *see Final Determination — Cold-Rolled Steel Sheet — Statement of Reasons*, AD/1198 (28 July 1999) (exporters with incomplete responses received the "highest margin of dumping found among all cooperating exporters to the investigation); *Final Determination — Hot-Rolled Steel Sheet — Statement of Reasons*, AD/1210, para. 5 (1 June 1999) (exporters with incomplete responses received the "highest margin of dumping, for a cooperating exporter").

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[147] *Cotton Yarn from Pakistan*, Official Gazette (Kampo) No. 1702 (8/4/96) Extra Edition (Gogai) No. 147 (The dumping margin for non-cooperating parties was calculated by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value among the cooperating suppliers. This methodology yielded a margin (*i.e.*, 9.9 percent) that exceeded the highest margin calculated for a cooperating party (*i.e.*, 7.9 percent)) (English language translation) (Exh. US/B-19A); *see also World Competition: Law and Economics Review*, v. 21, no. 1 at 35 (1997) (describing the *Cotton Yarn from Pakistan* determination) (Exh. US/B-19B).

[148] WTO Doc. G/ADP/N/1/BRA/2, Decree No. 1602 (8/23/95) at Art 66.1 ("The party shall be advised that if the information is not submitted within the specified period of time, it will imply that determinations will be made based on the facts available, including those contained in the request for initiating the investigation.").

[149] WTO Doc. G/ADP/N/1/ECU/1/Suppl.1, Rules and Procedures Art. 37 ("When the investigating authority requires the participation of the applicant or an interested party in order to verify information provided for the investigation in good time and in proper form, it shall inform him thereof in advance. If he does not agree to verification, the information provided by the other party shall be deemed to be correct, unless there is evidence to the contrary.").

[150] WTO Doc. G/ADP/N/1/EEC/2/Suppl.1, Council Reg. (EC) No. 2331/96 (2/12/96) Art. 18(5) ("If determinations, including those regarding normal value, are based on the provisions of paragraph 1, *including the information supplied in the complaint*, they shall, where practicable and with due regard to the time-limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.") (emphasis added).

[151] WTO Doc. G/ADP/N/1/MEX/1, Foreign Trade Act Art. 83 ("Information and evidence submitted by the interested parties may be verified in the country of origin if the interested parties so agree. Without their consent, the Ministry shall assume that the requesting party's claims are true, unless there exist elements which indicate otherwise.").

[152] WTO Doc. G/ADP/N/1/PAN/1, Law 29 of 1996 Art. 157 ("When the authorities of the exporting country or the interested parties deny access to the necessary information, refuse to provide such information within a reasonable time-period or seriously impede the investigation, preliminary or definitive conclusions may be reached on the basis of the facts available, including those appearing in the application for the initiation of the proceedings submitted by the domestic industry or production.").

[153] WTO Doc. G/ADP/N/1/URY/2, Law No. 16671 (12/13/94) Art. 120 ("{I}f the information is not supplied within the specified time, the implementing authority may make its determination on the basis of the facts available, including those contained in the application for the initiation of the investigation.").

that information submitted in a request for initiation is likely to be adverse to the interests of the responding party.

F. JAPAN'S INTERPRETATION OF ARTICLE 6.8 AND ANNEX II MUST BE REJECTED BECAUSE IT WOULD NULLIFY THOSE PROVISIONS

73. In a strained effort to deny investigating authorities the ability to make adverse inferences about uncooperative respondents, and yet preserve *some* force for Article 6.8 and Annex II, Japan concedes that the result of not cooperating may be less favourable to a respondent than cooperating *where that is an accident*. According to Japan, the authority to make inferences that may be adverse is limited to situations where the investigating authority is attempting to select neutral gap filler[154], but, owing to the imperfections in the data, selects data that coincidentally turned out to be adverse. But Japan insists that investigating authorities could never intentionally select data presumed to be adverse as a means of inducing a respondent to cooperate.[155]

74. There are two fundamental flaws in this argument. First, there is no such limitation in the language of Paragraph 7 of Annex II. The last sentence of that paragraph says that " [i]t is *clear*, however," that a failure to cooperate "could lead to a result that is less favourable to the party than if the party did cooperate" (emphasis added). That sentence does *not* say that "although failure to cooperate will normally lead to the application of neutral gap-filler, respondent parties should nevertheless be advised that some of this neutral gap-filler may, coincidentally, contain some information that turns out to be adverse to such parties." If that had been what the Member States intended, there would have been no need to emphasize (by stating that it "is clear") that the result of failing to cooperate could be adverse. Indeed, there would have been no need for the warning at all.

75. Second, Japan's nominal concession would virtually eliminate any incentive for respondent parties to cooperate. The remnant of the actually-intended incentive that Japan would allow would be that, if respondents did not cooperate, the neutral gap-filler applied to them might, by accident, contain some data that was adverse. However, the likely consequence of refusing to cooperate would not be adverse at all. Even if some of the data accidentally turned out to be adverse, the effect on the margin would likely be small.

76. In consequence, a respondent would stand to profit substantially by generally withholding unfavourable information. The probable result would be that only a small percentage of the information withheld would be replaced by other unfavourable information. Most of the information withheld would be replaced by "neutral" gap-filler (in reality, information favourable to the respondent).[156] Thus, the incentive to cooperate would be minimal, at best. This result is hardly surprising--Japan has explicitly acknowledged that its purpose is to eliminate any incentive that exporting respondents have to cooperate.[157]

77. Japan's reliance on the *Atlantic Salmon* GATT panel decision[158] for the proposition that the Agreement does not permit a purposeful selection of adverse facts available is also misplaced. In that case, Commerce selected a sample group of seven salmon farms to calculate a single cost of

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[154] *Id.*

[155] First Submission of Japan at paras. 57-60.

[156] A neutral number would be an average number. With much of the data withheld any "average" number would, in practice, be an average of the remaining, favourable, numbers.

[157] First Submission of Japan at para. 59.

[158] *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 30 Nov. 1992 (hereinafter *Atlantic Salmon*)(involving Article 6.8 of the (Tokyo Round) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, 26th Supp. BISD 171-88 (1980)).

production that would then be used industry-wide for most of the exporters under investigation. One of the seven farms failed to produce complete cost information. Commerce rejected that farm's reported costs, and as facts available for that farm's costs, used the highest reported cost information from among the other six farms.[159]

78. On review, the GATT panel rejected Commerce's selection of facts available, *not* because it was adverse as to the farm in question, but because it would be used to determine a single average cost of production in Norway. As the Panel stated:

> The actual verified costs of production per kg. for the six remaining farms in the sample differed significantly and the imputation of the highest of these figures to the [seventh farm] had a significant impact on the average cost of production figure. Given that the sample was used by the Department of Commerce to compute a single average "cost of production in the country of origin" figure to be included in the calculation of the constructed normal values of most of the exporters under investigation, the Department should have considered how its choice of "the fact available" for determining the costs of production of [the seventh farm] would affect the representativeness of the results of the sample.[160]

As can be seen, the decision in *Atlantic Salmon* was based solely on the fact that the facts available information selected was used to calculate a single, average cost of production, applicable to many other exporters. Japan is therefore incorrect when it suggests that this case stands for the proposition that facts available can only be used to "fill gaps in information in a manner consistent with existing data".[161] In *Atlantic Salmon*, the Panel did not reject the principle that adverse inferences may be drawn where appropriate.[162]

79. Finally, Japan's argument that the use of an adverse inference is punitive is without merit. The WTO Appellate Body has stated that an adverse inference drawn from a party's failure to produce information is not punitive, but "merely an inference which in certain circumstances could be logically or reasonably derived by a panel from the facts before it".[163] As we have noted, that inference is simply that the information was withheld precisely *because* it was unfavourable to the party that withheld it - - a perfectly reasonable conclusion. Moreover, as noted, the same WTO Appellate Body has recognized that the adverse inference tool is necessary to create an incentive for parties appearing before a tribunal (or, as in this case, the investigating authority) to participate in the information gathering process.[164] The Commerce decisions cited by Japan discuss the need for that incentive and are the result of no more than the application of this fundamental principle.

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[159] *Id.* at paragraph 449.

[160] *Id.*

[161] First Submission of Japan, at para. 58.

[162] Moreover, the Panel in *Atlantic Salmon* addressed a claim made under Article 6.8 of the Tokyo Round Antidumping Agreement, which did not include Annex II. Thus, any interpretation of Article 6.8 under that Agreement is of only limited value. Under the current Agreement, the provisions of Annex II must be observed in the application of Article 6.8. As detailed above, Article 6.8 and Annex II together clearly contemplate the use of adverse facts available by administering authorities.

[163] *Civilian Aircraft*, WT/DS70/AB/R at para. 200.

[164] *Id*. at para. 204.

II. THE DEPARTMENT'S PARTIAL ADVERSE FACTS AVAILABLE DETERMINATION WITH REGARD TO KAWASAKI STEEL CORPORATION ("KSC") WAS CONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AGREEMENT, AS WELL AS WITH ARTICLE 2.3 OF THE AGREEMENT

80. The Department's determination to apply partial adverse facts available to Kawasaki Steel Corporation ("KSC") for failing to act to the best of its ability to provide necessary information regarding the sales through its US affiliate, California Steel Industries ("CSI"), was consistent with Article 6.8 and Annex II of the Anti-dumping Agreement. Commerce's application of facts available to KSC was partial because KSC was cooperative as to the majority of its sales to the United States, which were simple export price sales to unaffiliated buyers in the United States and did not have to be constructed. Nevertheless, for those sales through CSI which did require construction and for which KSC was non-cooperative, Commerce used data drawn from KSC's own reported, verified sales information for its export price sales. Commerce applied the second-highest product-specific margin calculated for these reported, verified sales as the margin for KSC's sales through CSI. As a result, KSC's overall anti-dumping margin likely was less favourable to it than if it had cooperated with Commerce in the investigation.

81. Japan's arguments that Commerce's facts available determination as to KSC was inconsistent with the Agreement are based on incomplete factual information and a misreading of the relevant provisions of the Agreement. Based on all of the record evidence that was before Commerce in the investigation, its determination that partial adverse facts available should be applied to KSC is fully consistent with the applicable provisions of the Agreement.

A. THE FULL RECORD EVIDENCE SHOWS THAT COMMERCE PROPERLY DETERMINED THAT KSC FAILED TO ACT TO THE BEST OF ITS ABILITY TO REPORT THE REQUESTED DATA FOR THE US SALES THROUGH ITS AFFILIATE, CSI

1. Japan's first submission withholds, omits, and ignores critical factual information

82. In its first submission to the Panel, Japan has withheld, omitted, and ignored critical factual information regarding KSC's relationship with its US affiliate, CSI, and its joint venture partner, CVRD. This information is essential to a full understanding of the steps that KSC could have taken to obtain and report the sales and further manufacturing cost information Commerce requested in order to construct export price ("CEP") for KSC's US sales through CSI.[165] In fact, the full record evidence shows that KSC failed to exercise rights and powers that were readily available to it to report the requested information and, therefore, that KSC failed to cooperate to the best of its ability.

83. Japan lays the blame for KSC's failure to report the information requested by Commerce at the feet of its CSI joint venture partner, CVRD – and, in particular, Lourenço Gonçalves, a former employee of CVRD's partial owner, CSN.[166] During the investigation, Mr. Gonçalves was CSI's President and CEO and the person responsible for purportedly "stonewalling"[167] KSC's efforts to

[165] In calculating constructed export price, or "CEP," Commerce begins with the price at which imported products are first resold to an independent buyer in the United States, in accordance with Article 2.3 of the Anti-dumping Agreement and pertinent US legislation. This price is then adjusted to account for certain expenses that are incurred, including the costs associated with further manufacturing performed prior to the sale to the unaffiliated customer. It is this information, the prices for CSI's sales to unaffiliated customers and CSI's further manufacturing cost information, which was not provided in this case. *See also* the Statement of Facts above, regarding Commerce's application of facts available to KSC.

[166] First Submission of Japan at para. 65. CSN is a Brazilian steel producer and respondent in the companion investigation of hot-rolled steel from Brazil. KSC Letter to Commerce at 2, (November 10, 1998) **(Exh. JP-42(i))**.

[167] *Id.* para. 67.

obtain the requested information from CSI. So powerful was he – according to Japan – that KSC never bothered to go beyond making requests to him for the CSI information.

84. The factual information presented by Japan in support of its claims, however, is entirely one-sided. It omits the considerable power which KSC, as half-owner of CSI, held over that company through the structure of the corporation and its Board of Directors. This power is demonstrated through the CSI Shareholders' Agreement, which delineates the legal relationship between the shareholders and their relationship to CSI, as well as through information which Commerce officials gathered in discussions with KSC officials at verification in Japan. While some of this information is business confidential information that Japan has chosen to release under WTO protection for this proceeding, the United States has not yet obtained consent from KSC, through Japan, to release other parts of this information.[168] In particular, KSC has thus far not agreed to release, under WTO protection, the minutes of three critical CSI Board of Directors meetings and the confidential portions of the KSC sales verification report and Commerce's analysis memorandum regarding CSI.[169] It is essential that in reaching its decision here, the Panel consider all of the evidence that was before Commerce in its investigation. Accordingly, all such evidence must be released by Japan for consideration by the Panel.[170]

2. **The full record evidence shows that KSC failed to act to the best of its ability**

85. The full record evidence that was before Commerce in its investigation here demonstrably shows that KSC failed to act to the best of its ability to provide Commerce with the necessary information to calculate CEP for KSC's sales through CSI. Commerce repeatedly made requests to KSC, and KSC repeatedly refused, to supply this information. Commerce's verification of KSC then confirmed KSC's failure to cooperate.

86. Commerce requested the relevant sales and further manufacturing cost information from KSC no less than three times. And on three separate occasions, KSC requested that it be excused from reporting such information.[171] Finally, on January 25, 1999, instead of responding to Commerce's third request for the CSI information, KSC stated that it was unable to do so because CSI, which was also a petitioner in the anti-dumping proceeding, refused to cooperate. However, based on its analysis of the evidence on the record, Commerce found in its preliminary determination that KSC had failed to cooperate to the best of its ability to provide the requested information and that this failure justified the application of partial adverse facts available.

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[168] Pursuant to Article 6.5 of the Anti-dumping Agreement, permission to disclose business confidential information must be sought from the specific party submitting the information. In this instance, that is KSC, who referred the Department to Japan about this matter. Japan has referred the Department back to KSC. *See* Letter from Department to Japanese Embassy re: BCI (July 18, 2000) **(Exh. US/B-20)**.

[169] California Steel Industries ("CSI") Minutes of 1998 Board of Directors Meetings (hereinafter "CSI Board Minutes") (business confidential information redacted) **(Exh. US/B-23)**; KSC Verification Report (March 30, 1999) (showing business confidential information redacted) **(Exh. US/B-21) (redacted version at Exh. JP-42(y))**; and *Analysis Memorandum: Kawasaki Steel Corporation -California Steel Industries* (hereinafter "*KSC Final Analysis Memo*") (April 28, 1999) **(Exh. US/B-22)**. Japan has included the CSI Shareholders' Agreement **(Exh. JP-42(aa))**, with a request for BCI treatment as to its contents. All of the foregoing documents were in Commerce's administrative record for the investigation and all of the business confidential information in them has been released to counsel for petitioners and respondents pursuant to Commerce's administrative protective orders as well as the US Court of International Trade's judicial protective orders in parallel litigation pending with respect to this matter.

[170] The confidential information for which we have not yet obtained consent for release is double-bracketed and omitted in this submission.

[171] *See* Statement of Facts, above, regarding KSC.

87. Commerce conducted a thorough examination of KSC's efforts to obtain the CEP sales data at verification in Japan in late February and early March of 1999.[172] This included meeting with the involved KSC officials and reviewing the relevant corporate documents, including the minutes of CSI Board of Directors meetings, in order to take into account any and all efforts KSC made to obtain the data. These inquiries showed that although KSC had made written and oral requests to CSI for the data, KSC had failed to employ the numerous means at its disposal to obtain those data. Specifically, KSC never raised the issue before the CSI Board, never attempted to enforce its rights with respect to this matter under the CSI Shareholders' Agreement, and never discussed the matter directly with officials at its joint venture partner, CVRD.[173]

88. As an initial matter, Japan claims that the CSI Shareholders' Agreement "is irrelevant to the question presented by USDOC's action under the Anti-Dumping Agreement".[174] However, the Shareholders' Agreement is the only objective evidence on the record that shows how CSI operated and was governed internally. It therefore represents crucial evidence of the steps that KSC could have taken to obtain and report the information requested by Commerce regarding KSC's sales through CSI. Japan's astonishing assertion that the Shareholders' Agreement is "irrelevant" here and the failure on the part of Japan even to address the provisions of the Shareholders' Agreement are a true reflection of the lack of merit and credibility in its claims.

89. The record evidence shows that KSC and CVRD, through their respective holding companies, each own 50 per cent of CSI and have an equal number of votes in decisions made at shareholder meetings.[175] Moreover, at all relevant times, the Board of Directors of CSI consisted of [ ]. In other words, KSC [ ].[176]

90. Through its [ ]. Indeed, Article [ ].[177] Article [ ].[178] In addition, under Articles [ ].[179] Thus, Japan's claim that CSI's President and CEO, Lourenço Gonçalves, was CVRD's "man" and that KSC lacked any ability to control his actions at CSI is belied by express provisions of the Shareholders' Agreement itself.

91. Despite [ ]. KSC failed to have [ ].[180] KSC's [ ]. Indeed, at CSI's regular Board meeting on [[

]].[181]

92. KSC's Board representatives at CSI also [ ]. Again, at CSI's regular Board meeting on [[

]].[182]

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[172] KSC Verification Report **(Exh. JP-42 (y)) (Exh. US/B-21)**.
[173] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**; *KSC Final Analysis Memorandum* at 3-4 **(Exh. US/B-22)**.
[174] First Submission of Japan at para. 68.
[175] CSI Shareholders' Agreement **(Exh. JP-42(aa))**.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] Under [ ]. *Id.*
[181] CSI Board Minutes **(Exh. US/B-23)**.
[182] *Id.*

93. In addition to the foregoing, Article [ ].[183] Nevertheless, KSC never attempted to enforce [ ]. Indeed, there is no evidence on the record that KSC even invoked [ ]. But even if it could be argued that KSC invoked [ ] by simply requesting information from CSI, it acquiesced in CSI's failure to provide the requested information and did not make any attempt to enforce [ ].

94. Furthermore, despite the [ ] history of cooperation and partnership between KSC and CVRD[184], KSC itself acknowledged to Commerce during the investigation here that it never even discussed the anti-dumping investigation or the lack of cooperation it was receiving from CSI officials with CVRD.[185]

95. KSC's sole claim with respect to the issue of whether it acted to the best of its ability is that CSI's President and CEO Gonçalves and, "by extension," CVRD failed to cooperate in KSC's attempts to obtain the information requested by Commerce. However, KSC's assertions do not and cannot show that requesting cooperation from Mr. Gonçalves was equivalent to requesting cooperation from CVRD. In fact, the provisions of the Shareholders' Agreement and the record evidence here show otherwise. Moreover, this claim is directly refuted by KSC's own admission to Commerce during the investigation that it had failed to discuss this matter with CVRD. Thus, despite KSC's attempts to show otherwise, it inexplicably failed to ask for assistance even from CVRD in solving a problem with a company they jointly own and control.

96. There is nothing on the record indicating that KSC would have encountered any opposition from CVRD if KSC had directly requested CVRD's assistance in obtaining the information requested by Commerce regarding KSC's sales through CSI. Nevertheless, even if KSC had explicitly requested such cooperation and been refused, KSC had at its disposal [ ]. In the event of a deadlock between KSC and CVRD, [ ] to resolve the dispute.[186] [ ].[187]

97. In sum, KSC made no attempt either to exercise any of the contractual rights and powers available to it under the Shareholders' Agreement or to work with its joint venture partner, CVRD, to obtain the information requested by the Commerce Department. As the Department summarized:

> While the Department has considered that the record supports KSC's claim that it did make some effort to obtain the data and that CSI's management rebuffed these efforts, the record also shows that KSC essentially acquiesced in CSI's decision not to provide this data. Given KSC's relationship with this 50/50 joint venture, as detailed in the *Home Market Sales Verification Report*, dated March 26, 1999, this did not constitute making its best efforts to obtain the data.[188]

98. Based upon a proper establishment of all of the facts and an unbiased and objective assessment of those facts, Commerce reasonably determined that KSC failed to cooperate to the best of its ability to produce the necessary information for Commerce to calculate CEP for KSC's sales through CSI. Accordingly, as set forth below, the Department's use of an adverse inference in selecting facts available for those sales is fully consistent with the Anti-Dumping Agreement.

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[183] CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

[184] *See id.*

[185] KSC Verification Report at 22 **(Exh. JP-42(y)) (Exh. US/B-21)**.

[186] CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

[187] *See id.*

[188] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**. *See also KSC Verification Report* at 20-23 **(Exh. JP-42(y)) (Exh. US/B-21)**.

B. COMMERCE'S DETERMINATION THAT PARTIAL ADVERSE FACTS AVAILABLE WERE WARRANTED FOR KSC'S SALES THROUGH CSI IS CONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AGREEMENT

99. Given the facts when fully set forth, Commerce acted consistently with the Anti-dumping Agreement both in applying facts available to KSC's sales through CSI and in employing an adverse inference in selecting facts available for those sales.

100. As detailed in the section above defending Commerce's facts available practice generally, Article 6.8 of the Agreement permits the application of facts available for a party's failure or refusal to provide necessary information in an anti-dumping investigation. Annex II of the Agreement then sets out the criteria which investigating authorities must meet before drawing an adverse inference and applying less favourable information to parties which do not provide necessary information. As we have explained, taken together, Article 6.8 and Annex II of the Agreement allow investigating authorities to draw an adverse inference and apply less favourable information to a party that fails to act to the best of its ability to provide requested information. These provisions of the Agreement provide investigating authorities with a logical method for calculating anti-dumping margins when information is missing because parties either refuse access to it or otherwise do not timely provide it. In such situations, authorities cannot calculate margins out of thin air; instead, they are authorized by Article 6.8 to use facts available and, if necessary, to draw an adverse inference.

101. When all of the facts of record are examined here, as set forth above, it is clear that KSC failed to act to the best of its ability by taking the steps readily available to it to obtain and report the requested information regarding its CEP sales through CSI. Thus, Commerce's determination to apply facts available was consistent with Article 6.8 of the Agreement, and its drawing of an adverse inference through the use of "less favourable" information was consistent with Annex II of the Agreement.

C. JAPAN'S ARGUMENTS LACK ANY SUPPORT IN THE APPLICABLE PROVISIONS OF THE ANTI-DUMPING AGREEMENT OR IN THE FACTS AND SHOULD BE REJECTED BY THE PANEL

102. Japan's arguments attacking Commerce's application of facts available to KSC are based on a misreading or mischaracterization of the applicable provisions of the Agreement and, once again, ignore critical information. Accordingly, these arguments must fail.

1. Commerce did not violate any duty to provide assistance to KSC

103. Japan makes the incredible claim that Commerce should have held KSC's hand by advising it of methods to obtain information from its own affiliate. In support of this argument, Japan has cited Article 6.13 of the Agreement, but it has conveniently omitted that provision's specific reference to "small companies".[189] Article 6.13, in its entirety, provides: "The authorities shall take due account of any difficulties experienced by interested parties, *in particular small companies*, in supplying information requested and shall provide any assistance practicable." (emphasis added) Of course, in cleverly deleting the reference to small companies in Article 6.13, Japan is suggesting that the provision is not necessarily limited, in its application, to such companies. While facially correct, Japan's reading of the text totally disregards the provision's primary aim: that it be given particular force and effect with regard to small companies. This is logical, since small companies are normally the parties needing assistance from investigating authorities in highly complex and technical anti-dumping proceedings.

[189] First Submission of Japan at para. 75, quotes Article 6.13 as follows: "The authorities shall take due account of any difficulties experienced by interested parties . . . in supplying information requested and shall provide any assistance practicable".

104. KSC certainly is not a small company. Its sales revenue for fiscal year 1998 was more than $9 billion. Thus, Japan's suggestion that one of its largest corporations and one of the biggest steel producers in the world -- represented and advised by highly sophisticated and experienced US trade counsel -- needed the help of the US Commerce Department in divining how to manage its internal commercial relations with its half-owned affiliate and its Brazilian joint venture partner is astonishing.

105. Furthermore, Commerce had no responsibility or obligation to advise KSC to take the obvious steps that were available to it to obtain the information requested for its CSI sales, including contacting CVRD, its joint venture partner of more than [ ] years. There was no uncertainty as to the information requested; Commerce had met its obligation to make that clear. Yet Japan seems to expect that Commerce officials should have acted, in effect, as KSC's own lawyers, by advising them of all legal means, however obvious, of attempting to obtain the requested information. Any such interpretation of Article 6.13 of the Agreement is absurd and, therefore, should be eschewed by the Panel.

106. In any event, KSC never asked for Commerce's assistance in the investigation in any respect. Specifically, KSC never asked Commerce what steps it should take to obtain the information regarding its sales through CSI and never asked Commerce whether it could report the requested information in another form or suggested such other form. Indeed, rather than asking for Commerce's assistance, KSC asked to be excused altogether from reporting the requested information.[190]

107. In sum, Japan's argument that Commerce acted inconsistently with Article 6.13 of the Agreement is belied by the facts and unsupported by any but the most strained and illogical reading of that provision. It should, therefore, be rejected by the Panel.

2. Commerce appropriately applied an adverse inference because KSC "withheld" the requested information

108. Japan's contention that KSC did not "withhold" any information from Commerce and that an adverse inference should not, therefore, have been applied against it under Annex II of the Agreement is likewise belied by the facts. As Commerce found, KSC withheld the information requested regarding its sales through CSI because it did not take steps readily available to it to obtain and provide that information. In this regard, Japan's contention that "KSC did not have any control legally or in fact over the information without the voluntary cooperation of its contractual partner CVRD" is unsupported by the evidence, when fully disclosed, as discussed above. Specifically, there is no record evidence that there was any lack of cooperation on the part of CVRD with respect to obtaining the requested CSI data. In fact, KSC never even discussed the matter with CVRD. Moreover, KSC did not use the rights and powers granted to it by the Shareholders' Agreement to obtain and report the information that had been requested. In sum, the facts on the record here show that KSC withheld information from Commerce that was within its power to produce, and Commerce therefore properly applied an adverse inference under Annex II of the Agreement. Japan's argument to the contrary should be rejected.

3. Commerce exercised circumspection, taking all circumstances into account, in its choice of facts available

109. Japan further argues that "USDOC failed to exercise 'special circumspection' when it chose which *secondary sources* to use as facts available".[191] As demonstrated below, however, the

[190] *See, e.g.,* Letter from Howrey & Simon to the Honourable William M. Daley (November 10, 1998) **(Exh. JP-42(i))**.

[191] First Submission of Japan at 26 para. 80 (emphasis added).

requirement in the Agreement to apply "special circumspection" in making determinations based on information from "secondary sources" did not even apply here because Commerce relied on KSC's own reported data in selecting the facts available to apply for KSC's sales through CSI. And even assuming that this requirement did apply, Commerce certainly exercised appropriate circumspection in its selection of facts available to apply to KSC.

110. Annex II, paragraph 7, of the Agreement requires investigating authorities to use "special circumspection" in selecting facts available only when they base their determinations on information from "a secondary source, including the information supplied in the request for the initiation of the investigation." In selecting facts available to apply to KSC for its sales through CSI, Commerce did not base its determination on information from "a secondary source." Rather, as facts available, Commerce applied the margin it calculated for other US sales within the mainstream of KSC's transactions using the company's own verified data.[192] Because Commerce did not use information from "a secondary source" in making its determination here, the requirement of "special circumspection" was not even applicable.

111. Nevertheless, even assuming that the requirement of "special circumspection" did apply, Commerce plainly satisfied this requirement.

112. Specifically, as facts available for the sales through CSI, Commerce chose the second-highest product-specific margin for KSC's reported, verified sales, drawn from KSC's reported sales to unaffiliated buyers in the United States, which represented [[ ]] per cent of all of KSC's sales. In its preliminary determination, Commerce had chosen the highest product-specific margin for KSC. However, in the final determination, Commerce rejected this as not within KSC's mainstream sales and opted instead for what Commerce considered to be a more reasonable choice of the highest margin for a product for which there were sales in substantial commercial quantities.[193] In deciding what rate to substitute for the missing CSI information, Commerce fully explained its rationale:

> For the final determination, the Department has used as adverse facts available the second highest calculated margin for an individual CONNUM {control number for a specific product}. ... In selecting the facts available margin for the final determination, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of KSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied. To that end, we selected a margin for a CONNUM that involved substantial

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[192] *See LTFV Final Determination*, 64 Fed. Reg. at 24369 (Exh. JP-12).

[193] In the Preliminary Determination, Commerce chose the highest margin from among KSC's reported US sales. However, in the Final Determination , Commerce determined that the product for which this margin was calculated was not fully representative of KSC's US sales. Commerce explained this change as follows:

> Although no party commented on the rate chosen as facts available in the preliminary determination, we have reexamined our choice for this final determination. In the preliminary determination, we used as the facts available margin the highest margin by CONNUM {control number for a specific product}. However, upon re-examining that decision, we find that the margin chosen was not sufficiently within the mainstream of KSC's sales in that the rate was derived from sales of a product that accounted for a very small portion of KSC's total sales as well as the highest rate by CONNUM.

LTFV Final Determination, 64 Fed. Reg. at 24369 **(Exh. JP-12)**. Japan contends that Commerce's choice of the facts available margin was aberrant. First Submission of Japan at para. 69. To the contrary, as stated in the Final Determination, it was based upon a product within the mainstream of KSC's sales. Thus, Japan's citation to *Usinor Sacilor v. United States*, 872 F. Supp. 1000 (Ct. Int'l Trade 1994) is inapposite. *Id.*

> commercial quantities and thus fell within the mainstream of KSC's transactions based on quantity. Finally, we found nothing on the record to indicate that the sales that we selected were not transacted in a normal manner.[194]

113. Commerce's selection of KSC's second-highest product-specific margin as adverse facts available is consistent with Annex II of the Agreement. The margin selection is based upon KSC's own verified data and upon sales well within the mainstream of KSC's transactions during the period of investigation. Moreover, the adverse inference drawn is directly proportionate to the magnitude of the failure to provide a complete response, i.e., the smaller the quantity of unreported sales, the smaller the impact and vice versa. In short, the outcome appropriately reflects the level of cooperation; it is not punitive but merely provides reasonable assurances that KSC did not benefit by failing to provide the information requested. Thus, any further step to reflect KSC's limited cooperation, i.e., the selection of a lower margin, is unnecessary and could result in KSC receiving a benefit from its failure to cooperate. Such a result would be inconsistent with the admonition to non-cooperating parties in paragraph 7 of Annex II that their failure to cooperate may result in a margin which is less favourable than if they did cooperate.

114. Japan's argument that Commerce failed to take into account the fact that the party withholding the information – CSI – actually benefitted from the application of facts available[195] is likewise incorrect. As an affiliated importer and reseller of a substantial amount of KSC hot-rolled steel, it was in CSI's best interests for KSC's margin to be as low as possible so that CSI could continue to purchase such merchandise from KSC without incurring the costs imposed by high anti-dumping duties. Additionally, any benefit from high anti-dumping duties being imposed on hot-rolled steel from Japan that may have been experienced by CSI as a US producer of non-subject merchandise would also work to KSC's benefit as a 50 per cent shareholder in CSI. Commerce fully considered these interests and properly concluded that sorting them out was not a fruitful exercise:

> We cannot reasonably predict or weigh the magnitude of effects this might or might not have on the parties involved. In this case, we can only ensure that KSC and CSI do not obtain a more favourable dumping margin on subject merchandise. As an affiliated importer and/or seller of KSC's subject merchandise, CSI will be affected by any margin assigned to KSC's exports of this merchandise. Neither KSC nor CSI will be rewarded with more favourable dumping margins. Any benefit accruing to CSI from its non-cooperation will flow not from its role as an affiliate-respondent, but from its role as a US producer of non-subject merchandise. Furthermore, KSC, as a 50 per cent shareholder in CSI, will share in any such benefit. In addition, we note that it is not the use of the adverse inference which allows KSC's US affiliate to restrict the scope of data on the record – it is CSI's decision to withhold that data and KSC's decision to acquiesce in this posture. Neither KSC nor CSI should be relieved of the obligation to report data on sales through CSI in this or future proceedings. Thus, while KSC's business relationships may involve certain internal conflicts of interest, the use of an adverse inference in determining the dumping margins on CSI sales does not contradict the Department's policies.[196]

115. CSI's status as a petitioner in the investigation, while unusual, did not require Commerce to reach a different result here. KSC's representatives on the CSI Board of Directors [ ].[197] KSC [ ]. The only conclusion that may be drawn from these facts is that KSC, in effect, acquiesced in CSI's participation as a petitioner. Moreover, CSI's status as a petitioner did not relieve KSC from its

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[194] *LTFV Final Determination*, 64 Fed. Reg. at 24369 **(Exh JP-12)**.
[195] First Submission of Japan at para. 80.
[196] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**.
[197] *See* CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

responsibility to take all of the steps available to it to act to the best of its ability to provide the data necessary to calculate a dumping margin. Indeed, as Commerce explained in its final determination:

> Allowing a producer and its US affiliate to decline to provide US cost and sales data on a large portion of their US sales would create considerable opportunities for such parties to mask future sales at less than fair value through the US affiliate. The fact that the affiliate is a petitioner does not allay such concerns. Thus, this fact does not constitute an exception to the principle that the Department may make an adverse inference with respect to sales for which data is not provided unless the foreign exporter and its US affiliate have acted to the best of their ability to provide such data.[198]

116. Lastly, Japan overlooks the fact that, in this case, Commerce's application of facts available was partial. This is not a case in which the Department applied facts available to all of KSC's sales -- *i.e.*, it did not apply "total" facts available. Instead, it recognized KSC's cooperation on [[ ]] of its sales and applied actual, calculated margins to those sales based on the verified data reported by KSC. It is only with regard to the CSI sales that the adverse inference has been applied.

117. In sum, Commerce permissibly interpreted Annex II of the Agreement and acted with "special circumspection" when it chose the second-highest of the margins calculated for KSC's reported, verified sales to apply to its sales through CSI. As a result, KSC's overall anti-dumping margin was likely less favourable to it than if it had cooperated with Commerce in the investigation. Such a result is not only permissible, but intended, under the facts available provisions of the Agreement; otherwise, firms could refuse to report sales with their highest margins with impunity, as long as they were "cooperative" as to their lower-margin sales.

4. Commerce's Application of facts available to KSC was completely consistent with Article 2.3 of the Agreement

118. Japan concludes its attack on Commerce's determination with respect to KSC by arguing that the use of partial adverse facts available for KSC's sales through CSI was an "unreasonable surrogate for export price {that} constitutes a measure inconsistent with Article 2.3 of the Agreement governing the calculation of export price".[199] This argument is based on an incorrect and impermissible interpretation of Article 2.3 of the Agreement and should be rejected by the Panel.

119. Japan contends that, instead of applying the second highest margin for KSC's reported sales as facts available for KSC's sales through CSI, Commerce should instead have used some other methodology to determine a margin for the CSI sales.[200] Specifically, Japan claims that Commerce acted in a manner inconsistent with Article 2.3 of the Anti-Dumping Agreement because it failed to calculate export price for the sales through CSI on a "reasonable basis".[201] Article 2.3 governs the construction of export prices for sales through US affiliates like CSI and 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

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[198] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**.
[199] First Submission of Japan at 26-27.
[200] *Id.*
[201] *Id.*

buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

120. It is clear from the face of Article 2.3 that, if the investigating authority considers the export price to be unreliable because of association, or affiliation, between the exporter and the importer – as with KSC and its half-owned affiliate, CSI – then the authority may construct the export price on the basis of the resale price to the first unrelated customer, or, if the product is not resold in the condition as imported – as is the case here because of CSI's further manufacturing of the imported product – then on such reasonable basis as the authority may determine.

121. Commerce adhered to the requirements of Article 2.3 for KSC's sales through CSI. In order for Commerce to have constructed the export price and have calculated an accurate dumping margin for KSC's sales through CSI pursuant to Article 2.3, it was essential for Commerce to have obtained CSI's price to the first unaffiliated customer for such sales as well as the further manufacturing cost information on those sales as requested in Section E of its Anti-Dumping Duty Questionnaire. Nevertheless, KSC failed to provide any of the necessary sales data or further manufacturing cost data for the sales in question. By applying a product-specific dumping margin calculated for other US sales to the sales through CSI, Commerce used facts available that allowed it to make the necessary calculations under the applicable provisions of the Anti-Dumping Agreement.[202]

122. Commerce even considered, at the urging of KSC, whether to exclude CSI's sales pursuant to its "special rule" for further manufacturing. This rule allows the Department to base the margin for products further manufactured by an affiliate before sale in the United States on other sales of subject merchandise by the same exporter when "the value added by the affiliated person is likely to exceed substantially the value of the subject merchandise {when sold to the unaffiliated party}".[203] Commerce found that the value added by CSI's further manufacturing processes did not meet the threshold for the application of the "special rule".[204] Japan does not contest that finding.

123. Japan urges that "a logical step would have been for USDOC to request KSC's own prices to CSI and then test the data to see whether they were reliable or not".[205] In so doing, Japan once again ignores the facts on the record. Commerce did request, and KSC refused to report, the transfer prices between KSC and CSI.[206] Instead, KSC provided an average transfer price between KSC and CSI.[207] This would be insufficient as a basis for comparison to KSC's sales to its non-affiliated customers because it was calculated on an aggregate basis, rather than on a sale-by-sale basis, and would not provide an accurate comparison. Thus, any argument that the transfer prices between KSC and CSI could be the basis for US price on the CSI sales -- an approach which Commerce rejects -- is moot because KSC failed to report the transfer prices.

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[202] Japan cites *Atlantic Salmon* in support of the proposition that the right to apply facts available must be interpreted in conjunction with the relevant substantive provisions of the Anti-dumping Agreement. First Submission of Japan at para. 85. Commerce's application of facts available satisfies that standard here. As set forth above, Commerce's application of facts available for KSC's sales through CSI allowed it to make the necessary calculations under the applicable substantive provisions of the Agreement for those CEP sales. Thus, this application of facts available was fully justified and was consistent with the Agreement, and the decision in *Atlantic Salmon* does not require a different result.

[203] 19 U.S.C. § 1677a(e)(1).

[204] *LTFV Final Determination* at 24367 **(Exh. JP-12)**.

[205] First Submission of Japan at para. 84.

[206] *See* KSC Supplemental Section A Questionnaire at 2 (4 December 1998) **(Exh. JP-42(k))**; KSC Supplemental Section A Response at 6-7 (19 January 1999) **(Exh. US/B-24)**. *Cf.* Huey Affidavit at para. 27 **(Exh. JP-44)**, claiming that the Department did not perform any type of price comparison on the CSI sales, but omitting the fact that KSC did not provide the sales information to do such a comparison.

[207] *See* KSC Supplemental Section A Response at 6-7 (19 January 1999) **(Exh. US/B-24)**.

124. Japan further argues that by applying the second-highest product-specific margin calculated for reported sales as the margin for the CSI sales, Commerce "disregarded the existence of perfectly acceptable normal values . . . to which they could compare a surrogate export price . . ." calculated for the CSI sales.[208] This argument completely ignores the fact that Commerce could not have compared even surrogate export prices for the CSI sales to normal values calculated for home market sales because Commerce was never provided with the product characteristics, or any other data for that matter, for the merchandise imported by, and sold through, CSI. Without the product characteristics and the other details for the merchandise sold through CSI, there is no basis to compare those sales with home market sales for purposes of the margin calculation.

125. Japan essentially treats the "reasonable basis" language of Article 2.3 of the Anti-Dumping Agreement like an independent facts available provision. However, if that were so, the drafters of the Agreement would not have bothered to specify rules for application of facts available in Article 6.8 and Annex II, including the "less favourable" language allowing an investigating authority to apply an adverse inference when a party has not cooperated to the best of its ability, in order to induce its cooperation. Thus, for all of the foregoing reasons, Japan's interpretation of Article 2.3 is completely erroneous.

126. In fact, if Japan's interpretation of Article 2.3 were to be adopted, this would invite manipulation. The exporter could shield all of its CEP sales from the reach of the anti-dumping law and price those sales at whatever level it desired. Such could not have been the intent of the drafters of the Anti-Dumping Agreement.

127. In sum, Commerce's determination to apply partial adverse facts available to KSC for failing to act to the best of its ability to provide necessary information regarding its sales through its US affiliate, CSI, was consistent with Article 2.3, Article 6.8, and Annex II of the Anti-dumping Agreement. Japan's further argument that Commerce's determination was inconsistent with Article 9.3 of the Agreement because the margin for KSC was excessive[209] is likewise in error, because Commerce correctly calculated KSC's margin in accordance with the applicable substantive provisions of the Agreement. For all of these reasons, the Panel should uphold Commerce's application of partial adverse facts available to KSC.

III. THE DEPARTMENT'S PARTIAL ADVERSE FACTS AVAILABLE DETERMINATIONS WITH REGARD TO NSC AND NKK WERE CONSISTENT WITH THE STANDARDS OF THE WTO AGREEMENT

128. The Department's application of the facts available to NSC's and NKK's theoretical weight[210] sales for which they did not provide a theoretical-to-actual weight conversion factor within a

[208] First Submission of Japan at para. 86.

[209] First Submission of Japan at paras. 88-89. Japan also contends that the Department violated Article 9 of the Agreement and Article VI:2 of GATT 1994 by applying facts available to create an unreasonable and punitive margin for KSC's downstream sales, relying upon *United States-Antidumping Act of 1916*, 31 Mar. 2000, WT/DS136/R, at para. 6.189. First Submission of Japan at para. 78. In fact, that panel decision interprets Article VI:2 to mean that, when faced with dumping from another country, Members must apply some form of antidumping duty rather than some other punitive measure. The Department's decision to apply facts available to determine a dumping margin for KSC's downstream sales was fully consistent with this interpretation. The Department did not take punitive measures against KSC; it simply applied the facts available to calculate a dumping margin in the face of an uncooperative respondent, as it was permitted to do by Article 6.8 and Annex II of the Anti-Dumping Agreement.

[210] The "theoretical weight" of a steel coil is an estimated weight, based upon the dimensions of the product. In determining the price per metric ton of steel coil sold on a theoretical weight basis, the price of the coil is divided by the estimated weight for a coil of certain dimensions, which may vary from the actual weight

reasonable period of time was based upon a permissible interpretation of the Agreement. Export sales and home market sales must be compared on a common basis. Because both NSC and NKK made export sales that would be compared to home market sales made on a different weight basis, the Department reasonably required them to provide a weight-conversion factor so that it could make its margin comparison on a common basis.

129. Article 6.8 and Annex II expressly provide that an authority may resort to the facts available if information is not supplied within a reasonable time. In questionnaires and supplemental questionnaires, the Department, with extensions, eventually gave both NSC and NKK a total of 87 days in which to provide a timely response to its request for conversion factors. This clearly was a "reasonable time." Yet NSC and NKK did not submit their conversion factors until 22 February 1999, almost four months after the Department's first request for this data on 30 October 1998 and nearly a month after the 25 January 1999 final due date for a timely supplementary questionnaire response.

130. Thus the Department's decision to reject these untimely submissions, and to use adverse facts available in determining margins for the affected sales given that NSC and NKK could have provided the factors when originally asked, had they acted to the best of their ability, was consistent with each and every provision Japan has relied upon with respect to this question.[211] NSC and NKK, which each twice declined to provide such factors, alleging that this was unnecessary and/or impossible, were given ample opportunity both to present this evidence, and to provide its explanations. When Commerce rejected their untimely-submitted factors, they were told the reason this information was not accepted, and allowed to make further legal arguments on this issue before the Department reached its Final Determination. These provisions reflect the understanding of the drafters of the Agreement that, given the complex international nature of these investigations, authorities need to give parties an opportunity to make their presentations, but also need to be able to proceed to their determinations despite inadequate responses by interested parties.

131. As explained above, the facts available provisions of the Agreement, including the provision that an adverse inference may be taken when a party does not cooperate in providing the information at issue, creates an important incentive for an exporter to respond to the Department's questionnaires in a complete and timely manner. The Panel in the *DRAMs* case, for example, recognized that the Agreement should not be interpreted in a manner which would render antidumping cases unmanageable.[212]

132. The principle at issue here is a simple one: the right, under the Agreement, for authorities to establish reasonable deadlines for submission of information and to use the facts available when a party does not provide a response to a questionnaire within those reasonable deadlines. Where, as here, a respondent first offers the requested data item long after the reasonable deadlines have passed for its submission, the Agreement does not compel the Department to accept and use the late-provided data. Similarly, the Agreement permits authorities to use an adverse inference in selecting from the facts available when a party has failed to act to the best of its ability to timely supply the requested information. The Agreement thus leaves it to investigating authorities to set and enforce deadlines for receiving information in keeping with their judgment as to when they need it, so long as they provide interested parties with a reasonable period in which to make their submissions. The interpretation proposed by Japan with respect to the use and selection of the facts available would render

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of that coil. Thus, the price per ton (the basis of the antidumping margin comparison) may vary, depending on whether a coil was sold based on actual or theoretical weight.

[211] Japan has relied upon Articles 2.4, 6.1, 6.6, 6.8, 6.13, 9.3 and paras. 5 and 7 of Annex II of the Agreement.

[212] *US-DRAMS* at para. 6.78.

meaningless any Member's right to establish deadlines. This is an unacceptable result, and one not intended by the Agreement.

A. THE DEPARTMENT PERMISSIBLY INTERPRETED THE AGREEMENT TO ALLOW FOR THE USE OF FACTS AVAILABLE WHEN INFORMATION REQUESTED IN A QUESTIONNAIRE WAS NOT PROVIDED BY THE ESTABLISHED DEADLINE

133. When Commerce calculates a dumping margin, it compares US and home market sales made on the same quantitative basis. For example, it does not compare a per-pound price to a per-kilo price without first converting them to the same basis. Thus, the Department's initial questionnaires instructed NSC and NKK that if they had made some sales of hot-rolled steel based on theoretical weight and others based on actual weight, they "must" provide a conversion factor "used to arrive at a uniform quantity measure" for purposes of price comparison and report the converted quantity for affected sales.[213]

134. Under Article 6.8, authorities may base a determination on "facts available" if an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period . . . ." As detailed in our Statement of Facts, above, both NSC and NKK failed to provide the requested conversion factors in their initial questionnaire responses. Commerce again requested the data in its supplemental questionnaires, and again both respondents failed to provide the conversion factors in their supplemental responses. NSC's and NKK's belated attempts to submit the data, long after the due date for questionnaire responses had passed and even after the preliminary determination, does not constitute providing this information "within a reasonable period." Thus, Commerce was authorized, consistent with Article 6.8, to use the facts available in determining the margin for the affected sales.[214]

135. Article 6.8 also states that "[t]he provisions of Annex II shall be observed in the application of this paragraph." Neither Article 6.8 nor Annex II define "reasonable period." Therefore, "reasonable period" must be interpreted "in accordance with the ordinary meaning to be given to the terms . . . in their context" and in light of the object and purpose of the Agreement.[215]

136. Paragraph 1 of Annex II reiterates the basis for the use of facts available found in Article 6.8: "The authorities should also ensure that the party is aware that *if information is not supplied within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available . . . ." (Emphasis added.) The purpose of this sentence is to require investigating authorities to notify respondents of the consequences of a failure to submit requested information within the established deadlines. It clearly contemplates the use of facts available by authorities if that information is not provided within a "reasonable time."[216]

137. Paragraph 3 of Annex II discusses when an investigating authority should accept the information submitted by a respondent: "All information which is verifiable, which is appropriately

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[213] Section B-E Questionnaire at B-19, C-17 (October 30, 1998) **(Exh. JP-45(a))**.

[214] Commerce's use of facts available was made pursuant to its authority under Section 776(a)(2) of the Act (19 U.S.C. § 1677e(a)(2) **(Exh. JP-4(k)**). Although Japan has challenged the Department 's general practice with respect to use of adverse inferences and the consistency of its use of facts available in this case with the Agreement, it has not specifically challenged the statutory provision pursuant to which Commerce applied facts available.

[215] Article 31(1) of the Vienna Convention on the Law of Treaties.

[216] It is undisputed that, consistent with the requirements of Paragraph 1 of Annex II, NSC and NKK were warned that failure to provide the information requested could result in the use of facts available. *See* NSC Supplementary Questionnaire at second page (unnumbered) of cover letter (4 January 1999) **(Exh. US/B-13)**; NKK Supplementary Questionnaire at second page (unnumbered) of cover letter (4 January 1999) **(Exh. US/B-14)**.

submitted so that it can be used in the investigation without undue difficulties ***and*** *which is supplied in a timely fashion*, . . . should be taken into account when determinations are made." (Emphasis added.) The meaning of this sentence is clear on its face. If the information supplied meets all of the listed criteria, then an investigating authority should accept it. However, there is no obligation to accept the data unless it was, *inter alia*, timely. Because the drafters listed separate and distinct criteria, all of which were required to be satisfied before authorities should accept the proffered data, it is clear that the fact that submitted information could be used "without undue difficulty" was not sufficient to compel the acceptance later in the proceeding of information that was not also "timely."

138. Thus, the term "reasonable period" in Article 6.8, interpreted in accordance with Annex II, contemplates a timely submission. A respondent that does not meet the reasonable deadlines imposed by the authorities may face rejection of any data that are submitted late. If that information is rejected on a permissible ground (*e.g.*, untimeliness), then the authority may resort to facts available.

139. Because Article 6.8 requires that a party submit data within a "reasonable period," authorities should impose "reasonable" deadlines. As demonstrated below, the Department's deadlines were more than reasonable.

B. THE DEPARTMENT PROVIDED "AMPLE OPPORTUNITY" FOR NSC AND NKK TO FURNISH THE WEIGHT-CONVERSION FACTORS REQUESTED IN THE QUESTIONNAIRES

140. The Department's use of facts available for the sales affected by the weight-conversion factors also complies with the requirement of Article 6.1 that parties must be given "ample opportunity to present in writing all evidence they consider relevant in respect of the investigation in question".[217] NSC and NKK had ample opportunity to provide the conversion factors, which the Department requested both in the initial questionnaires and in supplemental questionnaires. NSC and NKK did not provide the conversion factors by the due dates contained in either of the questionnaires, and thus did not provide the factors within a "reasonable period."

141. The general requirement that parties have an ample opportunity to present evidence in Article 6.1 is clarified in Article 6.1.1, which provides that exporters or foreign producers must be given at least thirty days for reply to a questionnaire. Because Article 6.1.1 sets forth a specific requirement, it limits the more general language of paragraph 6.1. Thus, a respondent that has been given at least 30 days to respond to a questionnaire, has normally been given "ample opportunity" to present evidence with respect to the issues raised in that questionnaire.

142. NSC and NKK were given <u>more</u> than ample opportunity to respond to the Department's request for conversion factors. Both companies were given 52 days to respond to the original questionnaire. The questionnaire was issued on 30 October 1998, and NSC's and NKK's responses were ultimately provided on 21 December 1998, after the Department granted NSC and NKK's requests for a two-week extension beyond the original deadline.[218] After the Department had analyzed the initial questionnaire response, NSC and NKK were again asked for the same data in a supplemental questionnaire. Both companies were given 21 additional days to respond to the supplemental questionnaire. That questionnaire was issued 4 January 1999; NSC and NKK ultimately provided their responses on 25 January 1999, after the Department granted NSC and NKK a

[217] *See* First Submission of Japan at paras. 116-119.

[218] *See* Letter from Programme Manager to law firm of Gibson, Dunn & Crutcher (19 November 1998) (granting extension to NSC) **(Exh. US/B-9)**, and Letter from Programme Manager to law firm of Willkie Farr & Gallagher December 1, 1998) (granting extension to NKK) **(Exh. US/B-10)**.

one-week extension beyond the original deadline.[219] Between the Department's first request for the conversion factors in October of 1998 and the due date for the supplemental questionnaire, 87 days had elapsed. Thus, Commerce more than met the 30-day minimum amount of time stipulated for questionnaire responses in Article 6.1.1.

C. THE DEPARTMENT'S SUPPLEMENTATION QUESTIONNAIRES AFFORDED NSC AND NKK ADDITIONAL OPPORTUNITY TO FURTHER EXPLAIN, AND EVEN SUPPLEMENT, THEIR PRIOR RESPONSES CONSISTENT WITH PARAGRAPH 6 OF ANNEX II

143. Annex II, at paragraphs 1 and 3, makes it clear that authorities need only consider information "supplied in a timely fashion". If information "is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." Paragraph 6 of Annex II echoes this concern for timely responses in the provision that "due account" must be taken of the time limits of the investigation.

144. Despite the fact that NSC and NKK did not provide the necessary conversion factors by the deadline for the original questionnaire, Commerce, in its supplemental questionnaire, afforded them a second chance to submit these conversion factors. By this second request for data, the Department more than complied with its obligations under paragraph 6 of Annex II.

145. Paragraph 6 of Annex II, requires that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation." Paragraph 6 further requires that "[i]f the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

146. Paragraph 6 of Annex II requires that an investigating authority inform a respondent of the reasons evidence or information is not accepted and give a respondent an opportunity to provide further explanation within a reasonable period. The same provision also calls for the agency to provide, in its published determination, the reasons for the rejection of evidence or information it has not accepted. Commerce met all of these requirements. In particular, the Department's supplemental questionnaires put NSC and NKK on notice that their initial responses were inadequate because they neither provided the requested factor nor supported their claim that the factor was unnecessary, and gave both firms an opportunity to provide the necessary factor within a reasonable period.[220] Paragraph 6 requires "an" opportunity to provide further explanation, not endless opportunities to do so.

147. With respect to NSC, which initially attempted to avoid the conversion factor issue by stating (incorrectly) that no such factor was necessary because "NSC quantity types are consistent within the product type"[221], the supplemental questionnaire afforded an opportunity to examine the data on these sales more closely, and to correct its error by providing new evidence (the requested factor). Instead, NSC responded with another erroneous claim, that it had no way of calculating the requested factor.[222] Paragraph 6 of Annex II does not require the Department to recognize sequential errors and provide unlimited opportunities for new submissions.

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[219] *See* Letter from Programme Manager to law firm of Willkie Farr & Gallagher (7 January 1999) (granting extension to NKK) **(Exh. US/B-25)**, and Letter from Programme Manager to law firm of Gibson Dunn & Crutcher (15 January 1999) (granting extension to NSC) **(Exh. US/B-26)**.

[220] *See* NSC Supplementary Questionnaire at 2, (4 January 1999) **(excerpts at Exh. US/B-13)**; NKK Supplementary Questionnaire at 5 (January 4, 1999) **(excerpts at Exh. US/B-14)**.

[221] NSC Initial Questionnaire Response at B-22 (21 December 1999) **(excerpts at Exh. JP-29(a))**.

[222] NSC Supplementary Questionnaire Response at B-24-25 (25 January 1999) (**Exh. US/B-12**).

148. NKK likewise responded to the initial questionnaire by stating (incorrectly) that no conversion factor was necessary because none of its home market theoretical weight sales would be matched to actual weight US sales, but also added the claim that "it is not possible to convert a theoretical weight into an actual weight".[223] Commerce's supplemental questionnaire not only gave NKK the chance to further explain the claims it had made in the initial questionnaire response, but also to correct its erroneous answer and to provide new evidence (the requested factor). Commerce thus complied with the terms of paragraph 6 of Annex II. NKK chose to ignore this opportunity, and instead reiterated its position that a conversion factor was both unnecessary and impossible to calculate.

149. Paragraph 6 of Annex II does not require authorities to provide further opportunities to submit completely new information after respondents have twice failed to meet response deadlines and have asserted that the information requested cannot be provided. This is clear from the distinction in that paragraph that "explanations" (rather than further "evidence") may be provided when "evidence" or "information" is not accepted. Thus, although an authority should inform a respondent when evidence initially timely provided does not meet the necessary requirements, and should allow the respondent an opportunity to *explain* why that information should be accepted, paragraph 6 of Annex II does not require authorities to provide endless opportunities to submit evidence requested in a questionnaire at whatever point after the reasonable questionnaire response deadline the respondent may select. Thus, Commerce more than complied with its obligations under the Agreement when it issued supplemental questionnaires to NKK and to NSC, allowing them another chance to provide conversion factors.

D. COMMERCE PERMISSIBLY REJECTED THE BELATED CONVERSION FACTORS AND USED ADVERSE FACTS AVAILABLE BECAUSE NSC AND NKK FAILED TO ACT TO THE BEST OF THEIR ABILITY AS CONTEMPLATED BY PARAGRAPHS 5 AND 7 OF ANNEX II, AND BY ARTICLES 2.4 AND 9.3 OF THE AGREEMENT

150. The Department's use of facts available, including its use of an adverse inference, for the sales affected by the weight conversion factor was fully consistent with paragraphs 5 and 7 of Annex II, as well as with Articles 2.4 and 9.3 of the Agreement. Because NSC and NKK could have provided the information in a timely manner but did not do so, they failed to act the best of their ability and did not cooperate with the Department with respect to this information request. As a consequence, the Department was justified in rejecting the untimely data, and applying an adverse inference in its choice of facts available.

151. Paragraph 5 of Annex II states that "even though information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." That NSC and NKK did not act to the best of their ability in not providing the conversion factors in response to the original and supplemental questionnaires is demonstrated by the fact that both companies were able to proffer such factors immediately after the issuance of the preliminary determination. Paragraph 5 does not require the acceptance of all submissions, at any time. Instead it calls for agencies not to require "ideal" information when respondents are unable to provide "ideal" information, despite their best attempts to do so. Commerce did not violate this provision by declining to accept the conversion factor NSC discovered it could indeed provide, after the preliminary determination and just before verification. Because NSC's and NKK's conversion factors were not rejected because of flaws in their quality (but rather because they were untimely provided) and because this information could have been timely presented had these

[223] NKK Initial Questionnaire Response at B-30 (December 21, 1999) **(Exh. JP-45(b))**.

firms acted to the best of their ability with respect to this issue, Commerce was not required to accept the information pursuant to paragraph 5.[224]

152. Paragraph 7 of Annex II states, "[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." NSC and NKK refused to provide conversion factors, despite repeated requests for the data. The evidence demonstrates that both companies had the ability to submit the data in a timely manner, but failed to do so. A party that fails to act to the best of its ability with respect to a given issue must be deemed to be noncooperative with respect to that issue.[225] No other interpretation of paragraph 7 would provide an investigating authority with an adequate tool to encourage complete and timely submissions of data. An investigating authority must have the ability to draw an adverse inference when a party fails to provide requested information in a timely manner. Without such a tool, respondent parties would have little incentive either to provide relevant data that might be unfavourable or to submit data within stated time limits. The Department's use of an adverse inference in this case was a permissible use of this tool.

E. JAPAN HAS FAILED TO SHOW THAT COMMERCE'S USE OF PARTIAL FACTS AVAILABLE WAS INCONSISTENT WITH ANY PROVISION OF THE AGREEMENT

153. Japan has not demonstrated that the Department's use of adverse facts available in determining the margins for NSC's and NKK's sales affected by their refusal to timely provide weight conversion factors violated any provisions of the Agreement. With respect to each cited provision of the Agreement, Japan's arguments fail to establish that the interpretation upon which the Department's decisions on this issue were based was impermissible. Indeed, as we demonstrate below, the interpretations which Japan urges upon the Panel are seriously flawed.

1. The Department fully complied with Article 6.8 and with paragraphs 5 and 7 of Annex II

154. Just as Japan has failed to establish its newly-raised claim that the Department's general practice of making an adverse inference when it finds that a party has not acted to the best of its ability violates either Article 6.8 or the provisions of Annex II, it has also failed to establish that the Department violated those provision on the specific facts of this case.

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[224] Commerce also explained its reason for rejecting the factors that were belatedly provided by NSC and NKK in its Final Determination, stating that these submissions were rejected because they were untimely provided. *See* Letter from Programme Manager to NSC at 3 (12 April 1999) **(Exh. US/B-3(c))**; Letter from Programme Manager to NKK (April 12, 1999) **(Exh. US/B-3(a))** and Letter from Programme Manager to NKK (15 April 1999) **(Exh. US/B-3(b))**; *see also LTFV Final Determination*, 64 Fed. Reg. at 24360-62 (NSC), 24363-64 (NKK) **(Exh. JP-12)**. Thereby, Commerce complied with paragraph 6 of Annex with respect to this rejected information.

[225] The problem of selective data reporting to control the parameters of what data will be considered in calculating a margin is further illustrated by another area in which NSC also chose not to provide requested information. Contrary to the suggestion at para. 91 of the First Submission of Japan, the theoretical weight factor was not the only data with respect to which the Department was required to resort to the use of facts available during the investigation. NSC also declined to report, or expressly opted to report at an inadequate level of detail, product-specific costs for certain products, based on the stated (and incorrect) belief -- like that originally expressed with respect to its theoretical weight sales -- that the affected products would not be used in the margin-calculation process. *See LTFV Final Determination*, 64 Fed. Reg. at 24348 (Comment 14) **(Exh. JP-12)**.

(a) NKK and NSC did not submit their conversion factors "within a reasonable period" as required by Article 6.8

155. Japan does not deny that NSC and NKK's conversion factors were not submitted within the deadlines established for responding to the questionnaires in which these factors were requested. They do not deny that these deadlines were "reasonable" ones, or that they were even given extension of time in which to respond to these questionnaires. Thus, they have not demonstrated that the conversion factors, which were submitted for the first time long after the 87 days provided by Commerce's questionnaires[226], were submitted within the "reasonable time" referenced in Article 6.8 of the Agreement.

156. Instead, Japan suggests that, in the context of some unspecified provision of the Agreement, authorities have an obligation to accept information first proffered long after a reasonable questionnaire deadline as long as it "plays a minor role," affects a small number of lines of computer code, and is presented in time to allow for verification.[227] Such an interpretation would make a mockery of questionnaire response deadlines, allow respondents to selectively withhold certain data until after the preliminary determination, and limit the ability of petitioners to comment on submitted data prior to the preparation of verification outlines. It is, therefore, at odds with the paragraphs 1, 3 and 6 of Annex II, all of which emphasize the importance of information being timely presented. Because this interpretation would render the timeliness requirement contained in Annex II meaningless, it is contrary to the customary rules of treaty interpretation.[228]

157. Japan's second argument, that the Department's regulations define a "reasonable period" for the submission of such information as seven days prior to verification[229], is simply incorrect. The regulation upon which Japan relies, 19 C.F.R. § 351.301(b)(1), does not apply to data requested in questionnaires. Section 351.301(b)("Time limits in general") begins with a preamble explaining that "Except as provided in paragraphs (c) and (d) of this section and § 351.302" factual information is due by the deadlines provided in section 351.301(b). Thus, section 351.301(b) is only a fallback provision for data for which other deadlines (such as those for questionnaire responses) do not take precedence. The Department explained in the Final Determination:

> Section 351.301(b)(1) of the Department's regulations provides generally that, in an investigation, factual information can be submitted up to seven days prior to verification. However, section 351.301(c)(2) states that "[n]otwithstanding paragraph (b)", when requesting information pursuant to a questionnaire, the Department will specify the deadlines by which the information is to be provided by the parties. ... Any information submitted after the deadline specified in the questionnaire is untimely, regardless of whether the general deadline in section 351.301(b) has passed.[230]

158. Finally, neither the inclusion in the Department's verification agenda outlines of an item relating to this issue nor the fact that verifiers examined aspects of NKK's conversion factor data at

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[226] As an initial matter, Japan is incorrect in characterizing NSC and NKK' s belated submissions of conversion factors as simply "corrections" to previously submitted data. *See* First Submission of Japan at 29-39, *passim.* The conversion factors NSC and NKK submitted after the preliminary determination constituted completely new factual information, not a correction to a database they had previously provided.

[227] First Submission of Japan at paras. 99, 108.

[228] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. 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.")

[229] *See id*.

[230] *LTFV Final Determination*, 64 Fed. Reg. at 24361 **(Exh. JP-12)**.

verification "ratifies the notion" that the conversion factors were timely submitted within the meaning of Article 6.8.[231] The NKK and NSC verification agendas were issued before either company submitted a conversion factor, and reflect the Department's interest in verifying NSC and NKK's assertions that it was impossible for them to provide such factors.[232] The conditional verification of NKK's factor data merely shows that there was an outstanding issue with respect to NKK's submissions at the time of verification, given that the verifiers were not authorized to make determinations with respect to rejection of submissions. Once that decision was made by appropriate authorities in Washington, they properly omitted references to the untimely submitted data from their report.

(b) Annex II, paragraph 5 does not mandate acceptance of the untimely provided conversion factors

159. Japan's argument that paragraph 5 of Annex II compels the acceptance of NSC and NKK' s untimely provided conversion factors fails because NSC and NKK did not "act to the best of their abilities" to provide the necessary conversion factors. That NSC and NKK supplied these factors as soon as the Preliminary Determination convinced them that it was in their immediate interest to do so shows that they could have done so earlier. The very claim that these firms submitted the factors "as soon as they became aware of their ability to do so" is an admission that, from the time of the first, evasive[233], questionnaire response, they were "able" to provide the conversion factors.

160. NKK's original claims that, with respect to this unique issue, it was "impossible" to provide any conversion factor because it lacked the data to provide one derived from actual weights for the theoretical weight merchandise would be more believable had it not routinely demonstrated its ability to provide other requested information based on less-than-ideal underlying databases.[234] The premise that NSC was "unable" to discover prior to the preliminary determination that it did, in fact, weigh the steel coils sold on a theoretical weight basis is even more difficult to sustain. If huge, heavy steel coils are weighed anywhere, this would necessarily be done not at a Tokyo headquarters office, but at the production site. Because NSC did not ask the production facility whether it weighed the coils until the preliminary determination convinced it that this simple measure might yield a better result, NSC failed to act to the best of its ability to procure the information which enabled it to submit a conversion factor immediately after the Preliminary Determination.

(c) The Department's application of adverse facts available was consistent with Annex II, paragraph 7

161. Paragraph 7 of Annex II provides that, when information from a "secondary source" is used as facts available, "special circumspection" be exercised in the choice of such data. The second half of paragraph 7, however, tempers this concern by recognizing the "clear" corollary that when the need for the use of the facts available arises from the failure of an interested party to cooperate, the result

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[231] First Submission of Japan at paras. 99, 109.

[232] *See* NKK Sales Verification Agenda (February 16, 1999) **(Exh. JP-45(h))** and NSC Sales Verification Agenda (17 February 1999) **(Exh. JP-29(g))**. NSC and NKK first submitted their conversion factors on 22 February 1999. *See* Letter from Programme Manager to NSC (12 April 1999) **(Exh. US/B-3(c))**, at 3; Letter from Programme Manager to NKK, 12 Apr. 1999 and Letter from Programme Manager to NKK (15 April 1999) **(Exh. US/B-3(a))**.

[233] As described above, both companies had originally professed the belief that their theoretical weight sales would not affect the margin at all. In short, they were deemed "not worth the effort" to report on.

[234] *See, e.g.*, NKK's response at point 8 of its supplemental questionnaire response of 23 February 1999, at 3: "NKK does not track actual delivery charges for individual transactions. In order to provide movement expenses for each reported sales transaction, NKK allocated per metric ton average unit expenses to specific transactions based on the way in which the particular transaction was most likely to have been transported." **(Exh. JP-45(g))**.

may be "less favourable" to that party. The Department's decision to base its findings with respect to the theoretical weight sales on the facts available, and its use of an adverse inference in selecting from primary source data for NSC and NKK, are entirely consistent with both of these provisions.[235]

162. Japan's claim that the Department "required an impermissibly high level of cooperation from NKK and NSC" by requiring them to submit, within reasonable deadlines, conversion factors they were unquestionably able to submit by those deadlines is unconvincing.[236] Submitting information weeks and even months after it is requested, and after protestations that the requested information is unnecessary and impossible to provide, does not demonstrate "cooperation" as to that information simply because the information is finally produced prior to verification. Cooperation calls for the timely submission of data, as indicated by the fact that paragraph 3 of Annex II requires that only timely submitted data be taken into account, and for acting to the best of one's ability to provide requested data, as indicated in paragraph 5 of Annex II. Otherwise, respondents would have an incentive to delay the submission of selective pieces of information, waiting to determine whether the facts available an investigating authority might apply will yield better or worse results than the actual data. Because Japan has not demonstrated that NSC and NKK were cooperative with respect to the factors, paragraph 7 contemplates the selection of facts available that are less favourable to those firms.[237]

163. Finally, the Department's selection of facts available was not inconsistent with the "special circumspection" provision of paragraph 7 of Annex II. Here, the Department did act with circumspection, using as facts available not a secondary source but a primary source, namely data NSC and NKK had themselves timely provided on other sales. Furthermore, for that very reason, paragraph 7 of Annex II does not even apply to the facts available selected with respect to the theoretical weight issue, because that provision pertains expressly to situations in which authorities base their facts available findings on "information from a secondary source."

2. Commerce's treatment of the untimely submitted conversion factors fully complied with Article 6 of the Agreement

164. In addition to meeting all provisions of Article 6.8 and Annex II with respect to the application of the fact available, the Department also fully complied with the provisions of Article 6 respecting the establishment of the facts in the underlying investigation.

(a) Commerce gave NKK notice and ample opportunity to present the conversion factor information, as required by Article 6.1

165. Commerce also provided NKK with notice and ample opportunity to respond with respect to the weight conversion factor, as required by Article 6.1.[238]

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[235] The Department's resort to facts available was also necessary because, as discussed above, it properly rejected NSC's and NKK's untimely provided conversion data. Therefore, contrary to Japan's argument at para. 111, there was, in fact, a "gap to fill." Paragraph 7 of Annex II creates no new and distinct requirement of necessity.

[236] First Submission of Japan at para. 112-113.

[237] Paragraph 7 does not require a separate "finding" that NSC and NKK "withheld" the factor information. Under the terms of paragraph 7, it is understood that if the authorities lack necessary information as a result of the failure of a party to cooperate in providing that information, it follows that "*thus* relevant information is being withheld from the authorities." When exporters or producers have the ability to provide requested data but do not provide it, the data is necessarily "withheld from the authorities."

[238] *See* First Submission of Japan at paras. 117-119. (Japan's Article 6.1 argument is made solely with respect to NKK.) *Id.*

166. Japan's Article 6.1 notice argument claims that the Department failed to "specify in detail the information required," within the terms of paragraph 1 of Annex II. In addition, Japan claims that Commerce "officials" misled NKK's attorneys, orally instructing NKK that it "need not submit any conversion factor," and thus violated both the notice and opportunity to respond provisions of Article 6.1.[239] Neither claim is supported by the record; the second is, furthermore, flatly incredible.

167. There was nothing vague about the Department's request for a conversion factor. As discussed above, Commerce stated that such a factor "must" be provided. It also did not prescribe any single methodology that had to be used to the exclusion of all others in arriving at such a factor, reasonably leaving such details to the respondent parties, who were more familiar than the Department with what data they had to work with and how their systems worked.

168. NKK did not provide the data requested in the initial questionnaire, apparently choosing to read Commerce's request very narrowly. Commerce's supplemental request to NKK apprized the company of the deficiency of its initial response: a failure to provide conversion factors that Commerce still required. NKK was not required to "guess what [Commerce] was looking for".[240] Commerce was clearly "looking for" a conversion factor, which it needed in order to compare theoretical and actual weight sales on a common basis. NKK's insistence on the narrow reading that supported its "impossibility" thesis conveniently dovetailed with its stated belief that the information was unnecessary.

169. With respect to the second Article 6.1 claim, the Panel should disregard the self-serving thirteenth-hour allegation that "NKK attorneys called USDOC officials for clarification" and "those officials instructed that NKK need not submit any conversion factor".[241] The sole support for this claim is an extra-record affidavit from the attorney who claims to have made the telephone call in the course of which this alleged statement was made.[242] Even were the Panel to assume, *arguendo*, that counsel for NKK did telephone the Department "on or about" January 7, 1999 in order to seek clarification with respect to the Department's reiterated written request for a conversion factor, the analyst who responded may well have said, for example, that if NKK continued to take the position that providing a conversion factor was both unnecessary and impossible, it could so state. However, had the Department, as Japan suggests, gone further and modified the questionnaire requirement by orally withdrawing the requirement to provide such a factor, the Department would normally have memorialized such a change on the written record. NKK's experienced trade counsel, moreover, would have mentioned the change in NKK's questionnaire response to assure that this change in requirements was reflected on the record. The fact that neither of these things happened, and that no mention was made of this alleged change in the questionnaire requirement during the remainder of the investigation, suggests that the memory of precisely what may have been said during a phone call made on an uncertain date a year and a half ago is, at best, unreliable and thus cannot be relied upon by this Panel.[243]

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[239] *See* First Submission of Japan at paras. 118-119.

[240] *See* First Submission of Japan at para. 117.

[241] First Submission of Japan at para. 118. Although Japan also relies upon variations of this claim at several other points in its brief, we address it only once. Because the central claim is not credible (and the document supporting it is not on the record), it would be pointless to discuss it in multiple contexts.

[242] The source is the Affidavit of Daniel L. Porter, at 3 **(Exh. JP-28)**. For the reasons given in our Preliminary Objections, above, this document should be disregarded by the panel. In the alternative, however, above is a rebuttal to the charges made in that document with respect to this issue.

[243] It is also worth noting that the claim at para. 118 with respect to this phone call overstates even the claims made in the much more recent affidavit, which refers to a call by a single attorney, who spoke with a single analyst, who is alleged to have stated only that "the supplemental question was intended simply to confirm that NKK did not have a conversion factor to report." The affidavit further states that the analyst "did not indicate" what the Department expected or required. The transformation of this memory into an affirmation that multiple attorneys were told by multiple officials that, contrary to the standing written request, a conversion

(b) Article 6.6 did not require the Department to verify NSC's and NKK's untimely submitted conversion factors

170. Article 6.6 provides, in full, that "[e]xcept in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties *upon which their findings are based*" (Emphasis added.) Because the Department rejected NSC's and NKK's untimely submitted conversion factors, removed these data from the record, and did not base its findings upon those factors, there was no requirement under Article 6.6 that the Department verify these factors. Article 6.6 clearly does not require the Department to verify the accuracy of data it does not intend to use or even retain on the record, or, in the case of NKK, to memorialize the results of any examination at verification of such data.

(c) The Department's handling of the conversion factor issue was consistent with Article 6.13

171. Japan's claim that NSC and NKK faced difficulties with regard to the submission of the weight conversion factors which required some action by the Department under Article 6.13 is without merit. Article 6.13 states that "authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable." The drafters of the Agreement recognized that the need to submit large amounts of detailed data in advanced computer formats can be especially burdensome for small companies. The primary purpose of Article 6.13 was to alleviate that burden and ensure that companies experiencing such difficulties would nonetheless be able to participate in the investigation. Although the Article is not *per se* limited to small companies, it was not intended to excuse repeated errors, self-serving interpretations, or grossly untimely submissions by large, capable, sophisticated companies such as NSC and NKK.

172. Japan has failed to demonstrate that NSC and NKK were either unable to supply the requested information without special assistance from the Department or in fact experienced " difficulties" which led to the need for such assistance. Although NSC and NKK may have been burdened by the need to respond to the questionnaires in general, the record does not indicate that they required any special assistance with respect to this matter. Indeed, the fact that they were ultimately able to provide conversion factors within days of learning that their absence had resulted in the use of facts available in the preliminary determination belies the need for any special assistance such as the Department might render to small companies experiencing difficulties in dealing with the complexities of an antidumping questionnaire. Japan's reliance on Article 6.13 to excuse NSC's and NKK's belated submissions is, therefore, misplaced.

3. The Department's choice of facts available with respect to the weight conversion issue was consistent with Article 2.4 of the Agreement

173. The Department's utilization of NSC's and NKK's own verified information as facts available for the sales affected by the missing weight conversion factors was fully consistent with its obligation, under Article 2.4, to make a fair comparison between export price and normal value.

174. With respect to NKK, the failure to timely provide a conversion factor meant that the Department was unable to convert a small number of home market sales to an actual weight basis, and was therefore unable to determine the actual per metric ton normal value for these sales. The Department therefore substituted the highest per-product weighted average price for these few sales, and averaged them together with the actual weight sales of the same products. It then compared

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factor was affirmatively not required further demonstrates the unreliability of any claims as to this alleged conversation.

product-specific weighted average export prices to those weighted average normal values which were the most similar matches. Thus, the Department was able to make a fair comparison between export price and normal value with respect to NKK. Interpreting Article 2.4 to require that authorities use the "overall average normal value" for item-specific normal values which are missing due to the failure of a respondent to cooperate would nullify the provision of Annex II, paragraph 7 allowing authorities to select facts available "less favourable" to parties that have not been cooperative in providing what was requested of them.[244]

175. Because NSC's affected theoretical weight sales were export price sales, the Department assigned a margin to these sales based on margins calculated for NSC's actual weight sales of the same products. Although Japan complains because the Department did not, instead, calculate a surrogate export price for the affected products and then compare this to a normal value, Article 2.4 does not prevent authorities from utilizing a surrogate margin, rather than a surrogate export price. To the contrary, that provision must be read in tandem with Article 6.8, which clearly contemplates the use of facts available margins as well as of more limited facts available plugs. The margins used by the Department for this purpose, furthermore, fulfill the requirements of Article 2.4 because they were calculated by comparing (actual weight) export prices to (actual weight) normal values in accordance with Article 2.4. In addition, there was no information available that would allow the Department to determine export prices based on an adverse inference. Therefore, selecting margins for these sales was an appropriate way to apply an adverse inference.

4. The Department's application of facts available to NSC and NKK is also consistent with Article 9.3 of the Agreement

176. Finally, the Department complied with the requirement of Article 9.3 that the amount of anti-dumping duty "not exceed the margin of dumping established under Article 2" because the Department complied not only with the terms of Article 2.4, as demonstrated above, but also with all the other provisions of Article 2. Therefore, the Panel should uphold the Department's determinations with respect to the theoretical weight factor issue.

IV. SECTION 735(C)(5)(A) OF THE TARIFF ACT OF 1930 IS A PERMISSIBLE INTERPRETATION OF ARTICLE 9.4 OF THE AGREEMENT; THEREFORE, THE DEPARTMENT'S APPLICATION OF THAT ALL OTHERS RATE PROVISION OF THE STATUTE WAS LIKEWISE CONSISTENT WITH ARTICLE 9.4 OF THE AGREEMENT

177. The "all others" rate is the margin of dumping assigned to respondents whose own data are not examined when an authority limits its examination to a sample and they are not selected as part of the sample. The margin for such respondents is, therefore, based on a weighted average of data submitted by the "selected" respondents. Article 9.4 of the Agreement and US law, however, call for the authorities to disregard certain "outlier" types of margins when making this calculation: zero margins, *de minimis* margins, and margins established based on facts available. As we demonstrate below, the language and context of the Agreement support the position of the United States that such outlier margins should be disregarded in their entirety in making this calculation.

178. Similarly, the Department permissibly interprets the requirement of Article 9.4 to exclude "margins" which are zero, *de minimis* or established based on the facts available to refer only to an exporter or producer's overall margin, not to portions of that margin which may involve individual transactions dumped at rates that are zero, *de minimis* or based on partial or total facts available. Thus, an exporter or producer 's margin which was not based entirely on facts available would still be fully weight-averaged in the calculation of the all others rate.

[244] *See* First Submission of Japan at para. 136.

179. The interpretation urged by Japan, in contrast, improperly requires the Panel to read the term "margins" in Article 9.4 to mean "portions of the margins." That interpretation could lead to totally arbitrary results, including higher all others rates. It would, moreover, expose the calculation of the all others rate to manipulation by the selected respondents, who are competitors of the all others companies.[245]

A. ARTICLES 6.10 AND 9.4 OF THE AGREEMENT PROVIDE FOR AN ALL OTHERS RATE BASED ON OVERALL COMPANY-SPECIFIC MARGINS

180. The need for an all others rate described in Article 9.4, and thus the nature of that rate, proceeds from the recognition, in Article 6.10, that an administering agency will not always have the resources to examine each and every producer or exporter of subject merchandise. The first sentence of Article 6.10 refers to a "margin of dumping for each known exporter or producer". This plainly uses "margin" as meaning the company's overall (weight-averaged) margin. Therefore, Article 6.10 provides for the dumping margins of some producers or exporters to serve as proxies for those of other exporters or producers. In this case, the Department selected as its mandatory respondents NSC, NKK and KSC, the three companies with the largest volume of exports to the United States.[246] The appropriateness of that selection remains undisputed in this case.

181. Just as Article 6.10 provides for the consistent and objective selection of a sample which can serve as a proxy for the rest of the industry, Article 9.4 of the Agreement provides a method for using the margins from the proxy companies to determine the anti-dumping duty to be assessed on entries of merchandise exported by producers or exporters not included in that sample. This companion provision states, in pertinent part, as follows (emphasis added):

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of antidumping duty is calculated on the basis of a prospective normal value, the difference between the weighted average normal value **of the selected exporters or producers** and the export prices of exporters or producers not individually examined,
>
> **provided that the authorities shall disregard** for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

182. Article 6.8 provides that determinations may be made "on the basis of the facts available". Thus, Article 9.4 provides that, in calculating the all other rate, margins established on the basis of the facts available shall be disregarded. Article 9.4 also states that zero and *de minimis* "margins" shall

[245] Because the all others companies are competitors of the selected companies in both the foreign and domestic markets, the selected companies, under the interpretation proposed by Japan, might find themselves "unable" to provide tiny bits of information affecting only products sold at prices that would yield low-end margins. Elimination of such sales from the all others margin calculation would result in higher all others margins for their competitors, as could elimination of all zero and *de minimis* portions of the overall margins for mandatory respondents.

[246] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

be disregarded in the calculation of the all others rate. Such margins are, likewise, the entire weighted-average margins for each exporter/producer, not portions thereof, and no party here has suggested the contrary.

183. Given the context of Article 9.4, a respondent company's margin is only "established under the circumstances referred to in paragraph 8 of Article 6" when it is based entirely on the facts available. Thus, when the Department assigns an exporter a calculated margin[247], that exporter's margin is not a "margin established under the circumstances referred to in paragraph 8 of Article 6". Therefore, Article 9.4 addresses the situation where the overall company-wide margin is based entirely on the facts available.

184. In both the preliminary and final determinations in this case, Commerce used, as the all others rate, the weighted average of the rate it calculated for NSC, the rate it calculated for NKK and the rate it calculated for KSC.[248] As we demonstrate below, this methodology conforms to both Section 735(c)(5)(A) of the Act (19 U.S.C. § 1673d(5)(A) and to Article 9.4 of the Agreement.

B. SECTION 735(C)(5)(A) IS A PERMISSIBLE INTERPRETATION OF ARTICLE 9.4 OF THE ANTI-DUMPING AGREEMENT

185. The Department's methodology for determining the all others rate in this investigation was consistent with Article 9.4 of the Agreement because this rate was calculated in accordance with Section 735(c)(5)(A) of the Act, which is a permissible interpretation of that Article.

186. Congress amended the Act in the 1994 Uruguay Round Agreements Act ("URAA") to implement Article 9.4.[249] The Statement of Administrative Action ("SAA") accompanying the URAA stated:

> Recognizing the impracticality of examining all producers and exporters in all cases, Article 9.4 of the Anti-Dumping Agreement permits the use of an all others rate to be applied to non-investigated firms. To implement the Agreement, section 219(b) of the bill adds section 735(c)(5)(A) to the Act which provides that the all others rate will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available. Currently, in determining the all others rate, Commerce includes margins determined on the basis of the facts available.[250]

187. Reflecting this intent to conscientiously amend US law to implement Article 9.4, Section 735(c)(5), therefore, provided the following general rule for the calculation of the all others margin:

> [T]he estimated all others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and

[247] When the Department is able to use the exporter's company-specific data in determining the margin for that exporter, the Department considers that respondent to have received a "calculated" margin. A calculated margin is not necessarily based solely on the exporter's submitted data. When an exporter's margin is based in part, but not entirely, on the use of facts available, that respondent's margin is considered a calculated margin based on "partial facts available," not simply a margin based on facts available.

[248] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(Exh. JP-11)**; *LTFV Final Determination*, 64 Fed. Reg. at 24331, 24370 **(Exh. JP-12)**.

[249] Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[250] SAA at 873 **(Exh. US/B-27)**.

> producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 776.[251]

188. Under US law, the "weighted average margin of dumping" for the all others companies is calculated by weight-averaging the overall (weighted-average) margins for the mandatory respondents because the "margins" referred to in the portion of Article 9.4 which calls for disregarding certain "margins" are, in the context of Article 6.10 and the remainder of 9.4, the overall margin of each individual exporter or producer, rather than the component portions of those company-specific margins. Thus, the United States permissibly interprets the reference in Article 9.4 to "margins" established based on the facts available to mean company-specific margins established based entirely on the facts available.

189. A similar reference to the "margin" is contained at Article 5.8 of the Anti-Dumping Agreement, which provides, in relevant part, for immediate termination of an investigation where the authorities determine that "the margin of dumping is *de minimis ... "*. The United States permissibly interprets this to mean that an investigation should be terminated when the overall margin is *de minimis*, rather than any margins associated with component transactions. Thus, the Agreement uses the term "margins" to mean entire respondent-specific margins, not merely portions of those margins. Japan's interpretation that "margins," as used in Article 9.4, refers to any portions of those margins would require a parallel reading of the term "margin" in Article 5.8 as applied to termination based on zero and *de minimis* margins. Because such a reading would require an authority to dismiss a case unless every single product was being dumped at non-*de minimis* rates, this clearly is not the reading the drafters intended.

190. Article 31 (1) of the Vienna Convention provides that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added). Because the "context" of the reference to "margins" in the sentence in Article 9.4 includes earlier references to margins at the exporter-specific level both in Articles 6.10 and 5.8, and in the earlier portion of Article 9.4, the Department permissibly gave the same reading to the term "margins" in all of these segments of the Anti-Dumping Agreement. Under principles of statutory construction, "where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute".[252] This principle has been applied in the context of international dispute resolution.[253]

191. Specifically, Article 9.4 requires that the all others rate not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers".[254] Thus, Article 9.4 clearly contemplates that the all others rate is to be based on the weighted average of the overall margins of dumping established for individual exporters or producers, not on portions of those margins associated with individual transactions or other components of the overall margin.[255]

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[251] Section 776 of the Act is the section dealing with determinations made based on the facts available. The complete text of Section 735(c)(5), as reported at 19 U.S.C. § 1673(d)(5), is shown at **Exh. JP-4(c)**.

[252] Norman Singer, Statutes and Statutory Construction, § 47.16, at 272 (6th ed. 2000).

[253] *See Boundary Dispute Concerning the Taba Area (Egypt v. Israel)*, 27 International Legal Materials 1427, 1470 para. 177 (Egypt-Israel Arb. Trib. 1988)(finding the "it is only logical that the word 'address' should be given the same interpretation in two paragraphs of the same Annex").

[254] The United States does not calculate liability for payment of anti-dumping duties on the basis of a prospective normal value; thus, United States law is based on section (i) of Article 9.4, rather than on section (ii) of that Article.

[255] This reading is further buttressed by a parallel requirement, in section (ii) of Article 9.4, that, when a rate is set in a country which determines liability for antidumping duties on the basis of a prospective normal value, the only data from the originally-examined companies used for such purpose shall be the *single* weighted-average normal value of "the selected exporters or producers." It is reasonable to conclude that when

C. THE ARGUMENTS RAISED BY JAPAN LACK MERIT

192. Japan argues that the Department was required by Article 9.4 to disregard "the facts available *portion* "of the margins for the mandatory respondents.[256] Article 9.4, however, says nothing about discarding only a " portion" of the margins established "on the basis of the facts available." Instead, it calls for such "margins" to be disregarded in making this calculation. As demonstrated above, the United States permissibly interpreted this provision to mean that a company's margin should be either disregarded or not, as a whole. Japan has not demonstrated that the Agreement requires members to read the term "margins" to mean "portions of the margins." Thus, Japan has not carried its burden of proving that its preferred interpretation of the Agreement is the only permissible one, and the Panel must uphold the decision of the Department with respect to the calculation of the all others rate.

193. Japan's assertion that "the Agreement does not distinguish between determinations based entirely on facts available and determinations based partially on facts available" does not support the interpretation it urges upon the Panel.[257] This statement is based on the unstated assumption that the absence of an express reference in Article 9.4 to a distinction between margins based entirely on facts available and those based partially on facts available precludes an interpretation which makes such a distinction.

194. If this assumption is correct and the language of Article 9.4 is clear and complete on its face, then authorities must disregard all "margins" (not merely "portions" of margins) which are based wholly or in part on the facts available. The result would be a great many cases in which it would be impossible to calculate an all others rate under the Agreement because no margins would remain for this purpose. In this case, for example, the margins for NSC, NKK and KSC (*i.e.*, for all of the mandatory respondents), all of which are partial facts available margins, would all have to be disregarded. It is not logical that the Agreement would compel such a result.

195. If this assumption is not correct, the silence in the language of Article 9.4 as to whether the reference to margins established based on the facts available includes margins based in part on the facts available is due to an ambiguity in the language, in which case member countries are permitted to adopt a reasonable interpretation of the provision.[258] As we demonstrate below, the Department's interpretation is a permissible and workable one.

196. Japan's theory that Article 9.4 requires the Department to disregard the *portions* of the mandatory respondent margins that involve the use of the facts available appears to be based on the assertion that Article 6.8 (the article which provides for the use of the facts available) "contemplates the use of partial facts available whenever possible".[259] Like Japan's claim with respect to Article 9.4, this claim with respect to Article 6.8 is not substantiated. Article 6.8 itself makes no reference whatsoever to the use of partial facts available. While this absence of a counter indication clearly

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no sale-specific portions of the exporters' overall margins are disregarded in determining the all others rate under national laws following the model in section (ii), the same principle is intended to apply to countries which must determine the all others rate using section (i).

[256] First Submission of Japan at para. 140 (emphasis added).

[257] *See* First Submission of Japan at para. 135.

[258] Japan asserts, without support, that US-proposed language which would have incorporated a reference to margins based "entirely" on facts available was rejected during the course of the Uruguay Round. First Submission of Japan at 42 n. 126. Even if the Panel were to assume, *arguendo*, the truth of that assertion, it would not follow that the language ultimately adopted foreclosed the interpretation adopted by the United States. Because Article 9.4 also does not expressly refer to disregarding the "portion" of a margin that is based on facts available, it is more likely that the negotiators agreed upon deliberately ambiguous language in order to accommodate their differing interpretations.

[259] First Submission of Japan at para. 137.

permits the use of partial facts available under appropriate circumstances, it in no way compels the agency to "use" partial facts available "margins," once calculated, in any particular way. Furthermore, Annex II, which is referenced in Article 6.8, also contains no provision describing how facts available margins should be "used" once they have been calculated or dictating that, having calculated partial facts available margins, the United States should then ignore the facts available portions of those margins "whenever possible".

197. Japan's argument that the impact of the facts available portion of the margins for mandatory respondents must be avoided as to the companies receiving the "all others" rate because these companies have not refused access to information or otherwise impeded the investigation also lacks merit.[260] The Department did not base the all others margin on the facts available, but rather on the results of the formula set forth in Article 9.4 and in the Act: using a weighted average of the margins for the mandatory respondents (none of which were zero, *de minimis* or established based on the facts available). Thus, the fact that the all others companies did not refuse access to information or impede the investigation is not relevant to the use of the overall margins for the three mandatory respondents to calculate the all others rate.

198. The use of the partial facts available margins for the mandatory respondents, furthermore, cannot be said to "punish" the all others companies simply because the result is less favourable to them than the result would be under Japan's preferred interpretation.[261] While the terms of the formula set forth in Article 9.4 may result in either detrimental or beneficial rates for individual companies in particular cases, these terms are themselves intended to be neutral, as befits a margin for companies about whose pricing practices nothing is known.[262] Just as the provision in Article 9.4 for exclusion from the all others rate of margins that are zero or *de minimis* is not a punishment, the exclusion from this calculation of margins established based on facts available is not a reward. Thus, not excluding facts-available "portions" of a margin which is not, overall, "established based on facts available" certainly cannot be said to "punish" the all others companies. Article 9.4 does not provide for either punishment or reward; it simply provides for the elimination of "margins" that fall into outlier categories on both sides of the scale, such that the margin for the all-other companies is based on the overall response of the remaining mandatory respondents.

199. Japan's interpretation that an agency must disregard the facts available "portions" of the margins of the mandatory respondent also fails to realistically take into consideration the multiple levels at which the use of facts available must often be applied in practice, and would therefore result in an unworkable general rule.

200. Given the complexity of an anti-dumping investigation, a myriad of individual data items, relating not only to price but also to cost and product characterization (such as the weight conversion factor), must be provided. Not all respondents are able to bring to this process the high levels of manpower, technical expertise and computerization characteristic of Japan's largest steel companies. This frequently results in the use of at least some facts available. For example, if a respondent is unable to supply, or to adequately support, the value of an input, the Department may be required to use facts available as a proxy for that value in calculating a constructed value[263] for use in a margin

[260] *See* First Submission of Japan at para. 138.

[261] *See Id*.

[262] The calculation of margins for some firms based on the experience of other firms necessarily leads to some degree of inaccuracy. This may favour the all others firms or be adverse to them. For example, it might well be argued that basing the all others rate on the average margins for the largest exporters results in an unrepresentatively low margin because larger companies may have greater efficiencies of scale than smaller companies.

[263] Article 2.2.1 permits home market sales to be treated as not in the ordinary course of trade and thus disregarded from the margin calculation when they are made at prices below their per-unit cost of production.

comparison. If the input is part of the cost structure of a wide range of products, it is not possible to disregard the facts available portion of the calculation without disregarding all of the affected transactions. This is the case even if the input is a very minor one, even if the facts-available "plug" is a non-adverse one, and even if the effect of this use of facts available has an infinitesimal effect on individual margins.[264] Given that the use of such "plugs" is not uncommon in many investigations and reviews, it is also not uncommon for many - - or even all -- of a participating respondent's sales to be affected to some degree by the use of partial facts available.

201. If the Panel were to accept Japan's interpretation, all "portions" of a respondent's margin affected in part by facts available would have to be disregarded in calculating the all others rate. The calculation of the all others rate would then depend not upon a broader universe of data, but upon the random assortment of remaining "portions" for which no odd bit of information was missing. Such an approach would be much less transparent than the methodology the United States currently uses, and would not necessarily result in either more reasonable or lower all others rates.

202. Such an approach would also encourage manipulation with respect to data submission. Under the methodology prescribed in the Act, the level of the all others margin is tied to the level of the overall margins of the mandatory respondents, not merely to selective "portions" of a database controlled by those respondents. Under the approach Japan seeks to compel, this would no longer be the case. This is one of the problems the interpretation of the United States, a regular nuts-and-bolts user of the antidumping law, seeks to address.

203. In summary, Japan seeks to have the Panel demand an interpretation of Article 9.4 which would compel the Department to eliminate from its all others rate calculations "portions" of the partial facts available margins calculated for the mandatory respondents. To obtain that end, however, Japan must demonstrate to the Panel that the Department's statutory provision, which must provide rules not only for this case but for a host of other cases with more complex situations with respect to the use of facts available, is an impermissible interpretation of Article 9.4. Japan has not done so. Indeed, because the United States gives to Article 9.4 is wholly consistent with the context in which it occurs and with the purpose of the provision of which it forms a part, Japan cannot do so. Thus, the permissible, reasonable and workable statutory interpretation of Article 9.4 in US law must stand, as must the calculation of the "all others" rate in this investigation, which fully complied with that statutory provision.

When there are insufficient home market sales available for comparison purposes for this, or other reasons, Article 2.2 provides that the export sales may be compared with "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." This constructed cost of the exported sales is known used as normal value, cost is termed "constructed value." *See* Section 773(e) of the Act (19 U.S.C. § 1677b(e)) **(Exh. JP-4(j))**

[264] For example, Kawasaki's margin in the Japanese Steel Plate case was a partial facts available margin. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon Quality Plate Products from Japan, 64 Fed. Reg. 73215, 73226-27 (December 29, 1999)**(Exh. US/B-48)**. Because the Department was unable to verify the reported dates of payment to make a necessary calculation of home market credit expenses, the Department determined that it was necessary to resort to the use of facts available with respect to the number of days for which credit was extended. Id. Because the Department agreed that Kawasaki's affiliated trading company Kawasho was unable to systematically determine the actual date of payment, and that actual payment dates were both earlier and later than the reported dates, it applied a non-adverse adjustment to the reported payment dates for all of Kawasho's home market sales. Id. Despite the necessarily broad application of this facts available element, the number of credit days is only one component of a single adjustment among many.

V. THE DEPARTMENT'S APPLICATION OF THE "ARM'S LENGTH" TEST, WHICH DETERMINED THAT SOME EXPORTER'S HOME MARKET SALES TO AFFILIATES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE, AND SUBSEQUENT USE OF HOME MARKET DOWNSTREAM SALES TO CALCULATE THE NORMAL VALUE FOR SUCH SALES, WAS CONSISTENT WITH ARTICLE 2 OF THE AGREEMENT

204. The Department's application of the "arm's length" test, which determined that some exporter's home market sales to affiliates were not made in the ordinary course of trade, and its subsequent use of home market downstream sales to calculate the normal value for such sales, was consistent with Article 2 of the Agreement. In order for an exporter's home market sales to affiliated customers to be included in the normal value calculation, Article 2.1 of the Agreement specifically states that such sales must be made in the ordinary course of trade. That provision is subject to more than one permissible interpretation as to how authorities should determine whether such sales are made in the ordinary course of trade.

205. It is generally recognized that sales to affiliated customers are inherently suspect and may form an unreliable basis for the dumping calculations. Indeed, the Agreement makes explicit provision for the exclusion of sales to affiliated importers. Article 2.3 permits the calculation of a "constructed" export price "[w]here 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."

206. Home market sales may be similarly "unreliable because of association" between the producer and a customer in the country of export. Such sales may, therefore, reasonably be excluded under the "outside the ordinary course of trade" provision of Article 2.1. Indeed, Mexico defines all affiliated-party transactions as being "outside the ordinary course"[265], while the European Community[266], Brazil[267], Argentina[268], and Korea[269], like the United States, treat as outside the

[265] Mexico's Foreign Trade Act at Article 32 (defining the term "in the ordinary course of trade" to include only "transactions . . . between independent buyers and sellers") (WTO Doc. No. G/ADP/N/1/MEX/1) **(Exh. US/B-28(a))**.

[266] The relevant EC provision states:

> Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

WTO Doc. No. G/ADP/N/1/EEC/2, Council Regulation No. 384/96, Article 2 **(Exh. US/B-28(b))**. Pursuant to this legislation, the EC, like the United States, compares prices to affiliated and unaffiliated customers, and rejects transfer prices where "the analysis of prices of sales . . . to both related and unrelated customers did not show that the prices to the former were at arm's length." *Council Regulation (EC) No. 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan, and Thailand*, O.J.L. 50, p.1, rec. 21 (Feb. 20, 1998) **(Exh. US/B-29)**.

[267] The relevant Brazilian statute provides:

> Transactions among parties who are considered associated or who have agreed to a compensatory arrangement among themselves may be considered as not being in the ordinary course of trade and not be taken into account in determining normal value, unless it is proven that the related prices and costs are comparable to those of operations among parties that are not so related.

WTO Doc. No. G/ADP/N/1/BRA/2, Legislative Decree No. 1602 of 23 August 1995 at Article 6.4 **(Exh. US/B-28(c))**.

ordinary course those affiliated-party sales not made at arm's length. In addition, Australia and New Zealand exclude some, and Canada excludes all, affiliated customer sales from the calculation of normal value without explicit reliance upon the "outside the ordinary course" provision.[270]

207. The Department instructs respondents that "if you sold to an affiliate who resold the merchandise, report the affiliate's resales to unaffiliated customers [i.e., home market downstream sales] rather than your sales to the affiliate".[271] However, the Department accepts the reporting of affiliated-party home market sales in lieu of home market downstream sales where the former pass the arm's-length test".[272] As a result, if a respondent's sales relationship with an affiliated customer passes the arm's length test, sales to that affiliated customer can be used despite the affiliation – an option that is unavailable in countries such as Canada and Mexico which automatically disregard all affiliated customer sales and instead base normal value on the downstream sales corresponding to such transactions. Furthermore, if downstream sales are used in the normal value calculation, the Department will determine whether they are made at a different level of trade and, if so, determine whether a level of trade adjustment should be made.[273] Therefore, the Department's practice is consistent with Article 2.4, as is evident when this provision is read in combination with Articles 2.1 and 2.2.

A. FACTUAL BACKGROUND

208. In the *Preliminary Determination*, the Department tested whether home market sales by the respondent exporters to affiliated customers were arm's length transactions by applying its "99.5 per cent" methodology, which compares prices between affiliated and unaffiliated purchasers, as explained below.[274] The majority of KSC's total home market sales were made through Kawasho, an affiliated trading company.[275] KSC reported the downstream sales by Kawasho, which made sales to both affiliated and unaffiliated customers.[276] The Department's arm's length test indicated that sales

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[268] The Argentine statute provides that a "sale shall be considered as having been made in the ordinary course of trade," when "(a) the price is not affected by any of the associations or relationships" and "(b) the sale price is not lower than the cost of production." WTO Doc. No. G/ADP/N/1/ARG/2, Decree No. 2121/94 at Article 13 **(Exh. US/B-28(d))**.

[269] The relevant Korean regulations state that "in calculating the prices in the ordinary course of trade, . . . sale prices shall not be used as a basis [for normal value] where the sales price between such related parties as prescribed in Article 3-6(1) of the Decree was affected by such a relation." WTO Doc. No. G/ADP/N/1/KOR/4, Customs Regulations at Article 4-4(1). *See also* Article 4-6(1) (normal value) **(Exh. US/B-28(e))**.

[270] *See* Australia's Customs Act of 1901 at 269TAA(1)(b) & 269TAC(1) (excluding from normal value all non-arm's length transactions, defined as occurring where "the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller") (WTO Doc. No. G/ADP/N/1/AUS/1) **(Exh. US/B-28(f))**; New Zealand's Dumping Act at §§3(2) and 5 (excluding from normal value all non-arm's length transactions, defined as occurring where "the price is influenced by a relationship between the buyer, or a related person, and the seller, or a related person") (WTO Doc. No. G/ADP/N/1/NZL/2) **(Exh. US/B-28(g))**; Canada's Special Import Measures Act § 15(a)(i) ("where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter of the first mentioned goods to purchasers *with whom the exporter is not associated* at the time of the sale of the like goods") (WTO Doc. No. G/ADP/N/1/CAN/1) (emphasis added) **(Exh. US/B-28(h))**.

[271] Department's Initial Section B Questionnaire at B-1(30 October 1998) **(Exh. US/B-30)**.

[272] 19 C.F.R. § 351.403(d) **(Exh. JP-5(g))**. *See also Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 64 Fed. Reg. 44483, 44486 (16 August 1999) (prelim. results) ("the Department normally will not require the respondent to report the affiliate's downstream sales unless the sales to the affiliate fail the arm's length test") **(Exh. US/B-31)**.

[273] 19 U.S.C. 1677b(a)(7)(A) **(Exh. JP-4(j))**.

[274] *Preliminary Determination*, 64 Fed. Reg. at 8295 **(Exh. JP-11)**.

[275] *KSC Preliminary Analysis Memo* at 2 **(Exh. US/B-6)**; see also *LTFV Preliminary Determination*, 64 Fed. Reg. at 8295 **(Exh. JP-11)**.

[276] *Id.*

by Kawasho involving one affiliate were made at arm's length.[277] KSC did not provide data on certain other downstream sales because the affiliates were not able to trace the original purchase of subject merchandise from KSC to their resale to an unaffiliated customer.[278] The Department excused KSC from reporting downstream sales which accounted for less than 3 per cent of each firm's total home market sales of subject merchandise.[279]

209. A significant percentage of NSC's total home market sales were to affiliated parties.[280] NSC requested that it not be required to report downstream sales made by four affiliated companies, but provided data on other downstream sales which accounted for the majority of home market sales to affiliated trading companies.[281] The unreported downstream sales made by NSC's four affiliated trading companies represented a small percentage of NSC's total home market sales.[282] Furthermore, the results of the arm's length test indicated that NSC's sales to two of the four trading companies were made at arm's length.[283] The Department determined that the portion of home market downstream sales by two affiliated customers that failed the arm's length test was insignificant, and that NSC had put ample information on the record indicating that these sales were not essential to the Department's analysis.[284] Therefore, NSC was not required to report these downstream sales.

210. NKK submitted its home market sales as well as the downstream sales of its affiliated resellers.[285] The Department determined that NKK's home market sales to one of its affiliates failed the arm's length test, while NKK's home market sales to its other affiliates passed the arm's length test.[286] NKK argued that the Department should use a different arm's length test than it normally uses.[287] The Department disagreed and, in the *Final Determination*, continued to apply its established methodology.[288] The Department noted that, although NKK had proposed an alternative methodology based on a statistical approach, it had not demonstrated that the Department's current methodology was unreasonable.[289] Furthermore, the Department explained that it applies the arm's length test on a customer-by-customer, rather than a product-by-product, basis, because "the question underlying the test is whether affiliation between the seller and the customer has (in general) affected pricing".[290]

B. THE DEPARTMENT'S "ARM'S LENGTH" TEST FOCUSES ON THE RELATIONSHIP BETWEEN AFFILIATED PARTIES

211. The Department runs a basic test to determine whether home market sales by exporters to affiliated customers were made at prices comparable to those to unaffiliated customers. If they are comparable, then the sales to that affiliated customer are deemed to be at "arm's length," *i.e.*, the affiliation does not distort pricing. This is a permissible interpretation of the relevant provisions of

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[277] *Id.*
[278] *Id.* at 2-3.
[279] *KSC Preliminary Analysis Memo* at 3 **(Exh. US/B-6)**. Pursuant to Section 351.403 of the Department's regulations (19 C.F.R. §351.403), the Department does not normally require the reporting of home market downstream sales if total sales of the foreign like product by a firm to all affiliated customers account for five percent or less of the firm's total sales of the foreign like product.
[280] *NSC Preliminary Analysis Memo* at 2 (February 12, 1999) **(Exh. US/B-32)**; *see also Preliminary Determination*, 64 Fed. Reg. at 8296**(Exh. JP-11)**.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *NKK Preliminary Analysis Memo* at 2 (February 12, 1999) **(Exh. US/B-33)**.
[286] *Id.*
[287] *LTFV Final Determination*, 64 Fed. Reg. at 24341 **(Exh. JP-12)**.
[288] *Id.* at 24342.
[289] *Id.*
[290] *Id.*

the Agreement. If such sales were not made at arm's length prices and thus not in the ordinary course of trade, the Department may use the affiliated customer's downstream sales in calculating normal value, depending on the nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, and the level of trade involved.[291] Canada also provides for the use of downstream sales in lieu of home market sales.[292] The Department's use of downstream sales in this case is discussed above.

212. The Department's policy is to treat home market sales by an exporter to an affiliated customer as having been made at arm's length if prices to that affiliated customer are, on average, at least 99.5 per cent of the prices charged to unaffiliated customers.[293] The purpose of the arm's length test (also referred to as the 99.5 per cent test) is to determine whether the affiliation between the seller and the customer has, in general, affected the pricing of the goods sold to the affiliated customer. When the affiliation between a given seller and a given customer does affect pricing, the affected sales are reasonably deemed "not in the ordinary course of trade." Thus, the prices associated with those sales are not used in the calculation of normal value.

213. The Department's 99.5 per cent arm's length test is conducted in the following manner:

Step one: The Department separates each exporter/producer's customer into two groups: affiliated customers and unaffiliated customers. For each affiliated customer, the Department calculates a weighted average[294] net price for sales of each product (CONNUM[295]). All of that exporter/producer's sales to unaffiliated customers are combined in one pool, and the Department calculates a weighted average net price for sales of each product (CONNUM) to the unaffiliated customer group.

Step two: Working on a customer-specific basis, the Department compares the weighted-average price of a product sold to an affiliated customer to the weighted-average price of the same model to the unaffiliated customer group. Models which are sold only to the affiliated customer provide no basis for price comparison, and are eliminated from the test.

Step three: The Department calculates, for each affiliated customer and product-specific price comparison, the ratio of the weighted-average price to the affiliated customer to the weighted-average price to the unaffiliated group, using the formula of affiliated net price/unaffiliated net price, multiplied by 100.

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[291] *Preliminary Determination*, 64 Fed. Reg. at 8297 (Exh. JP-11).

[292] The relevant Canadian provision states:

> if there was not, in the opinion of the Deputy Minister, such a number of sales of like goods made by the exporter to purchasers described in subparagraph 15(a)(i) {i.e., "purchasers with whom the exporter is not associated"} who are at the same or substantially the same trade level as the importer in Canada as to permit a proper comparison with the sale of goods to the importer, but there was such a number of sales of like goods made to purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer, there shall be substituted for the purchasers described in paragraph 15(a) purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer.

Canada's Special Import Measures Act, Section 15(b) (WTO Doc. No. G/ADP/N/1/CAN/1) **(Exh. US/B-28(h))**.

[293] Anti-Dumping Duties; Countervailing Duties – Final Rule, 62 Fed. Reg. at 27296, 27355 **(Exh. JP-39)**.

[294] Weighted average is generally defined as "an average computed by counting each occurrence of each value, not merely as single occurrence of each value." Stickney, Weil, & Davidson, *Financial Accounting* (6th ed. 1991) at 825 **(Exh. US/B-34)**.

[295] A CONNUM is a product model as defined by the Department's matching characteristics.

Step four: On a customer-specific basis, the Department calculates a weighted average of the ratios calculated in step three for all of the products sold to that affiliated customer (other than products that were not sold to unaffiliated parties, as noted in step two). This yields a composite ratio representing the overall relationship between prices to that affiliated customer and prices to unaffiliated customers.

Step five: Sales made to affiliated customers whose overall prices are at least 99.5 per cent of the overall prices to unaffiliated parties are deemed to be at arm's length, and all sales to such customers are retained for use in determining normal value regardless of whether the price ratio for individual products is greater or less than 99.5 per cent. Sales made to customers whose overall prices do not pass this test are deemed not to be made at arm's length and thus not made in the ordinary course of trade. The Department does not use sales to these customers in determining normal value. Instead, respondents are asked again to report downstream sales made by these affiliates to their unaffiliated customers, unless one of the exceptions noted above applies.

C. THE AGREEMENT IS SUBJECT TO MORE THAN ONE INTERPRETATION AS TO HOW AUTHORITIES SHOULD DETERMINE IF AN EXPORTER'S HOME MARKET SALES TO AFFILIATED CUSTOMERS WERE MADE IN THE ORDINARY COURSE OF TRADE, AND THE ARM'S LENGTH TEST IS A PERMISSIBLE INTERPRETATION

214. The Agreement is subject to more than one interpretation as to how authorities should determine if an exporter's home market sales to affiliated customers were made in the ordinary course of trade, and the arm's length test is a permissible interpretation. Article 2 sets forth the general provisions of the Agreement which address the determination of dumping. Article 2.1, in establishing the basic tenets of the determination of dumping, provides definitions of the term dumping ("introduced into the commerce of another country at less than its normal value") and of the term normal value ("the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country"). However, Article 2.1 does not specify how to determine if home market sales were made in the ordinary course of trade. The Department, therefore, must interpret Article 2.1 for purposes of determining whether home market sales to affiliated customers were made in the ordinary course of trade. The Department's arm's length test, as described above, constitutes a permissible interpretation.

215. Also, Article 2.1 permits the use of home market downstream sales in order to calculate normal value.[296] As stated above, this provision defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Home market downstream sales meet the definition of normal value because the sales price being used by the Department in the normal value calculation is that of the same product sold by the exporter through its affiliate for consumption in the home market. The product has not left the home market, and the downstream sale is not unreliable based on affiliation. Japan fails to address this issue in its submission.

216. Although Article 2.2 suggests one example (i.e., certain sales below cost) of transactions made outside the ordinary course, this is not, nor was it ever intended to be, an exhaustive or even illustrative list.[297] To the contrary, Article 2.2 merely sets forth a single instance where sales may be

[296] Home market downstream sales to an unaffiliated party may be used by the Department to calculate normal value when, based on the factors discussed above, home market downstream sales reflect normal value more reliably than the transfer price sales.

[297] The negotiating history of the Agreement shows that attempts were made to include an illustrative list of sales considered "outside the ordinary course of trade." *See Amendments to the Anti-Dumping Code: Submission by the Nordic Countries*, GATT Doc. No. MTN.GNG/NG8/W/64 (22 Dec. 1989) at 2-3 (including

considered outside the ordinary course of trade.[298] The Agreement, however, imposes no other limitations or restrictions on the application of the outside the ordinary course provision. Therefore, the provisions of Article 2.2 concern what an authority may do in order to disregard home market sales because they are below cost, and leave open to permissible interpretation what an authority may do if affiliation has rendered home market sales unreliable.

1. Japan misinterprets the application of Article 2 of the Agreement

217. Japan alleges that the Department's determination of dumping is inconsistent with Article 2 of the Agreement, in that the Department employed a methodology which improperly excludes certain home market sales from the calculation of normal value, and replaces such sales with downstream sales.[299] In particular, Japan argues that under Article 2.1, read in conjunction with Article 2.4, "a 0.5 percentage point average price differential is too small a difference upon which to base a finding that sales to affiliates are not ordinary".[300] However, as stated above, Article 2.1 does not specify how to determine if home market sales were made in the ordinary course of trade, and thus does not compel that conclusion. The Department, therefore, must interpret Article 2.1 for purposes of determining whether home market sales to affiliated customers were made in the ordinary course of trade. The Department's arm's length test, as described above, constitutes a permissible interpretation.

218. Japan also challenges the arm's length test under Article 2.4[301] of the Agreement.[302] The first sentence of Article 2.4, in particular, provides that "[a] fair comparison shall be made between the export price and the normal value." Japan argues that the methodology applied by the Department in determining whether home market sales to affiliated customers were made in the ordinary course of trade does not allow for a fair comparison between export price and normal value.[303] In effect Japan is claiming that the arm's length test is unfair.

219. In arguing that the 99.5 per cent test is unfair, Japan improperly urges the Panel to impose upon the United States its own definition of what it considers fair.[304] Instead, Article 2.4 itself speaks

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the examples of "sales at strongly reduced prices to liquidate the end of stock," "sales at particularly advantageous prices having the character of gifts to important interest groupings for the company of business sector," and "low price sales offers, which are valid for very limited periods of time, to introduce new products") **(Exh. US/B-35)**. Nevertheless, the prevailing view was that "strictly defining 'ordinary course' was almost impossible and even inappropriate." *Meetings of 31 January-2 February and 19-20 February 1990*, GATT Doc. No. MTN.GNG/NG8/15 (19 Mar. 1990) at 13 **(Exh. US/B-36)**. Negotiators were "not certain that a detailed examination would lead to a list, be it an exhaustive or illustrative one," and believed "that the proposal to give a positive definition of cases which were not in 'the ordinary course' was certain to lead to controversy in the Group." *Id.*

[298] Article 2.2.1 provides, in relevant part, that sales below cost "may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time".

[299] Japan Panel Request at 3 **(Exh. US/A-1)**; First Submission of Japan at para. 141.

[300] First Submission of Japan at para. 160.

[301] Article 2.4 of the Agreement provides, in relevant part, that "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".

[302] First Submission of Japan at para. 165.

[303] *Id.* , para. 167.

[304] *See* 19 U.S.C. 1677b(a): "In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." **(Exh. JP-4(j))**.

to this issue, providing that comparisons are fair if made in accordance with the requirements of that provision. For example, Article 2.4 requires that the comparison shall take into consideration level of trade, the contemporaneity of sales, differences in circumstances of sale, and other differences demonstrated to affect price comparability. The Department's margin calculation takes all of these things into consideration.[305] Since all comparisons of export price or constructed export price to normal value based on downstream sales complied with the requirements of Article 2.4, such comparisons were fair.

220. Moreover, although not required by the Agreement, the Department's arm's length test also takes into consideration factors enumerated at Article 2.4. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is virtually identical to the margin calculation itself. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and US sales in the same way that the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated customer sales.

221. In the context of an investigation, the only other meaningful difference between the margin calculation and the arm's length test is in what the Department considers "significant." Whereas the former treats margins under 2 per cent as *de minimis*, the latter utilizes a 0.5 per cent threshold (i.e., sales to affiliated customers are excluded only if, on average, they are more than 0.5 per cent below the average arm's length price). However, the 0.5 per cent *de minimis* standard is not, as Japan now contends, "too small".[306] Indeed, it is the very same *de minimis* standard as that applied to the margin calculation in the context of administrative reviews -- a standard that has been specifically upheld as reasonable by a WTO panel.[307] Because the nature of affiliation does not vary between investigations and administrative reviews, it would be absurd to include sales to a particular affiliated customer in an investigation (using a 2 per cent *de minimis* threshold) that would otherwise be excluded in a review (using a 0.5 per cent *de minimis* threshold). There is thus no reason to depart, for purposes of investigations, from the application of the arm's length test's 0.5 per cent de minimis threshold used in administrative reviews.[308]

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[305] *See, e.g., LTFV Preliminary Determination*, 64 Fed. Reg. at 8294 **(Exh. JP-11)**.

[306] First Submission of Japan at para. 160.

[307] *See Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999) at p. 150, para. 6.90. The panel held that, because the function of Article 5.8's 2 percent *de minimis* standard was to determine "whether or not an exporter is subject to an anti-dumping order," it did not preclude Members from adjusting the threshold for other purposes. Specifically, the Panel found "logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures," and upheld the application of a 0.5 percent *de minimis* test in administrative reviews. *Id.* Similarly, Article 5.8 contains no *de minimis* standard for the comparisons involved in determining whether sales have been made outside the "ordinary course of trade".

[308] It has been noted that the heightened 2 percent *de minimis* standard for the final margin calculation:

> recognized that for purposes of investigations, a higher (more forgiving) standard of "actionable dumping" (which is what a *de minimis* standard is) was appropriate. This recognition is consistent with the fact that the calculation of a dumping margin necessarily involves scores (and in some cases, hundreds) of discrete factual determinations, some of which may involve situations where the outcome is close and the exercise of human judgment is unavoidable. For example, in the case of an adjustment to normal value, it may be a "close call" as to whether a particular expense is direct or indirect or whether the amount of the adjustment has been properly documented. This inevitable aspect of the anti-dumping process arguably makes it unfair to subject parties involved (perhaps for the first time) in an initial investigation of dumping to an overly rigorous standard of actionable dumping.

Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea, WT/DS99/R (29 Jan. 1999) at 127, Para. 4.661 (restating the position of the United States). There is no similar justification

2. Japan fails to prove that the Department's current arm's length test is not permissible interpretation of Article 2.1

222. As explained above, the purpose of the arm's length test is to determine whether the affiliation between a given seller and a given buyer affects pricing in general between those firms.[309] However, Japan argues that the 99.5 per cent test creates "inherent distortions".[310] Japan also claims that since the test considers higher prices to be normal no matter how high, and tests only lower prices, it produces absurd results.[311] Japan proposes that a new test be applied to determine whether home market sales by exporters to affiliates were made at arm's length prices, which it incorrectly claims the Department did not seriously consider.[312]

223. In fact, the Department did seriously consider Japan's proposed test, and found it fundamentally flawed. First, under Japan's proposed product-specific approach, affiliation could be found to have affected sales prices for some models, but not for others, even though the customer in both cases is the same.[313] Because affiliation involves relationships between firms, the focus of the Department's arm's length test is on the overall relationship with a particular customer, not the price of each particular product. In all cases, the focus of the Department's arm's length test, and thus the determination of whether home market sales to affiliated customers were made in the ordinary course of trade, is on the relationship between the seller and the customer, not on a particular product.[314] Therefore, under its methodology, the Department makes one up-or-down call on pricing to an affiliated customer: either there is arm's length pricing between the producer and that customer or there is not.[315] Rather than looking to pricing at the product-specific level, the Department reasonably prefers to focus on the overall relationship. This approach does not preclude findings that particular sales to a customer are outside the ordinary course of trade for other reasons. It only means that the arm's length test has a specific purpose. Such an interpretation of the "ordinary course of trade" provision of Article 2.1, while perhaps not the only reasonable interpretation, is certainly a permissible one.

224. Second, Japan argues that its standard deviation analysis more properly accounts for what it calls "variability in prices".[316] This line of argument reinforces the point that there is more than one interpretation of the meaning of "ordinary course of trade," and that the Department's arm's length test is a permissible interpretation. Nevertheless, Japan submits at Exhibit JP-53 descriptions of several hypothetical situations where such price variability causes affiliated-party sales to fail the Department's 99.5 per cent test. However, Japan's proposed methodology errs significantly on the

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for having a heightened *de minimis* standard for the arm's length test in investigations. Article 5.8 already provides a sufficient "cushion" to protect producers from anti-dumping orders in "close calls".

[309] *LTFV Final Determination*, 64 Fed. Reg. at 24342 (Exh. JP-12).

[310] First Submission of Japan at para. 168. *See also* Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44)**; Affidavit of Daniel L. Porter, Counsel to NKK **(Exh. JP-28)**; *and* Affidavit of Daniel J. Plaine, Counsel to NSC **(Exh. JP-46)**.

[311] First Submission of Japan at para. 168. This argument underscores Japan's misinterpretation of Article 2. Specifically, Article 2.1 says that "a product is to be considered as being dumped, i.e, introduced into the commerce of another country at less than its normal value..." Therefore, the determination of dumping is not concerned with sales prices higher than normal value.

[312] *See* First Submission of Japan at 47 n.144, 50 n.153.

[313] *See Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)**.

[314] *See Id.*

[315] *Id.*

[316] First Submission of Japan at para. 169. The standard deviation analysis is completely reliant on the model-specific approach rejected above, because standard deviation analysis requires a symmetrical, bell-shaped frequency distribution of data, which is unlikely under the customer-specific approach. *See LTFV Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)** .

side of inclusion – it excludes only those affiliated-party prices that can be shown to a high degree of certainty not to have resulted from normal price variability. In effect, the proposed statistical approach simply lowers the threshold at which sales to affiliated parties will be considered to be arm's length sales. While lowering the threshold for accepting affiliated-party sales may provide increased certainty that those sales prices excluded from the normal value calculations were in fact influenced by affiliation (rather than by normal price variability), it provides no assurance that those sales prices included were not so influenced.[317] The Department's 99.5 per cent test is designed to ensure that sales outside the ordinary course of trade are not used as normal value; the test Japan urges the Panel to impose falls short of that goal.

225. Unlike the Japanese proposal, the Department's method is consistent with the normal process under the Agreement for determining dumping margins. Moreover, the margin calculation after which the arm's length test is modelled does not use such a statistical methodology. Dumping occurs where export price is below normal value by a non-*de minimi*s margin calculated on an aggregate weighted average basis (such as that used in the 99.5 per cent test), whether or not that margin resulted from a practice of price discrimination or was a consequence of price variability. Indeed, the problems described in the hypothetical situations at Exhibit JP-53 are also inherent in the margin calculation itself. The margin calculation, which is prescribed by the Agreement, contains no statistical mechanism such as that now proposed, by which to identify "outliers" that could not have resulted from price variability. There is no reason why the arm's length test must operate differently.

226. It is helpful to briefly illustrate how the Department's test addresses the problem of price variability. Since an average is involved in the arm's length test, some individual sales will be above the average and some individual sales will be below the average. It is likely that some sales, though made at arm's length prices, will be found to be less than 99.5 per cent of the average price of comparable products to unaffiliated customers, but will still be included in the normal value calculation because, based on the overall weighted average, sales to that affiliate pass the 99.5 per cent test and are therefore deemed to be at arm's length. This result is the Department's normal practice under the arm's length test.

227. The use of price averages inherently accounts for price variability. Thus, the Department's use of price averages and a 99.5 per cent baseline for determining whether the sales were arm's length transactions for purposes of "ordinary course of trade", rather than running yet another statistical calculation in order to compute a standard deviation to use as the baseline, accounts for price variability in a reasonable and fair manner while maintaining the focus on the overall relationship between affiliated parties.

228. Japan also complains that the 99.5 per cent test is unfair because "it tests only lower prices, and considers higher prices to be normal no matter how high".[318] For example, it asserts that where the arm's length price is $300 per ton, a weighted-average affiliated-party price of $298 per ton would be deemed outside the ordinary course of trade, while a price of $500 per ton would be considered ordinary.[319] This is not necessarily the case, since aberrationally high prices, as well as prices that do not pass the arm's length test, may be considered by the Department to be outside the ordinary course of trade.[320] The Japanese respondents in this case, however, have never contended that any of their

[317] *See LTFV Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)** ("by lowering the threshold for accepting affiliated party sales under their statistical approach from the Department's current standard, NKK's test would increase the likelihood of testing error when pricing to affiliated and unaffiliated customers is not the same (*i.e.*, the error of finding that affiliation has not affected price when, in fact, it has)").

[318] First Submission of Japan at para. 168.

[319] *Id.* at 48, para. 161.

[320] *See* the Statement of Administrative Action (SAA) at 834 (stating that examples of sales made outside the ordinary course of trade includes "merchandise sold at aberrational prices") **(Exh. US/B-37)**.

affiliated-party sales prices were, in fact, aberrationally high. In any event, as Japan itself acknowledges, "[p]rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit".[321] Thus, this aspect of the Department's test cannot be unfair to respondents because they can only benefit from the fact that the structure of the arm's length test prevents some prices to affiliated home market customers from being replaced by what by their own admission would be higher prices to downstream customers. Furthermore, because the 99.5 per cent arm's length test does not automatically reject all affiliated party sales, it is more favourable to the exporting country than the practices of Canada and Mexico, which always require the use of the higher downstream prices.

229. The 99.5 per cent test imposes a reasonable requirement on affiliated party prices: on average, they essentially must be as high as prices to unaffiliated parties.[322] The test has been consistently applied in a reasonable manner by the Department for a number of years. In addition, the 99.5 per cent test provides predictability, in that exporters fully understand the threshold at which their home market sales to affiliated customers will be considered arm's length transactions. The Department's approach is reasonable and thus represents a permissible interpretation of Article 2.1 of the Agreement.

3. Japan's claim that use of downstream sales is unfair lacks merit

230. Article 2.1 of the Agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Downstream sales of the like product to the first unrelated buyer for consumption in the home market clearly come within this definition. Hence, the Agreement authorizes the use of such downstream sales in the calculation of normal value.

231. Japan argues that the use of affiliates' downstream home market sales in lieu of sales to affiliated parties is not permitted by Articles 2.2 and 2.3.[323] In particular, Japan argues that, because Article 2.3 allows replacement of an exporter's sales to an affiliate with the affiliate's resales and Article 2.2 says nothing about replacement of home market sales to an affiliate with the affiliate's resales, the Agreement does not allow such replacement.[324] However, Article 2.2 discusses when to use third country sales and constructed value, and Article 2.2.1 deals only with sales below cost. Neither provision explains what to do when sales, such as affiliated-customer sales, are excluded for reasons other than being made at below cost prices. As noted above, Article 2.2.1 is not, nor was it ever intended to be, an exhaustive or even illustrative list of sales that could be considered outside the ordinary course. Therefore, the Agreement is subject to the permissible interpretation of the Department as to the use of home market downstream sales through affiliated customers.

232. Japan refers to the Latin maxim *expressio unius est exclusio alterius*, which can be a guide to the intent of the parties where it may be assumed that the parties, in listing a number of items but not others, deliberately intended to exclude the non-listed items.[325] Japan suggests that Article 2.3 evinces an intention of the parties to exclude the possibility that, where home market rather than export sales are "unreliable because of association," members could calculate normal value based on the price at which the foreign like product is "first resold to an independent buyer." However, it should be noted that *expressio unius est exclusio alterius*, as Lord McNair also remarked in his book excerpted by Japan at Exhibit JP-54, must be "applied with caution".[326] Indeed, the US Supreme Court has noted

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[321] First Submission of Japan at para. 170.
[322] *LTFV Final Determination*, 64 Fed. Reg. at 24342-43 **(Exh. JP-12)**.
[323] First Submission of Japan at para. 170.
[324] *Id.* at 49, para. 164.
[325] *Id.*
[326] Lord McNair, *The Law of Treaties* 400 (1961) **(Exh. JP-54)**.

that "the principle *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence'".[327] It is significant that the rules of the Vienna Convention do not refer to the maxim. The purpose of treaty interpretation is, as stated in Article 31 of the Vienna Convention, to give effect to the intention of the parties to the treaty as expressed in their words read in context.

233. Indeed, the context of Article 2.3 reveals that the provision is limited to export sales for reasons other than the prohibition of the use of downstream home market sales. First, it would have been redundant for Article 2.3 to refer to home market affiliated-party sales, which may already be rejected as outside "the ordinary course" and replaced by downstream sales pursuant to Article 2.1. Second, the purpose of Article 2.3 is to make explicit the authority to construct export price, as a prelude to discussing export sale adjustments in Article 2.4.[328] Thus, it cannot be inferred from the silence of Article 2.3 silence regarding home market sales that the parties intended to preclude the inclusion of downstream sales in the calculation of normal value.

234. Japan suggests that where affiliated customer sales are rejected as outside the ordinary course of trade, the Agreement requires the calculation of normal value on the basis of "sales to a third country" or "constructed value" rather than downstream sales.[329] However, such a practice would conflict with the Agreement's clear preference to calculate normal value based on home market sales prices. Article 2.2 plainly states that normal value may be based on third-country sales prices or on constructed value "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when...such sales do not permit a proper comparison". Where downstream home market sales made in the ordinary course of trade exist, the Agreement permits their use, rather than the use of constructed value or third country sales. As explained below, downstream home market sales allow for a proper comparison here because the Department determined that home market sales were made at the same level of trade as the export transactions or adjustments were made as appropriate. Japan's proposed inference based on the *expressio unius est exclusio alterius* maxim is, therefore, inconsistent with this part of the Agreement.

235. Moreover, Japan's construction based on the *expressio unius est exclusio alterius* maxim could create absurd consequences in violation of Article 32(b) of the Vienna Convention. A prohibition on the use of downstream sales to calculate normal value would enable producers in exporting countries to exclude from normal value all of their sales destined for consumption in the home market simply by making them through affiliated resellers. The absurd result would be that in every such case, normal value would have to be calculated based on third country sales or constructed value.

236. Finally, Japan argues that the downstream sales are at different levels of trade, and that the Department is not taking this factor into account in calculating normal value, such that a "fair comparison" under Article 2.4 is not being made with respondent's US sales.[330] This is not so. The Department determines normal value based on sales in the comparison market at the same level of trade as the EP or CEP transaction, to the extent possible.[331] If the comparison market sales are at a different level of trade, the Department makes a level of trade adjustment under Section 773(a)(7)(A)

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[327] *Pauley v. Bethenergy Mines, Inc., 501 US 680, 703 (1991) (quoting Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2109, n. 182 (1990))* **(Exh. US/B-38)**

[328] Article 2.4 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."

[329] First Submission of Japan at para. 162.

[330] First Submission of Japan at para. 165.

[331] 19 U.S.C. §1677b(a)(1)(B)(i); *see also Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

of the Act, where appropriate.[332] In this case, the Department received no requests for level of trade adjustments, but nevertheless conducted a level of trade analysis.[333] Therefore, because the Department conducts a detailed level-of-trade analysis for use in making its prior to making the normal value calculation, considers level of trade in making its margin comparisons, and makes appropriate adjustment in accordance with Article 2.4, the alleged "apples-to-oranges comparison.[334] Japan claims takes place when the Department uses affiliates' downstream sales does not occur. Japan ignores these aspects in its submission to the Panel.

4. Conclusion

237. As made clear by Article 2.3 of the Agreement, affiliated party transactions are inherently suspect. For this reason, the United States, like many other countries, excludes as outside the ordinary course of trade those affiliated party sales not made at arm's length. The 99.5 per cent test is analogous to the margin calculation, which itself is prescribed by the Agreement, and is therefore a perfectly reasonable methodology by which to determine whether affiliated party sales are in fact at prices below arm's length. Under the applicable standard of review, the Department's methodology must be upheld as a permissible interpretation of the Agreement.

VI. THE DEPARTMENT'S CRITICAL CIRCUMSTANCES DETERMINATION WAS CONSISTENT WITH ARTICLE 10 OF THE ANTI-DUMPING AGREEMENT

238. The remedy of imposing anti-dumping measures to counteract injurious dumping usually takes effect after an administering authority makes a preliminary determination of dumping and consequent injury to the domestic industry. However, the effectiveness of this remedy is seriously undermined if exporters are able to dump massive quantities of the subject merchandise prior to the imposition of provisional measures. For this reason, Articles 10.6 and 10.7 of the Anti-dumping Agreement provide that where such critical circumstances exist, anti-dumping duties may be imposed retroactively on imports that enter during the 90 days prior to the preliminary determination. Without these provisions for retroactive relief, exporters could dump massive quantities of their merchandise in anticipation of an investigation or as soon as the investigation is initiated with no risk of anti-dumping duties being imposed until the date of the preliminary determination.

239. In the petition filed in this case, the US steel industry alleged that critical circumstances existed with respect to Japanese imports of hot-rolled steel and provided over 800 pages of extensive data, documentation, and analysis showing high levels of dumping, massive import surges, decreasing prices and public knowledge of the impending anti-dumping investigations due to the existing economic crisis. The Department promptly reviewed the allegations and the voluminous supporting facts and documentation, sought additional clarifying information, and on 30 November 1998, published an affirmative preliminary finding of critical circumstances pursuant to Section 733(e) of the Act, the US statute which implements Articles 10.6 and 10.7 of the Anti-Dumping Agreement. This "early" preliminary critical circumstances determination (i.e., prior to the issuance of the preliminary determination of dumping) was based upon the evidence contained in the petition and amendments thereto, the USITC preliminary determination of threat of injury, and other publicly available information before the Department at that time. However, although the Department issued the preliminary determination of critical circumstances prior to the issuance of the preliminary determination of dumping, it did not instruct the US Customs Service to require bonds or any other security for the payment of estimated anti-dumping duties until after the preliminary determination of

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[332] 19 U.S.C. §1677b(a)(7)(A); *see also Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

[333] *See Department's Memorandum on Level of Trade*, (12 February 1999) **(Exh. US/B-39)**; *see also LTFV Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

[334] First Submission of Japan at para. 170; *see also Id.* at 47, footnote 145.

dumping. Additionally, because the USITC (in its final determination of injury) later found that critical circumstances did not exist, no definitive anti-dumping duties were ever assessed and all bonds were released and all cash deposits were refunded.

240. Nevertheless, Japan claims that the Department's "early" critical circumstances determination in this case was impermissible under Articles 10.6 and 10.7 of the Anti-Dumping Agreement. Japan further claims that the standards governing preliminary critical circumstances determinations under Section 733(e) of the Act are inconsistent, on their face, with the requirements of Articles 10.6 and 10.7. As demonstrated below, each of the arguments asserted by Japan is without merit.

A. ARTICLES 10.6 AND 10.7 OF THE ANTI-DUMPING AGREEMENT PERMIT AUTHORITIES TO TAKE MEASURES NECESSARY FOR THE RETROACTIVE APPLICATION OF ANTI-DUMPING DUTIES AT ANY TIME AFTER THE INITIATION OF AN INVESTIGATION

241. Under the Anti-Dumping Agreement, an administering authority normally may begin to take provisional anti-dumping measures with respect to entries of subject merchandise only after making an affirmative preliminary determination of dumping and injury to the domestic industry.[335] Thus, under normal circumstances, cash deposits or some other form of security may only be collected from the time of the preliminary determination[336], and definitive anti-dumping duties are not imposed until the administering authority has made a final affirmative determination of dumping and injury.[337]

242. However, where critical circumstances exist, Articles 10.6 and 10.7 of the Agreement provide for the imposition of anti-dumping measures retroactively for a period of up to 90 days prior to the preliminary determination of dumping. The purpose of these provisions is to ensure that the anti-dumping remedy is not undermined by massive import surges that occur in anticipation of, or in response to, the initiation of an investigation.

243. Under Article 10.6 of the Agreement, an administering authority may impose anti-dumping duties retroactively if it finds that two conditions are satisfied. Specifically, the administering authority must find that:

(1) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(2) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

244. Article 10.7 of the Agreement further provides that "{t}he authorities may, *after initiating an investigation*, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided in paragraph 6, *once they have sufficient evidence* that the conditions set forth in that paragraph are satisfied." (Emphasis added). Pursuant to Article 10.7, therefore, an administering authority may make a determination that critical circumstances exist and may take those measures that are necessary to secure potential definitive

[335] *See* Articles 7.1 and 10.1 of the Agreement.
[336] *See* Articles 7.1 and 7.2 of the Agreement.
[337] *See* Article 10.2 of the Agreement.

anti-dumping duties at any time after the initiation of an investigation.[338] The only restriction is that retroactive duties may not be applied to merchandise entered before the date on which the investigation was initiated.[339]

B. THE US CRITICAL CIRCUMSTANCES STATUTORY PROVISIONS ARE CONSISTENT WITH ARTICLES 10.6 AND 10.7 OF THE AGREEMENT

245. The US statutory framework for critical circumstances determinations provides a remedy of retroactive anti-dumping duties to combat surges of dumped imports that is consistent with Article 10 of the Anti-Dumping Agreement. Specifically, the US statute governing preliminary determinations of critical circumstances closely follows Articles 10.6 and 10.7 of the Agreement.

246. As noted above, in order to provide an immediate response to import surges, Article 10.7 of the Agreement authorizes administrative authorities to take appropriate measures for the retroactive application of anti-dumping duties at any time after the initiation of an investigation if there is sufficient evidence that critical circumstances exist under Article 10.6. As such, Article 10.7 of the Agreement necessarily provides for an early or preliminary critical circumstances determination. Section 733(e) of the Act likewise provides for such an early or preliminary determination of critical circumstances under US law. Specifically, Section 733(e) provides, in relevant part, as follows:

> SEC. 733. PRELIMINARY DETERMINATIONS
>
> (e) CRITICAL CIRCUMSTANCES
>
> (1) IN GENERAL. - If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by the administering authority, then the administering authority *shall promptly (at any time after the initiation of the investigation under this subtitle) determine, on the basis of the information available to it at that time, whether there is a reasonable basis to believe or suspect that-*
>
> > (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
> >
> > (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value, and that there was likely to be material injury by reason of such sales, and
> > (B) there have been massive imports of the subject merchandise over a relatively short period.

(Emphasis added).

247. Section 733(e)(1) of the Act, in accordance with Article 10.7 of the Agreement, directs the Department of Commerce to make a preliminary critical circumstances determination based upon "the information available to it at that time." Thus, where a critical circumstances allegation is made, the Department will promptly and thoroughly analyze the facts in the allegation, the petition (including

[338] For example, an administering authority may, at any time after initiation, suspend liquidation (*i.e.*, withhold appraisement or assessment) of subject entries if there is sufficient evidence that critical circumstances exist under Article 10.6 of the Agreement.

[339] Article 10.8 of the Agreement.

the section pertaining to injury to the domestic industry)[340], the USITC preliminary determination of injury[341], and other publicly available information (*e.g.*, press reports, US Census Bureau and US Customs Service data, etc.) to determine whether critical circumstances exist. If there is insufficient evidence of critical circumstances, the preliminary critical circumstances determination will be negative. However, if the record facts are reliable and are sufficient evidence of critical circumstances, the statute authorizes an affirmative preliminary determination of critical circumstances.

248. Finally, although Article 10.7 of the Agreement authorizes an administering authority to take measures, such as the withholding of appraisement or assessment of duties, at any time after the initiation of an investigation where critical circumstances are found, the US statutory provision is more conservative. Section 733(e)(2) of the Act directs the Department of Commerce to take action upon an affirmative preliminary critical circumstances finding only at the time of the issuance of a preliminary determination of dumping.[342] Thus, although appraisement or assessment of entries of merchandise can properly be suspended prior to a preliminary determination under Article 10.7 of the Agreement, the US statute restricts such measures.[343] In fact, in this case, no measures were taken on imports from the Japanese respondents prior to Commerce's Preliminary Determination.[344]

249. In sum, Section 733(e) of the Act provides for the Department to make a preliminary determination as to whether critical circumstances exist based on sufficient evidence in the record and consistent with the requirements of Articles 10.6 and 10.7 of the Anti-Dumping Agreement. As demonstrated below, because the Department's preliminary critical circumstances determination in

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[340] Indeed, even prior to initiating an antidumping investigation, the Department takes steps to confirm and corroborate the allegations and facts in the petition. *See, e.g., Initiation Checklist*, at 15 (Exh. US/B-18).

[341] Shortly following the initiation of an anti-dumping investigation by the Department of Commerce, the International Trade Commission issues its preliminary finding regarding injury to the domestic industry. Thus, prior to issuing the preliminary determination of critical circumstances, the Department of Commerce will generally have the USITC's analysis of domestic injury.

[342] Section 733(e)(2) of the Act provides as follows:

> SEC. 733. PRELIMINARY DETERMINATIONS
> (e) CRITICAL CIRCUMSTANCES
> (2) SUSPENSION OF LIQUIDATION. - If the determination of the administering authority under paragraph (1) is affirmative, then any suspension of liquidation ordered under subsection (d)(2) shall apply, or, if notice of such suspension of liquidation is already published, be amended to apply, to unliquidated entries of merchandise entered or withdrawn from warehouse, for consumption on or after the later of-
> (A) the date which is 90 days before the date on which the suspension of liquidation was first ordered, or
> (B) the date on which the notice of the determination to initiate the investigation is published in the Federal Register.

[343] Japan argues that the US statute requires Commerce to wait until the preliminary determination of dumping because the Agreement requires such. *See* First Submission of Japan at 51, n.156. This contention is incorrect. As explained above, Article 10.7 of the Agreement clearly permits preliminary critical circumstances determinations at any time after initiation and provides that authorities may take necessary measures at that time. The fact that the US statute directs Commerce to issue instructions to the Customs Service in the first instance at the preliminary determination of dumping is irrelevant to what is permitted by Article 10.7. Commerce only recently revised its policy to take advantage of the remedy provided by Article 10.7 (*i.e.*, early critical circumstances decisions), after finding that such policy was necessary in order to respond adequately to unfair import surges. *See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, 63 Fed. Reg. 55364 (Oct. 15, 1998) ("*Critical Circumstances Policy Bulletin*") **(Exh. JP-3)**.

[344] *See LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(JP-11)**.

this case was made in accordance with Section 733(e) of the Act, it was fully in accordance with Articles 10.6 and 10.7 of the Agreement.

C. THE DEPARTMENT'S PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES IN THIS CASE WAS FULLY IN ACCORDANCE WITH ARTICLES 10.6 AND 10.7 OF THE ANTI-DUMPING AGREEMENT

250. Together with its petition seeking relief from injurious dumping, the US hot-rolled steel industry provided extensive documentation and data showing high levels of dumping, massive import surges, decreasing prices, and public knowledge of the impending anti-dumping investigation. Consistent with its obligations under Articles 10.6 and 10.7 of the Anti-Dumping Agreement and Section 733(e) of the Act, the Department promptly analyzed the evidence in the petition, the USITC's finding of threat of material injury and other publicly available data and preliminarily determined that critical circumstances existed based on the substantial evidence available to it.[345]

251. The petition in this case contained over 800 pages of data, documentation, and analysis, with approximately 700 pages of that being purely factual documentation. Such documentation included an extensive Japanese market research report detailing actual transaction prices for hot-rolled steel in Japan (with product-specific information pertaining to physical characteristics, inland freight charges, packing costs and credit terms)[346], an actual offer for sale in the United States of Japanese-produced hot-rolled steel[347], affidavits[348], Harmonized Tariff Schedule and US Census Bureau import statistics[349], national and international press reports[350], Financial Disclosure Reports on major Japanese producers (NSC, NKK, KSC and Sumitomo)[351], consulting firm reports regarding the domestic and foreign steel industries[352], and published articles pertaining to metallurgy and steel-making.

252. Upon receiving the petition, the Department analyzed the evidence provided, and determined that additional explanation and factual information were needed. The Department thus sent the petitioners a questionnaire ("deficiency questionnaire") requesting, among other things, additional supporting documentation pertaining to claimed import volumes, material injury, and knowledge by

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[345] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751 **(Exh. JP-9)**.

[346] The original market research report in Exhibit 14 to Volume 1 of the petition contains sensitive business confidential information. **(Exh. US/B-40(a)).** A public summary of the exhibit has been provided ("*Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products*") along with a Confidential Version of Figure 2 and Exhibit 16 to the petition, which includes ranged numbers. Both the *Public Summary* and the Confidential Version are attached at Petition Volume 1, Exhibit 14. **(Exh. US/B-40(a)).** As explained in the *Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products*, "Exhibit 14 of the petition contains a pricing study on hot-rolled carbon steel flat products in the Japanese market. Specifically, it contains the actual transaction prices for hot-rolled carbon steel flat products produced and sold by Nippon Steel Corporation ("NSC") and Nippon Kokan ("NKK") . . . {and} a description of the methodology used to prepare the pricing study, which shows that a market researcher with decades of experience in Japan employed recognized research techniques to develop the data in the study and to cross-check those data to ensure maximum accuracy." *Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products*, at 1-2. Petition, Volume 1 at Exhibit 14. **(Exh. US/B-40(a)).**

[347] *See* Petition, Volume 1 at Exhibit 7 **(Exh. US/B-40(a))**.

[348] *See, e.g.*, Petition, Volume 1 at Exhibits 7, 13 **(Exh. US/B-40(a))**; Volume 2 at Exhibit 14, **(Exh. US/B-40(b))**.

[349] *See, e.g.*, Petition, Volume 1 at Exhibits 4-6, 1, **(Exh. US/B-40(a))**; Volume 2 at Exhibits 1-3 **(Exh. US/B-40(b))**; Volume 3 at Exhibit 6 **(Exh. US/B-40(c))**.

[350] *See, e.g.*, Petition, Volume 2 at Exhibits 7-8, 11, 16, 20, 24, 25, 40, **(Exh. US/B-40(b))**; Volume 3 at Exhibits 1-5, 9, **(Exh. US/B-40(c))**.

[351] *See*, Petition, Volume 2 at Exhibits 28-31, **(Exh. US/B-40(b))**.

[352] *See* Petition, Volume 2 at Exhibits 17 and 39 **(Exh. US/B-40(b))**.

Japanese producers of the potential investigation.[353] In response to the deficiency questionnaire, the petitioners filed amendments to the petition on 9 October 1998 and 14 October 1998 containing additional supporting documentation as requested.

253. In reaching its preliminary determination as to whether critical circumstances existed, the Department recognized the need to ensure that the anti-dumping remedy was not undermined in this case by a sudden flood of massive imports. Based on the evidence before it, the Department found a massive surge in import volumes in which "imports of hot-rolled steel from Japan increased by more than 100 per cent".[354] This was more than six times greater than the 15 per cent increase needed to establish massive imports under the Department's established practice.[355] The Department also found that importers knew or should have known both that the respondents were selling the subject merchandise at less than fair value and that there was likely to be material injury.[356] It based this determination on the fact that the dumping margins documented in the petition were in excess of 25 per cent, on the USITC's preliminary determination of threat of injury, and on other publicly available information, including "numerous press reports . . . regarding rising imports, falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers".[357] It also considered comments submitted by the respondents on this issue.[358] In other words, the Department determined that it was proper to issue a preliminary affirmative determination of critical circumstances only after analyzing the volume of corroborated evidence showing that critical circumstances existed and in recognition of the need for immediate action. Its determination was supported by sufficient evidence and was consistent with Articles 10.6 and 10.7 of the Anti-dumping Agreement.

254. Japan argues that the Department's determination of critical circumstances violated the Agreement in that: (1) a preliminary critical circumstances determination must be based on a preliminary finding of current material injury, rather than threat of injury; (2) Commerce's determination was not supported by sufficient evidence as required by Article 10.7 of the Agreement; and (3) the standards for critical circumstances determinations in the US statute, on their face, fail to meet the standards in Articles 10.6 and 10.7 of the Agreement.[359] As we show below, each of these arguments is without merit.

1. Article 10.6 of the Agreement does not prohibit a finding of critical circumstances where there is a threat of injury to a domestic industry

255. Japan claims that Commerce "ignored" the USITC's determination of no current material injury and dismissed the USITC's expertise in injury determinations when it issued its affirmative critical circumstances determination. Japan further argues that Article 10.6 of the Agreement limits the application of retroactive anti-dumping duties to situations where there is present injury, not threat of injury. These arguments lack any support. First, the Department of Commerce did not ignore the USITC's determination. In fact, Commerce relied on the USITC's determination of threat of injury and the findings set forth in that determination. Second, Commerce's reliance on the USITC's finding of threat and other supporting factual information was consistent with Article 10.6 of the Agreement.

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[353] *See* Letter from the Department to Skadden, Arps, Slate, Meagher & Flom LLP (October 6, 1998), **(Exh. US/B-41)**.

[354] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751**(Exh. JP-9)**.

[355] *Id.* at 65750; *see also* 19 C.F.R. § 351.206(h)(2).

[356] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2-4 **(Exh. US/B-42)**.

[357] *Id.*

[358] *See Preliminary Critical Circumstances Memo* at 3 (discussing the respondents' contentions regarding the existence of critical circumstances) **(Exh. US/B-42)**.

[359] First Submission of Japan at 50.

256. Japan argues that Article 10.6 requires a finding of current material injury in order to issue a preliminary determination of critical circumstances. However, Articles 10.6 and 10.7 specifically authorize preliminary critical circumstances determinations and the suspension of assessment or other measures in instances where there is threat of material injury. Article 10.6 authorizes the imposition of retroactive duties where "(i) there is a history of dumping *which caused injury* or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping *would cause injury*, and (ii) *the injury* is caused by massive dumped imports . . . ." (Emphasis added). Article 3, footnote 9 of the Agreement expressly states that "the term 'injury' shall, *unless otherwise specified*, be taken to mean material injury to a domestic industry, *threat of material injury* to a domestic industry or material retardation of the establishment of such an industry. . ." (Emphasis added). Article 10.6 does not "otherwise specify" that threat of material injury is not included within the meaning of injury for purposes of critical circumstances determinations. Thus, consistent with Article 3, footnote 9, the term injury in Article 10.6 must include threat of material injury.

257. Japan notes that other Article 10 provisions do specify a distinction between injury and threat of injury. In particular, Japan stresses that Article 10.2 distinguishes between "injury" and "threat thereof".[360] However, this argument actually supports the Department's determination in this case. Indeed, while it is true that Article 10.2 distinguishes "injury" from "threat," this merely emphasizes the fact that Articles 10.6 and 10.7 do not specify such a distinction. In contrast to Article 10.2, there is no exclusion of threat in Article 10.6.[361]

258. Japan further argues that, under Article 10.2, "retroactive duties may be levied after finding threat only if there would have been a final injury determination absent provisional measures".[362] Thus, Japan suggests that the preliminary determination in this case (based in part on the USITC's determination of threat of injury) was in error, because retroactive duties may only be applied if there is a determination of current injury. Japan confuses the application of Article 10.2 in two respects. First, Article 10.2 applies to "final" determinations regarding injury and speaks to the situation where an administering authority finds only threat of injury in its final determination. Japan is challenging Commerce's reliance on a finding of threat of injury for purposes of its *preliminary* determination, not its final determination. In this respect, Article 10.2 is not applicable. More importantly, the USITC's final determination in this case included an *affirmative finding of current material injury.*[363] Thus, the discussion relating to threat of injury in Article 10.2 is not even pertinent here.[364]

259. Japan similarly cites to Article 10.4, arguing that remedies for threat of injury should be prospective only. Again, however, Article 10.4 speaks only to the application of "definitive" anti-dumping duties after a *final* determination is issued.[365] Thus, in instances where there is a final determination of threat of injury, but no current injury, "definitive anti-dumping dut{ies}" may only

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[360] *See* Article 10.2 of the Anti-Dumping Agreement.

[361] Quoting from the Law of Treaties, Japan argues that "{u}nder a general principal of treaty interpretation, by specifying 'injury,' the Agreement excludes alternative concepts such as 'threat of injury.'" First Submission of Japan at 56 (*citing generally* Lord McNair, *The Law of Treaties* 399-410 (1961) **(excerpts in Exh. JP-54)** for the proposition: "Expressio unius est exclusio alterius (to specify one thing implies the exclusion of another)."). This principle, however, does not apply where, as here, the language of the Agreement specifically states that to specify one thing (*i.e.*, injury) implies the *inclusion* of another (*i.e.*, threat of material injury). *See* Article 3 n. 9 of the Agreement. Thus, contrary to Japan's argument, the presumption is that threat of injury is included within the meaning of injury, unless a particular provision specifically excludes it. Article 10.6 does not specifically exclude threat of material injury.

[362] First Submission of Japan at 56 (emphasis in original).

[363] *Certain Hot-Rolled Steel Products From Japan*, 64 Fed. Reg. 33514 (June 23, 1999), **(Exh. JP-13)**

[364] Article 10.2 addresses the application of retroactive duties generally and does not specifically apply to situations involving critical circumstances.

[365] Article 10.4 of the Anti-Dumping Agreement.

be imposed prospectively from the date of the determination of threat of injury. For the same reasons noted above with respect to Article 10.2, Article 10.4 also does not apply here.

260. In fact, the language in Article 10.4 indicates that even where there is only a preliminary finding of threat of injury, provisional measures *are* proper. By suggesting that all cash deposits collected prior to the final determination of threat must be *refunded*, the provision necessarily implies that the provisional measures (*e.g.*, collection of cash deposits) - even where they were based upon a preliminary finding of threat of injury - were appropriate when imposed. In sum, because Articles 10.2 and 10.4 apply to situations not present here (*i.e.*, *final* determinations of threat of injury), Japan's argument that "{i}t makes no sense to interpret Article 10.6 broadly as allowing precisely the type of retroactivity that Articles 10.2 and 10.4 seek to prevent"[366], is without merit.

261. Finally, Japan argues that Commerce improperly reversed its practice when it began issuing affirmative critical circumstances determinations in 1997 in cases where the USITC preliminarily found only threat of injury. Specifically, Japan cites *Brake Drums and Brake Rotors From the People's Republic of China*, in which the Department stated that in instances in which the USITC has found only threat of material injury, "it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury".[367] Japan is essentially arguing that the Department changed its policy three years ago and, since that time, has been improperly relying on threat of injury as a sufficient factor for imputing knowledge. Japan's argument fails for several reasons. First, it is not a violation of the Anti-Dumping Agreement for an authority to formulate and revise its policies in the course of administering the Agreement. The *Brake Drums and Brake Rotors* case was one of the first critical circumstances decisions in which the Department applied the new law implementing the Agreement. In June 1997, less than four months after the Department issued the *Brake Drums and Brake Rotors* decision, the Department broadened the criteria used in determining whether knowledge of injury exists for purposes of critical circumstances determinations. In *Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, the Department explained that in instances in which the USITC preliminarily found threat of injury, it would consider that finding as well as other evidence in determining whether a reasonable basis exists to impute knowledge of injury.[368]

262. Thus, the Department's current policy is to consider *both* the USITC's finding of threat of injury *and* other evidence on the record in deciding whether to impute knowledge of injury. As the Department explained in this case:

> If, as in this case, the USITC preliminarily finds threat of material injury . . ., the Department's practice is to consider additional information such as the extent of the increase in the volume of the subject merchandise during the critical circumstances period and the magnitude of the margins, in determining whether a reasonable basis exists to impute knowledge that material injury was likely.[369]

The Department's policy therefore meets the requirements of Articles 10.6 and 10.7 of the Agreement with respect to imputing knowledge of injury. In this case, because the Department's reliance on the USITC finding of threat of injury and the other substantial evidence before it in deciding whether to

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[366] *See* First Submission of Japan at 57.

[367] *Brake Drums and Brake Rotors From the People's Republic of China*, 62 Fed. Reg. 9160, 9164 (Feb. 28, 1997) (final determination) **(Exh. US/B-44)**.

[368] *Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 Fed. Reg. 31972, 31978 (June 11, 1997) (preliminary determination) **(Exh. US/B-45)**.

[369] Preliminary Critical Circumstances Memo at 2 (*citing Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 Fed. Reg. at 31978) **(US/B-42)**.

impute knowledge of injury was permissible under Articles 10.6 and 10.7, Japan's argument to the contrary should be rejected.

2. The Department's preliminary determination of critical circumstances was supported by sufficient evidence under Article 10.7

263. Japan argues that Commerce violated Article 10.7 of the Agreement because it did not base its preliminary critical circumstances determination on sufficient evidence that: (1) the importer was, or should have been, aware that the exporter practiced dumping and that such dumping would cause injury; (2) the injury was caused by massive dumped imports of a product in a relatively short time; and (3) the massive dumped imports were likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. As we demonstrate below, however, the Department had sufficient evidence regarding all of these factors.

(a) The "Sufficient Evidence" Standard

264. The panel in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup from the United States* ("*HFCS*") recently interpreted the "sufficient evidence" standard in the context of determining whether an anti-dumping investigation was properly initiated. In that case, the panel explained that to determine whether there is sufficient evidence for purposes of initiating an investigation, a panel must examine "whether 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 initiating the investigation".[370] Accordingly, under the interpretation of the "sufficient evidence" standard set forth in *HFCS*, the question in this case is whether an unbiased and objective investigating authority evaluating the evidence could properly have determined that sufficient evidence of critical circumstances existed for purposes of making a preliminary determination under Article 10.7.

265. In addition, pursuant to the principles of treaty interpretation set forth in Article 31(1) of the Vienna Convention, the "sufficient evidence" standard in Article 10.7 of the Anti-Dumping Agreement must be read within the context in which it is applied and in light of its object and purpose.[371] The evidentiary standard for reviewing the sufficiency of preliminary determinations like that at issue here must necessarily be lower than that applied to final determinations because of the greater opportunity to engage in more complete fact gathering and analysis leading up to a final determination. This is even more so the case here where, under the express provisions of Article 10.7 of the Agreement, administering authorities are permitted to make preliminary critical circumstances determinations and take measures at any time "after initiating an investigation."

266. Japan suggests that a critical circumstances determination is not proper unless it takes into account all of the responses of the foreign producers. However, by the time an authority is able to analyze and verify all of the factual data submitted by foreign producers, it may be too late to provide the remedy afforded in Article 10.7. By enacting Article 10.7, the signatories to the Anti-dumping Agreement determined that, under certain urgent circumstances, it is appropriate to take immediate measures in order to prevent import surges and to secure potential duties (later refundable if the final determination is negative). In other words, if at the time of a critical circumstances allegation (*i.e.*, any time after initiation), there is sufficient evidence in the record of an import surge (accompanied by other Article 10.6 circumstances), the administering authority may take necessary measures.[372] In

[370] *HFCS*, WT/DS132/R, Report of the Panel adopted on January 28, 2000, at para. 7.94, 7.95.

[371] *See* Article 31(1) of the Vienna Convention.

[372] Japan further argues that because early preliminary determinations have a "chilling effect" on trade, they should be subject to more serious scrutiny. *However, this is the precise purpose of Article 10.7 - to halt pre-order surges of massive dumped imports.* Given this objective, the Anti-Dumping Agreement permits

providing for early critical circumstances determinations prior to a preliminary determination of dumping, the United States has acted in accordance with the express provisions of Article 10.7. Indeed, the United States has implemented Article 10.7 consistently with Thailand, which has also enacted a similar provision in its anti-dumping laws.[373]

267. In sum, the "sufficient evidence" standard in Article 10.7 must be read in its context and in light of the purpose of Article 10.7 in providing for early critical circumstances determinations in urgent circumstances. As is demonstrated below, Commerce's early preliminary critical circumstances determination in this case was based upon the substantial evidence available to it in the form of the literally hundreds of pages of factual documentation attached to the petition and the amendments thereto as well as the additional news articles, import data, and other publicly available information obtained by Commerce. Commerce's determination therefore satisfied the "sufficient evidence" standard of Article 10.7.

(b) Evidence of importer knowledge dumping

268. With respect to the question of whether importers had knowledge of dumping, the Department relied on the margins set forth in the petition. In attacking the Department's actions here, Japan repeatedly claims that Commerce "blindly" relied on "mere allegations" in the petition to support the preliminary critical circumstances determination. However, the approximately 700 pages of exhibits submitted with the petition and the amendments thereto are not mere allegations - they are evidence.

269. The petition established that estimated margins for NSC and NKK were 27.20 per cent and 28.25 per cent, respectively. The basis for the margins was set forth in extensive exhibits contained in the petition. Specifically, in order to establish the "export price" ("EP"), the petition provided an actual offer for sale in the United States of Japanese-produced hot-rolled steel.[374] Additionally, in accordance with the Department's practice for calculating EP, the petition estimated appropriate adjustments to the gross price, subtracting amounts for the following expenses:[375] foreign inland freight charges[376]; ocean freight and insurance; unloading and wharfage[377]; a US trading company mark-up[378]; a Japanese trading company mark-up[379]; and US Customs duties and fees.[380] In order to establish the "normal value" ("NV") for comparison purposes, the petition provided actual transaction prices in Japan for the product that was most similar to the product used to establish EP.[381] Consistent

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provisional measures where there is a finding of sufficient evidence of certain facts. This is the standard that should be applied, regardless of any potential "chilling effect".

[373] *See* Anti-Dumping and Countervailing Act B.E. 2542, art. 31 (Tha.) **(Exh. US/B-43)**.

[374] *See* Petition, Volume 1 at Exhibit 7 **(Exh. US/B-40(a))**.

[375] *See* Petition Volume 1 at p. 10, Figure 1 **(Exh. US/B-40(a))**.

[376] The basis for calculating foreign inland freight charges was contained in the Japanese market research report attached as Exhibit 14 to the petition. *See* Petition Volume 1 at Exhibit 14 **(Exh. US/B-40(a)).**

[377] In order to determine ocean freight, insurance, unloading and wharfage, petitioners provided data from the US Census Bureau and US Customs Service regarding such charges. *See* Petition, Volume 1 at Exhibits 11-12 **(Exh. US/B-40(a))**.

[378] The petition included an industry expert affidavit detailing the typical mark-up for US-based trading companies. The affidavit further detailed the affiant's background and experience with such matters. *See* Petition, Volume 1 at Exhibit 13, **(Exh. US/B-40(a))**.

[379] The basis for calculating the Japanese trading company mark-up was contained in the Japanese market research report. Petition Volume 1 at Exhibit 14 **(Exh. US/B-40(a))**.

[380] The basis for US Customs duties and fees was derived from the 1997 US Harmonized Tariff Schedule. *See* Petition, Volume 1 at Exhibit 4 **(Exh. US/B-40(a))**.

[381] The basis for determining NV was contained in the Japanese market research report attached as Exhibit 14 to the petition. *See Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat*

with Department practice for determining NV, the petition further subtracted amounts for inland freight charges, packaging expenses, and credit expenses.[382]

270. Based upon this factual information, after having closely scrutinized the petition for accuracy and sufficiency at initiation[383], the Department determined that the margins in the petition provided a sufficient basis for imputing importer knowledge of dumping.[384] Specifically, the Department determined that "{b}ecause the estimated dumping margins calculated in the petition - 27.20 and 28.25 per cent - are greater than 25 per cent, we may impute knowledge of dumping".[385]

271. Japan does not contest the Department's "25 per cent margin test" for determining whether importers were, or should have been, aware that dumping was occurring. Rather, Japan takes issue with the Department's decision to use the margins set forth in the petition. Japan suggests that the Department should have waited and relied on the margins calculated in the Preliminary Determination because those margins included an analysis of the respondents' submissions. However, as demonstrated above, the petition margins were derived from extensive evidence that was sufficient to determine that importers knew, or should have known, of the dumping. Because the Anti-Dumping Agreement does not dictate how an administering authority is to determine importer knowledge of dumping and because the Department's approach in this case was both reasonable and predictable, and is certainly a permissible interpretation of the Agreement.

272. Finally, it is important to note that Japan did not contest the sufficiency of the petition evidence for purposes of initiation of the investigation. While the United States agrees that the standard for initiation is less stringent than that for a preliminary determination, Japan apparently recognized that, for purposes of initiation, the evidence constituted more than "mere allegations." In accordance with Articles 5.2 and 5.3 of the Anti-dumping Agreement, "{s}imple assertion{s}, unsubstantiated by relevant evidence, cannot be considered sufficient" to establish a basis for initiation of an investigation, and authorities must "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is *sufficient evidence* to justify the initiation of an investigation".[386] Japan did not challenge, in any way, the sufficiency of the evidence leading to initiation (*e.g.*, the Petition exhibits). Now, however, Japan argues that the record contained nothing more than unsubstantiated allegations. If Japan truly believed that the Petition contained no supporting evidence whatsoever, it would have challenged the Department's determination to initiate the investigation.

Products, at 1-2, with a Confidential Version of Figure 2 and Exhibit 16 of the petition attached thereto (which includes ranged numbers), Petition, Volume 1, at Exhibit 14. **(Exh. US/B-40(a)).**

[382] The basis for determining these expenses was contained in the Japanese market research report. *See id.*

[383] When determining whether to initiate the investigation, the Department sought to ensure that the allegations were properly supported by factual documentation, *i.e.*, evidence. *See Initiation Checklist* at 6-8 **(Exh. US/B-18)**. Specifically, the Department inquired as to whether the petition contained sufficient supporting documentation of: volume and value of imports; US market share (*i.e.*, the ratio of imports to consumption); actual pricing (*i.e.*, evidence of decreased pricing); relative pricing (*i.e.*, evidence of imports under-selling US products); prices or costs and claimed adjustments; market research reports and affidavits referring to sources of how information was obtained; current price data (no more than one year old); price and cost data from contemporaneous time periods; correct currency rates used for all conversions to US dollars; and conversion factors for comparisons of differing units of measure. *Id.* Additionally, the Department further assessed the reliability of the factual support provided in the petition by comparing the evidence with publicly available data. *Id.* at 15-16.

[384] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2 **(Exh. US/B-42)**.

[385] *Preliminary Critical Circumstances Memo* at 2 **(Exh. US/B-42)**.

[386] Articles 5.2 and 5.3 of the Anti-Dumping Agreement.

(c) Evidence of import knowledge injury

273. For purposes of determining importer knowledge that injury would result from the dumped imports, the Department analyzed the USITC's determination of threat of material injury, the enormous increase in the volume of Japanese imports of the subject merchandise during the critical circumstances period[387], the magnitude of the margins, information in the petition regarding injury to the domestic industry[388], and numerous press reports regarding rising imports, falling domestic prices as a result of the imports, and domestic buyers shifting to foreign suppliers.[389] The Department determined that this evidence overwhelmingly supported a finding that importers were, or should have been, aware that injury would be caused by reason of dumped imports.[390] This determination was supported by sufficient evidence on the record in accordance with Article 10.7 of the Agreement.

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[387] The Department specifically found that "imports of Japanese hot-rolled steel increased 101 percent during the period May - September 1998 (as compared to December 1997 - April 1998), or over six times the level of increase needed to find 'massive imports' during the same period." *Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**. This information was derived from U.S. Census Bureau import statistics. *See id* at Attachment 2.

[388] In addition to Volume 1 of the petition relating specifically to "Critical Circumstances," the petition contained a separate volume, Volume 2, pertaining to "Injury". Both volumes contained extensive documentation showing that Japanese steel producers were, or should have been, aware that the flood of imports into the United States was causing injury to the US hot-rolled steel industry. For example, Volume 2 of the petition included multiple industry-related articles discussing the Japanese financial crisis, the flood of imports into the United States, and the resulting price erosion on those products. *See, e.g.*, Petition, Volume 2 at Exhibit 8, "Nucor Cuts Flat-Roll, Galvanized Again," *American Metal Market*, 11 September 1998 ("For the second time in less than two months, Nucor Corp., Charlotte, N.C., is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports. . . . Obviously, we're doing this because of imports, said . . . Nucor's chairman."); Petition, Volume 2 at Exhibit 9, *Hotline Transaction Prices*, September 1, 1998 (demonstrating a general fall in prices during the relevant period); Petition, Volume 2 at Exhibit 11, "Low Prices Force Nucor to Cut Production," *Metal Bulletin*, 7 September 1998 ("Nucor has cut production . . . in response to low market prices. . . . Nucor reduced . . . weekly operations from seven days to four because of market turmoil in the wake of a flood of cheap imports."); Petition, Volume 2 at Exhibit 15, *Morgan Stanley Dean Witter Industry Report* , 21 July 1998 ("Because of an increase in low-priced flat-rolled imports, we are assuming that flat-rolled prices will break down in late September or early October . . . ."); Petition, Volume 2 at Exhibit 16, "Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing," *Wall Street Journal*, September 21, 1998 ("'Japanese steel is just murdering' the US steelmakers"); Petition, Volume 2 at Exhibit 17, "Nucor Cuts List Prices of Steel Sheet - Sheet Prices Sure to Decline for All Domestic Producers," *PaineWebber*, 16 September 1998 ("We expect the US flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998. Imports are likely to remain high. World prices are well below US prices."); Petition, Volume 2 at Exhibit 18, "Analyst Interview - Steel: An Obtuse Approach," *Wall Street Transcript Corporation*, 29 July 1998 (Question: "You say that imports are too large to be comfortable. Does this suggest that some steel has once again been 'dumped'?" Answer: "During 1997, record levels of steel product imports came in the US.. . . . Despite the highest level of domestic steel consumption observed in several decades, the price of steel products declined during 1997. Imports were simply so large, and prices at which they entered markets so low, that steel pricing was compromised."); Petition, Volume 2 at Exhibit 24, Weekly Steel Analysis, *World Steel Dynamics*,11 June 1998 ("1998 is shaping up to be a bad year. "); Petition, Volume 2 at Exhibit 25, Weekly Steel Analysis, *World Steel Dynamics*, July 16, 1998 ("The Japanese yen has weakened recently . . . . At current exchange rates, the Japanese are shipping an ever wider variety of steel products to the United States at a significant price discount to US price levels."); Petition, Volume 2 at Exhibit 39, "Steel Industry Conditions Still Worsening in the United States and Abroad," *PaineWebber*, 8 Sept. 1998, ("World export prices in recent weeks have fallen even further . . . Prices in many cases are now below the marginal costs of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force."). All of the cited articles are included in **Exh. US/B-40(b)**.

[389] *Id.*

[390] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2-3, **(Exh. US/B-42)**.

274. Japan argues that because the USITC found no present material injury, Commerce could not impute knowledge of injury to the importers. Specifically, Japan argues that under Article 10.6 of the Agreement, it was necessary for importers to have known that the dumping was causing *present injury*. This contention is simply incorrect. Article 10.6 specifically states, in pertinent part, that an affirmative critical circumstances determination may be made where an authority finds that "the importer was, or should have been, aware that the exporter practises dumping and that such dumping *would* cause injury . . . ." (Emphasis added). The use of the word "would" necessarily implies that there need not be knowledge of *present injury* for purposes of a critical circumstances determination under Article 10.6. In fact, as discussed in detail above, the term "injury," unless otherwise specified, includes "threat of material injury".[391] Thus, the Department's reliance on the USITC's finding of threat of material injury, along with other relevant record information, in finding importer knowledge of injury in this case was consistent with the Agreement.

(d) Evidence that the injury was caused by massive imports over a relatively short period of time

275. Japan does not argue here that the Department failed to make its massive imports determination based upon sufficient evidence. Rather, Japan takes issue with the comparison period selected by the Department to determine whether there was a massive surge of imports. Seemingly, Japan concedes that if the comparison period selected is appropriate, then the imports were indeed massive.

276. The Anti-Dumping Agreement provides that for a critical circumstances determination to be issued, massive dumped imports must have occurred "in a relatively short period of time".[392] It is indisputable that a 100 per cent increase in imports from one six-month period to the next, and continuing at that high level through the date of initiation of the investigation, is a massive increase over a relatively short period. Japan argues, however, that having established a different time period as the "normal" (but by no means absolute) period for analysis in its regulations, the Department was precluded from changing that period.

277. There is no basis for this claim. Section 351.206(i) of the Department's regulations provides that the Department will "normally" compare the three months following initiation of an investigation to the three months preceding initiation in order to determine whether critical circumstances exist.[393] These comparison periods are appropriate where companies learn of the investigation when it is initiated and then try to beat the preliminary determination with a surge of imports of the subject merchandise. However, Section 351.206(i) provides that if the Department finds that importers, exporters, or producers had reason to believe, at some point prior to the beginning of the proceeding, that an investigation was likely, the Department may consider a period of not less than three months from that earlier time for comparison purposes.[394]

278. In this case, beginning in December 1997 and continuing through the filing of the petition in September 1998, there was a steady stream of national and international press reports concerning surges in steel imports from Asia, drops in steel prices, and meetings of steel producers and importers where parties discussed the possibility of the filing of trade cases by the US industry. In particular, in Spring 1998, there were a significant number of press reports discussing concerns of steel producers and others about the influx of imports from Asia and the likelihood of unfair trade actions due to the significant increases in low-priced steel.[395] Thus, it was reasonable for the Department to conclude

[391] Article 3, n. 9 of the Anti-Dumping Agreement.
[392] Article 10.6(ii) of the Anti-Dumping Agreement.
[393] 19 C.F.R. § 351.206(i).
[394] *Id.*
[395] *See Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**; *see also* Petition, Volume 3 at Exhibit 5, "July US Steel Imports Hit Record," *Japan Economic Newswire*, 19 September 1998 ("he also said

that importers knew of the impending anti-dumping investigation and, consequently, would build-up inventories in order to avoid potential anti-dumping liabilities. The petitioners' decision to await filing the petition until they had sufficient evidence should not deprive them of their remedy against a massive surge of imports that occurred in anticipation of an anti-dumping investigation. Accordingly, the Department properly applied Section 351.206(i) of its regulations in selecting the comparison period it used here to determine whether there was a massive surge of imports.

279. Nothing in the Anti-dumping Agreement dictates the selection of a different comparison period here. Indeed, the Agreement does not specify how to determine whether massive imports existed. The Department's actions under its regulations in this case reflect a reasonable method for implementing the Agreement and should be sustained by the panel.[396]

(e) Evidence that the imports were likely to seriously undermine the remedial effect of imposing anti-dumping duties

280. In reaching its preliminary determination of critical circumstances, the Department plainly considered whether the massive surge of imports from Japan that it found was likely to seriously undermine the remedial effect of an anti-dumping duty order. Simply because the US statute does not specifically mention this element does not mean that the Department does not consider it. Indeed, it was an integral part of the Department's analysis in this case, as it is in all cases.

281. The Department's recent policy bulletin relating to the timing of the issuance of critical circumstances determinations makes clear that "the purpose of {the critical circumstances} provision is to ensure that the statutory remedy is not undermined by massive imports following initiation of an investigation".[397] In fact, as required by Article 10.6(ii) of the Anti-dumping Agreement, the Department specifically looks to the timing and volume of the dumped imports to determine whether critical circumstances exist. In this case, only after finding that there indeed was a massive surge of

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that importers accelerated deliveries in anticipation of domestic steelmakers' action, expected within this month, to file charges against foreign producers for what they believe is the dumping ... of steel products in the United States"); Petition, Volume 3 at Exhibit 9, Chris Adams, "Rising Imports Distress US Steelmakers", *The Wall Street Journal*, 8 Sept. 1998 ("steelmakers are expected to accelerate plans to file trade complaints with the US Department of Commerce and the US International Trade Commission."); Petition, Volume 2 at Exhibit 16, "Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing," *Wall Street Journal*, 21 September 1998 ("Already US steelmakers have said they will file complaints with the Commerce Department and the US International Trade Commission against countries they say are selling steel in the US at unfairly low prices. Although industry spokesman haven't specified which countries will be targeted, people with knowledge of their plans say Japan and Russia are expected to be among those included."); Petition, Volume 3 at Exhibit 3, *CRU Monitor: Steel* ("Japanese integrated steelmakers remain worried about possible anti-dumping actions from local producers . . . ."); "US Dumping Actions on the Horizon?," *World Steel Dynamics*, 30 April 1998 ("World Steel Dynamics sees a fair to good possibility that some mills in the United States could file trade suits against foreign mills perhaps as early as the third quarter of 1998 . . . ."); Keith Darce, "Cheaper Asian Steel Imports Are on the Rise," *The Times-Picayune*, 6 May 1998 (noting that if Asian steel is imported below productions costs, dumping charges could be filed); Petition, Volume 3 at Exhibit 4 "More Steel Trade Cases Said Likely," *American Metal Market*, 7 May 1998 ("Steel buyers, convinced that US trade laws as well as the complaint process in Washington are stacked against their offshore producers, expect domestic mills to continue using this weapon against imports."); Petition, Volume 3 at Exhibit 5, *Metal Bulletin*, 24 Sept. 1998 ("US industry executives were in Washington last week to discuss unfair trade cases . . . ."). All of the cited articles are included in **Exh. US/B-40(c)**.

[396] *See New Zealand - Imports of Electrical Transformers from Finland*, L/5814, Report of the Panel, adopted on 18 July 1985, 32/S55, 66-67, at paras. 4.2-4.3 (after concluding that the agreement was silent because it did not provide any specific guidelines for the calculation of the cost of production in an anti-dumping case, the panel stated that "the method used in this particular case appeared to be a reasonable one," and it therefore found no violation of the Agreement.).

[397] *Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 **(Exh. JP-3)**.

dumped imports (100 per cent increase) during the relevant time period (*i.e.*, once importers learned of the impending anti-dumping investigation), the Department determined that critical circumstances existed. In other words, the Department necessarily found that without retroactive application of provisional measures, the ultimate anti-dumping duty would be undermined. A separate finding of this was unnecessary.

D. THE STANDARD FOR CRITICAL CIRCUMSTANCES DETERMINATIONS PROVIDED FOR IN THE US STATUTE IS CONSISTENT WITH ARTICLES 10.6 AND 10.7 OF THE ANTI-DUMPING AGREEMENT

282. Section 733(e) of the Act provides for the Department, upon receiving an allegation of critical circumstances, to make the required determinations outlined in Article 10.6 of the Anti-dumping Agreement at any time after the initiation of an investigation based upon "the information available to it at that time." Japan claims that Section 733(e) is inconsistent with Articles 10.6 and 10.7 of the Agreement in two respects. First, Japan contends that Section 733(e) is deficient because it does not specifically require that all of the standards of Article 10.7 be satisfied at the time of a preliminary determination of critical circumstances. In particular, Japan claims that the US statute does not expressly require findings that the injury was caused by massive dumped imports or that the massive imports were likely to seriously undermine the remedial effect of the duty. Second, Japan argues that the evidentiary standard for a preliminary critical circumstances determination under Section 733(e) of the Act is lower than that in Article 10.7.

283. These claims are completely without merit. A law is not, on its face, inconsistent with a WTO Agreement unless it mandates actions that are inconsistent with that Agreement. In *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*[398] the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*[399] found that "the mere existence" of the anti-circumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision.[400] The Panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions".[401]

284. Plainly, where, as here, the US critical circumstances provision itself does not mandate an action inconsistent with the Anti-Dumping Agreement, Japan's claim must fail. That it does not mandate inconsistent actions is demonstrated by the fact that, in applying this provision, the Department specifically makes the findings required by the Anti-Dumping Agreement.

1. As part of its policy and practice under the US Statute, the Department makes all of the findings required under Article 10.6 of the Agreement

285. Japan argues that Section 733(e) of the Act is facially inconsistent with Article 10.6 of the Agreement because the US statute does not mandate a *separate* finding that the injury was caused by massive dumped imports. However, the absence of such a requirement from the statute does not

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[398] Panel Report on United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, BISD 41S/131 ("US -- Tobacco").

[399] Panel Report on EEC -- Regulation on Imports of Parts and Components, adopted 16 May 1990, BISD 37S/132 ("EEC -- Parts").

[400] *Id.*, paras. 5.9, 5.21, 5.25-5.26.

[401] *Id.*, para. 5.25.

mean that this factor is not considered and analyzed as part of the Department's critical circumstances determination. As a result of its complete analysis in cases like this, the Department does, in fact, determine whether the massive imports are both dumped and causing injury (or threat thereof) to the domestic industry. As part of the Department's enquiry regarding knowledge of dumping, the Department considers the dumping margins for the largest producers of the subject merchandise. The Department will find importer knowledge of dumping where the producer has a dumping margin of greater than 25 per cent. Second, the Department makes a finding as to whether importers have knowledge, or should have knowledge, that the dumping is causing injury (or threat thereof) to the domestic industry. After determining that the importers have both knowledge of dumping and injury, the Department then reviews the shipment data for each respondent (or US Census Bureau and Customs Service import statistics, where shipment data are not on the record) in order to determine whether there exists "massive imports." If there is an increase in imports of more than 15 per cent during the relevant time period, the Department will find that the imports are "massive".[402] Japan argues that the Department, at this point, must also find that those imports are dumped and are causing injury to the domestic industry. However, these separate findings are not necessary. Indeed, the Department has already made such conclusions. First, it has already been determined that the anti-dumping margins on these imports are above 25 per cent. Thus, they are dumped. Second, the Department does not make a critical circumstances determination without considering the injury (or threat thereof) to the domestic industry.

286. Second, it is evident from the record and the Department's analysis that the surge of massive dumped imports was causing injury or threat thereof. The Department made a specific finding that importers had knowledge that the dumping would cause injury or threat thereof. This decision was based on the extent of the increase in the volume of imports of the subject merchandise during the critical circumstance period, the magnitude of the dumping margins, the evidence in the petition demonstrating injury to the US industry, numerous press reports discussing the intense hardship caused by the flood of imports (specifically discussing rising imports and falling domestic prices) - and importantly - on the USITC's preliminary finding that the domestic industry was already threatened with injury. The massive surge of dumped imports (including a 100 per cent increase in imports over a short time) could only compound the impact of the dumping on the domestic industry. As explained above, the term injury in Article 10.6(ii) includes "threat of material injury." Thus, because the US industry was already threatened with injury, the tremendous surge of dumped imports could have only further threatened, or actually caused, injury. The US statute did not require a separate injury finding in this respect. However, it does not preclude such analysis, and the Department practice leads to a consistent application of Article 10.6(ii). Furthermore, the Agreement does not specify how the administering authority is to determine that "the injury is caused by massive dumped imports." Because the Department's implementation is reasonable based upon the language of the Agreement, it is consistent with the Agreement.

287. Japan further argues that the US statute is inconsistent with Article 10.6 because it does not mandate a separate finding that the massive imports are "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied". However, as discussed previously, the statutory framework (including the relevant regulation and the policy bulletin applicable to preliminary critical circumstances determinations) does compel this finding.[403] As such, Section 773(e) of the Act is consistent with the Agreement on this basis as well.[404]

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[402] *See* 19 C.F.R. § 351.206(h)(2). When determining whether massive imports exist, the Department examines: (1) the volume and value of the imports; (2) seasonal trends; and (3) the share of the domestic consumption accounted for by the imports. *See id.* at § 351.206(h)(1).

[403] *See* 19 C.F.R. § 351.206(h) and (i); *Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 **(Exh. JP-3)**.

[404] *See Section 301 Panel Report*, at para. 7.27.

2. The evidentiary standard for preliminary critical circumstances determinations is not lower in the US Statute than in Article 10.7 of the Agreement

288. Section 733(e) of the Act provides for the Department to make a preliminary critical circumstances determination where there is "a reasonable basis to believe or suspect" that the necessary conditions for such relief have been met. Japan argues that this evidentiary standard is a "much lower threshold" than the "sufficient evidence" standard set forth in Article 10.7 of the Agreement. However, Japan provides no legal basis for this conclusion, and it is simply incorrect. Indeed, the "reasonable basis to believe or suspect" standard set forth in Section 733(e) of the Act is fully consistent with the "sufficient evidence" standard detailed in Article 10.7.

289. As demonstrated by the discussion above, even where a statutory provision does not contain the precise words of a WTO agreement, this does not mean that it does not impose the same requirements or standards, or permit the administering authority to take action consistent with the agreement.

290. Indeed, a review of previous Department of Commerce critical circumstances determinations shows that the "reasonable basis to believe or suspect" standard is similar or even identical to the "sufficient evidence" standard found in Article 10.7 of the Anti-dumping Agreement. For example, in *Certain Polyester Staple Fibre From the Republic of Korea,* the Department explained as follows:

> Section 733(e)(1) of the Act provides that if a petitioner alleges critical circumstances, the Department will determine whether there is *a reasonable basis to believe or suspect that*: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise . . . . Based on the recent existence of this order, there is *sufficient evidence* to determine that there is a history of dumping of the subject merchandise and a history of material injury as a result thereof. (Emphasis added).[405]

The Department's use of the "reasonable basis to believe or suspect" and "sufficient evidence" standards interchangeably in its decisions reflects that the two standards are not intended to be and, in fact, are not different. Accordingly, the evidentiary standard provided for in Section 733(e) of the Act is not inconsistent with that in Article 10.7 of the Anti-Dumping Agreement, and Japan's argument to the contrary should be rejected.

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[405] 64 Fed. Reg. 60776, 60779 (8 Nov. 1999) (preliminary determination of critical circumstances) (emphasis added)**(Exh. US/B-46)** ; *see also Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422, 60423 (5 Nov. 1999) (preliminary determination of critical circumstances) ("Section 733(e) of the Act provides that the Department will determine that critical circumstances exist if there is *a reasonable basis to believe or suspect that*: (A)(i) there is a history of dumping . . . The existence of an antidumping order on ammonium nitrate in the EC is *sufficient evidence* of history of injurious dumping.") (emphasis added) **(Exh.US/B-47).**

PART C: INJURY

I. INTRODUCTION

1. Japan raises claims concerning two United States actions with regard to material injury under the Anti-Dumping Agreement. It attacks a clause of the US anti-dumping statute and challenges the adequacy of the findings of some Commissioners at the United States International Trade Commission ("USITC") supporting the affirmative determination in the USITC's investigation of *Certain Hot Rolled Steel Products from Japan*.[1]

2. Japan's arguments concerning both of these claims substantially mischaracterize the United States' measures. As a result, much of the discussion that follows will be devoted to correcting Japan's misstatements about the US statute and the USITC determination. Since Japan misstates the facts, almost all of its arguments are irrelevant to the United States' measures. Consequently, Japan cannot be said to have met the burden of proof in this proceeding. Nevertheless, the United States demonstrates below why its statute and the USITC's decision are in accordance with the Anti-Dumping Agreement.

3. This section of the United States' first submission will address two issues: first, the so-called captive production provision of the United States anti-dumping statute and, then, the USITC's determination, including the application of the captive production provision in this case. As Japan's analysis demonstrates[2], this panel's decision as to the statutory provision's consistency with the Anti-Dumping Agreement should not impact on the adequacy of the determination. As Japan notes, a plurality of affirmative votes by three of the six Commissioners constitutes an affirmative determination by the USITC under US law. In this investigation, three Commissioners did not find the provision applicable but nevertheless made affirmative determinations. The votes of those three USITC Commissioners are sufficient to form the basis for an affirmative determination under US law.

II. THE CAPTIVE PRODUCTION PROVISION IS CONSISTENT WITH THE ANTI-DUMPING AGREEMENT

4. The "captive production provision" of the US statute, section 771(7)(C)(iv) of the Tariff Act of 1930, as amended ("the Act")[3], becomes relevant to an injury determination when vertically-integrated US producers sell a significant volume of their production of the domestic like product to US consumers (*i.e.*, the merchant market) and internally transfer a significant volume of their production of that same like product for further processing into a distinct downstream article

[1] Inv. No. 731-TA-807 (Final), USITC Pub. No. 3202 (June 1999) ("USITC Views") (**Exh. US/C-1**).
[2] First Submission of Japan at para. 44.
[3] 19 U.S.C. § 1677(7)(C)(iv) (**Exh. Jp-4(e)**).

(*i.e.*, captive production). Under certain conditions[4], then, the statute directs the USITC to focus primarily -- not exclusively -- on the merchant market in performing its analysis.[5]

5.. In enacting this provision, the United States Congress ("Congress") recognized that, in certain situations, dumped imports compete primarily with the domestic like product in the merchant market, not with the inventory internally transferred for processing into a separate downstream article.[6] Since the main effects, if any, of imports would likely be felt in the merchant market, it is logical that this should be a focus of the injury analysis. If the investigation revealed that imports were having no significant effect even on the merchant market, then it would be highly unlikely that imports would not be having an impact on the industry as a whole. Thus, Congress sought to provide for a more focused analysis which allowed the USITC to obtain a more complete picture of the competitive impact of imports on the domestic industry.[7]

6. What Congress did *not* do, despite the Japanese contention to the contrary[8], was create a provision requiring the USITC to focus on the merchant market and ignore the captive market or focus on one segment of production to the exclusion of the industry as a whole. In fact, Congress expressly rejected this interpretation of the captive production provision when it approved the Statement of Administrative Action, which said, "{t}he provision does not require the USITC to focus exclusively on the merchant market".[9] The statute does require the USITC in all cases to render a determination of whether there is material injury to the domestic industry as a whole.

7. Congress' express intent was to make the captive production provision consistent with the Anti-Dumping Agreement.[10] As will be demonstrated below, it achieved this goal. Indeed, it is Japan's position in this case that would tend to create violations of the Anti-Dumping Agreement, since Japan's position would require investigating authorities to ignore factors that the Agreement makes relevant. Japan would require the investigating authorities to pretend that a single market for hot rolled steel exists, and thus ignore the distinction between sales to the merchant market and captive production.

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[4] The provision provides for a multi-step analysis. As a threshold matter, the USITC must first determine that a significant amount of the like product is both internally transferred by the domestic industry for production of a downstream article and sold on the merchant market. If this threshold criterion is satisfied, then three other questions must be answered in the affirmative: (1) whether the "domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product;" (2) whether the "domestic like product is the predominant material input in the production of that downstream article;" and (3) whether "the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article." § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv). There is no argument over whether the statutory criteria delineated by the statute are appropriate or whether the three Commissioners that applied the provision reasonably found that the statutory criteria were satisfied.

[5] The statute directs the USITC to "focus primarily on the merchant market for the domestic like product" when assessing the market share and financial performance of the domestic industry. § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[6] Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316, vol. I at 852 (1994) (**Exh. US/C-2**). The SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Agreements, . . . {and} it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." Thus, the Statement of Administrative Action has been affirmatively approved by Congress.

[7] SAA at 852.

[8] First Written Submission of the Government of Japan in *United States - Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan* ("First Submission of Japan") at para. 218.

[9] SAA at 852.

[10] SAA at 852.

8. Since it has based its arguments on a transparent misreading of the United States statute, Japan obfuscates the issues involved by making sweeping allegations about dangerous levels of protectionism or anti-competitive behaviour[11], questioning the continued validity of the anti-dumping regime[12] and imputing improper motives to the United States. These insinuations have no place in a proceeding before the Dispute Settlement Body. The issue with which this Panel is presented is whether the United States' *actions* or *law* violate the terms of the Anti-Dumping Agreement. A panel is called upon to provide "security and predictability in the multilateral trading system" and should not "diminish the rights and obligations provided in the covered agreements".[13] Japan is seeking to have this Panel go beyond the issue at hand and render policy determinations that are beyond its jurisdiction. The Panel should reject such an attempt in no uncertain terms.

A. US LAW REQUIRES THE US AUTHORITY TO EXAMINE THE EFFECTS OF IMPORTS ON THE DOMESTIC INDUSTRY AS A WHOLE, CONSISTENT WITH ARTICLES 3 AND 4 OF THE ANTI-DUMPING AGREEMENT

9. Japan's argument against the captive production provision rests on the misconception that the provision requires the USITC to ignore the effects of imports on the domestic industry as a whole.[14] Japan is simply wrong. The United States agrees entirely that a determination under Article 3 of the Anti-Dumping Agreement concerning whether a "domestic industry," as defined in Article 4.1, is materially injured requires an examination of "domestic producers as a whole of the domestic like products." An analysis of the effects of imports on the domestic industry that requires a focus on the portion of the output of the domestic like product that competes in the marketplace with dumped imports is entirely consistent with that requirement. It, in effect, is merely a recognition that, under certain conditions, the fact that domestic producers internally transfer a significant portion of the production while selling significant portions in the merchant market constitutes a "relevant economic{}factor having a bearing on the state of the industry" under Article 3.4.

10. US law requires the USITC to determine whether "an industry in the United States" is materially injured or threatened with material injury.[15] It defines "industry" as "the producers as a {w}hole of a domestic like product,... ." Therefore, on the face of the statute, the USITC is not permitted to disregard any portion of the domestic producers' output. The captive production provision's elaboration on the factors that the Commission must consider in making an injury determination does not detract from this expansive definition. Rather, the captive production provision itself, the directions that the United States Congress gave in enacting it, and the other provisions of the United States anti-dumping statute make clear that the USITC must find injury to the producers as a whole.

1. The captive production provision, itself, shows that the USITC must consider the industry as a whole

11. Japan's depiction of the captive production provision is wrong both because of the circumstances in which it applies and the nature of the analysis that the USITC is to perform when it does apply. The captive production provision only applies when domestic producers "internally transfer significant production of the domestic like product . . . *and sell significant production of the domestic like product in the merchant market*".[16] Therefore, the USITC may apply the provision only when merchant market sales represent a significant proportion of the domestic industry's overall

[11] First Submission of Japan at paras. 44-45.
[12] First Submission of Japan at para. 43.
[13] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") at para. 3.2.
[14] *E.g.* First Submission of Japan at para. 218.
[15] 19 U.S.C. § 1673d(1)(A) (**(Exh. Jp-4(c)**).
[16] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

production and, consequently, the impact of imports on that segment are liable to have a significant effect on the industry as a whole.

12. The statute does not, however, allow the USITC to assume, simply because a significant portion of domestic production is destined for the merchant market, that impacts on that segment will *ipso facto* constitute material injury to the industry. Rather, if the provision's threshold requirements are satisfied, the USITC focuses "primarily" on the merchant market.[17] As those Commissioners who applied the provision in this case found, the statutory language requires "in all cases that the {USITC} determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production".[18]

13. Japan's contrary interpretation relies on a contorted interpretation of the statutory language. The Japanese Government is arguing that the word "primarily" modifies "focus"[19] to somehow narrow it. "Primarily" in no way connotes exclusivity, but manifestly attempts to incorporate more than one focus into the USITC's calculation. The use of the term "primarily" thus clearly indicates Congress' intent that the USITC's analysis of the factors should encompass more than the merchant market.

14. Congress provided a very clear statement of its intended effect of the captive production provision by approving the Statement of Administrative Action, the authoritative legislative history of the Uruguay Round Agreements Act, in which the captive production provision was enacted. The SAA, explains that the captive production provision, "does not require the USITC to focus exclusively on the merchant market".[20] Consequently, Congress approved of an authoritative expression squarely contradicting Japan's proposed interpretation of the captive production provision. Congress unequivocally directs the USITC to look beyond the merchant market in its evaluation of the factors.

2. The statutory provisions governing injury, taken together, demonstrate that the USITC must consider the industry as a whole, even when the captive production provision applies

15. Looking at the captive production provision in light of the full statutory scheme governing injury determinations, it is clear that Congress had no intention of excluding a portion of the domestic industry's production from the injury analysis. When evaluating the effects of dumped imports, the statute requires the USITC to consider the volume of dumped imports, the price effects of dumped imports on the domestic like product, and the impact of the dumped imports on the domestic producers of the like product.[21] In § 1677(7)(C), the statute delineates specific factors bearing on each of these issues.[22] The captive production provision does nothing to alter these fundamental requirements of the statute.

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[17] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[18] USITC Views at 35.

[19] Again, the language of the statute directs the USITC to "focus primarily on the merchant market for the domestic like product." § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[20] SAA at 852.

[21] 19 U.S.C. § 1677(7)(B).

[22] Section 1677(7)(C) discusses the "evaluation of relevant factors" and provides as follows:

> For purposes of subparagraph (B) -
>
> (i) Volume
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price

16. The captive production provision, on its face, only affects some statutory factors dictated in clause (iii) of section 1677(7)(C) and does not affect other clauses of the statute. When the provision, appearing in subsection (iv) of 19 U.S.C. § 1677(7)(C), applies, "the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii) {of 19 U.S.C. § 1677(7)(C)}[23], shall focus primarily on the merchant market for the domestic like product."

17. As a result of this narrow application dictated in the statute, the USITC must perform an initial layer of analysis for these market share and financial performance that it is not otherwise required to do for any other factor. For these factors, the USITC examines both the merchant market and the total industry. That the USITC must consider the impact of imports on the total industry in addition to the merchant market is reenforced by the fact that the authority is required to "evaluate *all* relevant economic factors described in {19 U.S.C. § 1677(7)(C)} within the context of the business cycle and conditions of competition that are distinctive to the affected industry".[24] The factors addressed by the captive production provision are not excluded from this overall directive.

18. Moreover, the factors that the USITC is to consider under subsection (iii) are not exclusive. The chapeau of that subsection states that "the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States." The statute is explicit that such relevant economic factors are "including, but not limited to" the enumerated factors that follow. Thus, the USITC must, under US law, evaluate all relevant economic factors having a bearing on the state of the industry.

19. Similarly, because the captive production provision on its face only affects the analysis of certain factors enumerated in subsection (iii) pertaining to impact, it does not require a change in the USITC's analysis of the significance of volumes of imports under subsection (i) of 19 U.S.C. § 1677(7)(C). That subsection provides, "In evaluating the volume of imports of merchandise, the USITC shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." Although the USITC takes into account the fact of the merchant market in its analysis of the significance of imports, it nevertheless under subsection (i) considers them relative to production

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In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether -

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to -

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

[23] This subsection is titled "impact on affected domestic industry.

[24] 19 U.S.C. § 1677(7)(C) (emphasis added).

or consumption in the United States, not only relative to production or consumption for the merchant market.[25]

20. In brief, Japan's argument concerning the operation of the captive production provision is contrary to the plain language of the statute, to the United States Congress' expressed intention in enacting it, and to the USITC's interpretation of it. Seeking to find support for its position, Japan resorts to purely aspirational statements by lobbyists before the provision was passed. Such statements are not, however, a source for the interpretation of statutes under US law.[26]

21. The statements do not, in any event, support Japan's position. If anything, they show that lobbyists failed to persuade the United States Congress to enact the provision that they desired. Japan cites the efforts of the Committee to Support US Trade Laws to influence Congress to enact a "captive production provision prohibiting USITC from considering captive production in its injury and causation analysis".[27] The definitive statement by Congress cited above shows that it was not persuaded by these efforts because it stated the exact opposite. Whereas the steel industry purportedly lobbied for the consideration of the merchant market exclusively, Congress, in no uncertain terms, expressed that the merchant market was not to be considered exclusively. The lobbying efforts Japan cites demonstrate that Congress explicitly rejected the construction of the captive production provision that Japan now proffers.

B. THE CAPTIVE PRODUCTION PROVISION MEETS THE REQUIREMENT TO CONSIDER RELEVANT ECONOMIC FACTORS IN KEEPING WITH ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

1. The refined analysis provided for in the captive production provision helps assure an objective examination of all relevant factors, as required by Articles 3.1 and 3.4

22. The captive production provision is entirely in accord with the specific obligations of Article 3 of the Anti-Dumping Agreement. As has been demonstrated, the provision does not alter 19 U.S.C. § 1677(7)(C)(i), which tracks the language of the first sentence of Article 3.2 concerning the volume of dumped imports. Likewise, although the captive production provision does impose additional fact-finding duties on the USITC in making determinations on the impact of dumped imports on the affected industry under 19 U.S.C. § 1677(7)(C)(iii), it does not affect that subsection's requirement, like that of Article 3.4, to consider "all relevant economic factors". Because the captive production provision does not prohibit the USITC from considering any evidence or from giving such weight to that evidence as it may ultimately deem appropriate, it is also consistent with the requirement of Article 3.1 to conduct an "objective examination" of the volume, price effects and consequent impact of imports.

23. Indeed, the captive production provision represents an analytical tool that assures the consideration of all relevant factors, unlike the alternative on which Japan insists. Congress recognized a relevant economic factor bearing on certain industries that internally transfer a significant amount of their production of the domestic like product. When an industry engages in significant captive consumption, a substantial amount of the domestic industry's production is

[25] The requirements of Article 3.1(a), to analyze effects of imports on prices, and of the second sentence of Article 3.2, to examine price undercutting, depression and suppression, would appear to assume the existence of sales in a marketplace. Thus, where a substantial proportion of output is not sold, the provisions of the Agreement concerning price effects contemplate an analysis of effects on only part of production.

[26] In interpreting a statute, it is well established that, first, the text of the statue is examined, and, if the statutory language is unclear, then the legislative history of the statue is examined. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (**Exh. US/C-4**). Efforts of lobbyists are not listed among the traditional sources of legislative history. *See* 3 *Sutherland Statutory Construction* 371 (5th Ed.1992) (**Exh. US/C-5**).

[27] First Submission of Japan at para. 219.

shielded from competition with the dumped imports. However, if a significant part of its production is destined for the merchant market as well, the impact of imports in the merchant market, alone, may have an impact on the overall state of the industry. Thus, examining only aggregate information for the industry as a whole would risk obscuring any effects that this segment may have.

24. Congress thus reasonably decided that the USITC should specifically examine the impact of dumped imports on the segment of the industry where domestic producers compete directly with those imports and assess how that competition is effecting the industry as a whole. The captive production provision ensures that the USITC takes into account a relevant economic indicator -- competition between the domestic like product and dumped imports -- when assessing the impact of dumped imports on the domestic industry. Nothing in the examination required by Congress prohibits the USITC from concluding that, notwithstanding observed effects in the merchant market segment, imports are not materially injuring a domestic industry as a whole.

25. Japan's position, however, would require an investigating authority to disregard the significance that impacts specific to a merchant market sector might have for the industry as a whole. Japan asserts that it is inappropriate to isolate the merchant market sales *as either the primary or secondary focus of analysis.*[28] Japan offers no basis for this amazing assertion. Article 3.4 can provide no support for it. That Article requires investigating authorities to evaluate all relevant economic factors. It does not limit the methods by which they may choose to do so nor does it provide any exceptions that would justify ignoring such factors. As will be discussed below, WTO precedent supports the use of sectoral analysis when accompanied by an analysis of the industry as a whole.

26. Indeed, the non-objective nature of Japan's position is illustrated by the fact that Japan itself urges such a similar analysis when it contrasts the performance of minimills against that of the integrated steel producers.[29] Whereas the captive production provision calls for a segmented analysis depending on the destination of merchandise, Japan argues for a segmented analysis based on the type of producer. It provides no basis for why the one kind of analysis should be prohibited while it urges that the other kind of analysis is required.

27. Moreover, even in discussing the captive production provision itself, Japan relies on irreconcilable positions. Initially, Japan argues that the USITC improperly segments markets in its analysis, thereby not resting its determination on the industry "as a whole".[30] Later, however, it cites with approval what it characterizes as the USITC's past practice of distinguishing market segments when there are internal transfers of the domestic like product.[31] Thus, Japan's arguments concerning segmented analysis are plainly influenced by the results that it desires. It urges an analysis that is plainly contrary to the "objective examination" requirement of Article 3.1.

2. The captive production provision pinpoints evidence relevant to each factor as required by Articles 3.4, 3.5 and 3.6 of the Anti-Dumping Agreement

28. Article 3.4 specifies illustrative relevant economic factors that that an authority should consider. That list of relevant economic factors distinguishes between effects on "sales", the first item enumerated, and effects on "output", the third item enumerated. Article 3.4 thus recognizes that imports may have effects on sales that they do not have on output. Unlike Japan's position, the captive production provision fully takes into account the differences between these two factors.

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[28] First Submission of Japan at para. 245.
[29] First Submission of Japan at paras. 35-36.
[30] First Submission of Japan at para. 222, 225; *see also* para. 246.
[31] First Submission of Japan at paras. 248-249.

29. Cases meeting the threshold conditions for applying the captive production provision may present facts in which the distinction that Article 3.4 draws between effects on sales and on output are particularly pertinent. Internal transfers of product for captive consumption typically cannot properly be called sales even though the United States recognizes such production as output. If they are priced at all, they are often assigned price values for accounting purposes only. In such cases, the effects of imports on sales may well be observable only in the merchant market. Japan's position, however, would require an authority in such a case not to examine effects on sales.

30. Thus, Japan's argument that an injury determination may not focus either primarily or secondarily on the merchant market is contrary to the requirement of Article 3.4 to examine the effects of imports on sales in all cases, including when there is substantial captive consumption. As a result, Japan would systematically, in such cases, give effects on output dispositive weight over effects on sales. Nothing in the Agreement, however, supports giving effects on output such a priority over effects on sales. Indeed, although the United States does not claim that the order in which factors are listed indicates the weight that they are to be accorded in any given case, it is noteworthy that Article 3.4 lists effects on sales before effects on output.

31. As has been demonstrated, the United States statute does not limit the USITC's analysis of market share only to merchant market sales. Rather, it requires the USITC to examine market share primarily in terms of share of the merchant market. The USITC proceeds, as it did in the current case, also to examine market share in terms of share of total consumption. Such an analysis is plainly within the discretion provided by Article 3.4.

32. Japan's contention that the captive production provision "ignores the attenuated nature of import competition in the captive market".[32] is simply ill founded. The provision does not, as Japan alleges, require the USITC to ignore the possibility that, due to the sheltered nature of captive production, apparent effects on the merchant market do not cause material injury to the industry as a whole. The USITC must still make a determination concerning the industry as a whole.

33. Rather, the captive production provision constitutes a command to the USITC not to ignore evidence of injury resulting from impacts specific to the merchant market. Thus, the captive production provision is entirely consistent not only with Article 3.4, but also with Article 3.5's requirement that all relevant evidence before the authority be examined. Instead, it is Japan's view that effects specific to the merchant market may not be either a primary or secondary focus of examination that would violate Article 3.5.

34. Similarly ill founded are Japan's arguments based on Article 3.6. As Japan notes[33], this provision requires that an administering authority assess "the effect of dumped imports in relation to the domestic production of the like product." The United States statute so provides[34], and the captive production subsection does not furnish an exception to that requirement. Japan seeks to move from that uncontroversial proposition to the proposition that effects on output must be given weight over effects on sales. Article 3.6, like Article 3.4, refutes this proposition. Article 3.6 provides for assessing import effects in terms of production "when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits." Thus, under Article 3.6, sales are no less important than the production process in the identification of production.

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[32] First Submission of Japan at para. 226.

[33] First Submission of Japan at para. 240.

[34] *See* 19 U.S.C. § 1677(4)(D)("The effect of dumped imports ... shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits.")

35. In sum, Japan's challenge to the captive production provision is based on a thoroughgoing misreading of both the US statute and Articles 3 and 4 of the Anti-Dumping Agreement. WTO precedent also refutes Japan's arguments.

C. WTO PRECEDENT RECOGNIZES A SEGMENTED MARKET ANALYSIS AS CONSISTENT WITH ARTICLE 3 AND ARTICLE 4

36. The reasoning of the panel in *Mexico -- High Fructose Corn Syrup ("HFCS")*[35] provides direct support for the kind of segmented market analysis[36] delineated in the captive production provision. That panel properly distinguished between a market segmented analysis and a determination based only on information about one market sector, to the exclusion of the remainder of the domestic industry's production.[37] While it found that an analysis limited exclusively to one market sector generally would not be sufficient for establishing injury[38], it noted that nothing in the Anti-Dumping Agreement precluded the use of segmented analysis where different sectors are analyzed separately.[39] The panel found that an analysis focusing on the sector where dumped imports and the domestic industry directly compete is permitted, although it does not "excuse the investigating authority from making the determination required by the Agreement -- whether dumped imports injure or threaten injury to the domestic industry as a whole".[40]

37. In fact, the *HFCS* panel even went so far as to advocate for the use of a sectoral analysis in certain circumstances. It found that an analysis by sector could provide a "better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry".[41] Moreover, "in many cases, such an analysis can yield a better understanding of the effects of imports, and a more thoroughly reasoned analysis and conclusion".[42]

38. The flaw that the *HFCS* panel found with the Mexican government's consideration of a single segment does not exist in the US statute. The panel found that the Mexican government "deliberately excluded from its analysis" a portion of the domestic production[43], thereby ignoring "possible effects of imports on the portion of the domestic industry's production" in the excluded sector of the market, and "ignored the effect of {that} sector on the condition of the domestic producers".[44] In contrast, the captive production provision only requires the USITC to focus primarily -- not exclusively -- on the merchant market segment in considering certain factors, and the statute requires the USITC to make a determination about the industry as a whole. When the USITC focuses primarily on the merchant

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[35] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000.

[36] As noted above, one of the captive production provision's threshold requirements is designed to assure that merchant market sales represent a significant factor for the domestic industry as a whole. The other preconditions are that " the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article" and that "the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product". All three of these criteria help define captive production and merchant market sales as discrete segments.

[37] *HFCS* at para. 7.154.

[38] An analysis of a specific sector could be sufficient if this sector was adequately representative of the industry as a whole. *HFCS* at para. 7.155.

[39] *HFCS* at para. 7.154.

[40] *HFCS* at para. 7.160.

[41] *HFCS* at para. 7.154.

[42] *HFCS* at para. 7.154.

[43] *HFCS* at para. 7.159.

[44] *HFCS* at para. 7.160.

market it is performing an analysis akin to the consideration of factors found acceptable in *HFCS*[45]*;* it is not making it the basis for the ultimate determination of injury.

D. THE INJURY ANALYSES OF OTHER AUTHORITIES FACED WITH SIMILAR FACTS DEMONSTRATE THE REASONABLENESS OF THE UNITED STATES' APPROACH

1. Canada

39. Faced with circumstances similar to those for which the United States' captive production subsection provides, the Canadian Import Trade Tribunal ("CITT") has adopted a similar approach. Its decisions demonstrate how an analysis that focuses on captive production does not, as Japan claims, dictate results.[46]

40. In *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America*[47], the CITT, like the United States statute, rejected the proposition that captively consumed tomato paste should not be regarded as production of the domestic tomato paste industry. Although the CITT found that dumped import prices were too low in 1992 for domestic producers to compete on a profitable basis, it did not find the industry materially injured by imports. Rather, it found the lost sale margin on merchant-market sales for one firm "small when compared to the gross margin achieved on products that Heinz produces from tomato paste." As to the other producer, it found that its high level of capacity utilization due primarily to captive production was the main reason for its decline in production for merchant market sales.

41. The CITT engaged in a similar analysis but reached the opposite result in *Certain Cold Rolled Steel Sheet Originating In or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America.*[48] There, the CITT calculated total production, as well as performing a separate calculation for production for internal consumption and for the merchant market. Also, the CITT calculated employment, capacity, capacity utilization, financial expenses, depreciation and net income for all production. It further calculated import and domestic shares of market sales, net sales and costs of good sold. Thus, the CITT made findings based on data for both the industry as a whole and for data focusing on merchant market sales. Its determination of material injury was based on finding that the industry's difficulty adjusting to increasing volumes of low-priced dumped import prices was the direct cause of a shift from overall industry profitability to overall losses.[49]

42. Although these cases preceded the current version of the Anti-Dumping Agreement, the CITT's practice has continued since the Agreement. For example, in *Certain Flat Hot Rolled Carbon and Alloy Steel Sheet Products Originating In or Exported From France, Romania, The Russian Federation and the Slovak Republic*, CITT Enquiry No. NQ-98-004 (19 July 1999), the CITT again focused on the effects of imports on the merchant market. It addressed, and rejected as factually unsupported, arguments similar to those that had been successful in *Tomato Paste*. Specifically, the CITT responded to arguments that domestic producers were preferring to allocate production to more

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[45] *HFCS* at 7.154.

[46] *See Vienna Convention on the Law of Treaties*, Article 31.3 (b) (taking into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.)

[47] *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America*, CITT Enquiry No. NQ-92-006, at 16 (30 March 1993) (*"Tomato Paste")* (**Exh. US/C-6**).

[48] *Certain Cold Rolled Steel Sheet Originating In or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America*, CITT Enquiry No. NQ-92-009, at 15-16, 19 (29 July 1993) (**Exh. US/C-7**).

[49] *Id.*

profitable downstream products. The CITT, however, found that they did so because prices in the merchant market had been forced down by low-priced imports.[50] The CITT found that the industry at the end of the investigative period needed to discount sales to the merchant market to maintain overall capacity utilization and found material injury based on the fact that price erosion caused primarily by dumped imports accounted for a significant part of the domestic industry's financial losses.[51]

43. Thus, in all such cases, the CITT examined evidence concerning whether the impact of imports on the merchant market segment had a materially injurious effect on the industry as a whole. The CITT's approach appears to differ somewhat from that required by the United States statute[52], and in citing these cases the United States does not necessarily endorse their outcome on the facts. Nevertheless, the CITT's approach confirms the reasonableness of the requirement to focus in appropriate cases on the effects of imports on merchant market sales. Such practice by other countries supports the conclusion that the United States' provision is a permissible approach under the Anti-Dumping Agreement.

2. The European Communities

44. The arguments that Japan directs at the United States' captive production provision, in fact, appear to confuse it with the different approach that the European Communities have taken in the face of the same circumstances. The EC, like the United States, has recognized the difficulties that captive production pose to an injury analysis. The EC, however, unlike Canada and the United States, excludes output for captive production from its injury analysis in such circumstances.

45. In such cases as *Anti-Dumping Duties on Imports of Certain Flat Rolled Products of Iron or Non-Alloy Steel*, EC Decision No. 283/2000/ECSC (4 February 2000)[53] and *Countervailing Duties on Imports of Certain Flat Rolled Products of Iron or Non-Alloy Steel*, EC Decision No. 284/2000/ECSC (4 February 2000)[54], the EC has excluded all captive production from the production of the industry under consideration. It did so, not on the basis that the product produced for captive production was different from the product produced for merchant-market production, but, rather, on finding that (1) no prices for transfers in the captive market were comparable to those in the free market (a.k.a. merchant market), (2) movement of hot rolled coils between the two markets are insignificant, and (3) integrated EC producers did not purchase product for the captive market from independent parties.[55]

46. Having made these determinations, the EC evaluated the impact of imports on the EC industry only insofar as it produces the like product for merchant market sales. As it stated, it examined "the situation of the Community industry in terms of the development of the various economic indicators such as production, sales, market share and profitability ... with respect to the free market".[56] It considered developments in the subject firms' captive production only insofar as they might constitute another factor causing injury to the industry consisting of production for free market sales. Production capacity could be used for either free market or captive market production, so the EC examined whether the decrease in production intended for the free market was due to an

[50] *Certain Flat Hot Rolled Carbon and Alloy Steel Sheet Products Originating In or Exported From France, Romania, The Russian Federation and the Slovak Republic*, CITT Enquiry No. NQ-98-004 at 29, 30 (19 July 1999) (**Exh. US/C-8**).

[51] *Id.*

[52] The United States' statutory criteria are stricter than the CITT practice. Faced with facts such as those in the *Tomato Paste* investigation, the USITC might have found under the US statute that the amount of captive production was insignificant and thus that a segmented analysis was not required.

[53] **Exh. US/C-9.**

[54] **Exh. US/C-10.**

[55] EC Dec. No. 283/2000/ECSC, at para. 43.

[56] EC Dec. No. 283/2000/ECSC, at para. 48.

increased need for captive production.[57] This EC analysis is quite different from the analysis that the USITC performs under the US statute because the USITC examines whether the effects of imports on production for the merchant market impact the industry as a whole, including its operations for captive production.

47. The United States expresses no view as to the consistency of the EC's approach with the Anti-Dumping Agreement. The EC decisions are not the subject of this panel proceeding. The EC decisions, like the United States statute, reflect that captive production creates anomalies for the injury factors set forth in Article 3 of the Anti-Dumping Agreement because those factors assume that a like product will be sold in at least potential competition with imports. The United States takes a reasonable approach to addressing such circumstances, recognizing the anomalies that the EC too has recognized, as well as fully and reasonably addressing all of Japan's concerns arising from the Anti-Dumping Agreement.

E. THE CAPTIVE PRODUCTION PROVISION IS CONSISTENT WITH ARTICLE XVI:4 OF THE WTO AGREEMENT

48. As discussed above, Congress specifically undertook to make the captive production provision consistent with US international obligations.[58] It rejected proposals that would have raised many of the questions that Japan has raised here and adopted a requirement that fully satisfies the requirements of Articles 3 and 4 of the Anti-Dumping Agreement. Since US laws are in conformity with the Anti-Dumping Agreement, the United States is not in violation of Article XVI:4 of the WTO Agreement.

III. THE USITC'S MATERIAL INJURY DETERMINATION IS CONSISTENT WITH THE ANTI-DUMPING AGREEMENT

A. JAPAN'S SUBMISSION IS BASED UPON A MISCHARACTERIZATION OF THE USITC'S DETERMINATION

49. As with other arguments that Japan has raised in this proceeding, Japan accuses the USITC of not conducting an objective examination of the evidence. It does so, however, both by ignoring the nature of the USITC's process and mischaracterizing the USITC's findings. The nature of both the USITC's investigation and its determination in this case demonstrate that those allegations are not true.

1. The nature of the USITC's proceedings

50. The USITC is the United States authority with responsibility for determining, under US anti-dumping law, whether a domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded, by reason of dumped imports.[59] The USITC is an independent agency, not part of any Executive Branch Department of the US government, that is composed of six commissioners, not more than three of which may be members of the same political party.[60] In order to further ensure the nonpolitical nature of the USITC, in making appointments of commissioners, the members of different political parties must be appointed alternatively[61], the Chairman and the Vice-Chairman of the USITC must be of different political parties[62], and it is

[57] EC Dec. No. 283/2000/ECSC, at paras. 83-86.
[58] SAA at 852.
[59] 19 U.S.C. § 1673d(b)(1).
[60] 19 U.S.C. § 1330(a) (**Exh. US/C-3(a)**).
[61] 19 U.S.C. § 1330(a).
[62] 19 U.S.C. § 1330(c)(3)(B).

prohibited to have a Chairman designated who is of the same political party of the preceding Chairman.[63]

51. In determining whether there is material injury to an industry in the United States, threat of material injury to such an industry, or material retardation of the establishment of an industry in the United States by reason of subject imports, an affirmative vote on any of these issues shall be treated as a vote that the determination should be affirmative.[64] Three affirmative votes are sufficient under US law to carry an affirmative determination.[65] In the present matter, all six members of the USITC determined that an industry in the United States was materially injured, or threatened with material injury, by reason of imports from Japan of hot rolled steel products that had been found by the Department of Commerce to be sold in the United States at less than fair value.[66] The six Commissioners unanimously voted in the affirmative, with three Commissioners finding that the captive production provision was applicable, and three Commissioners finding that it was not.[67]

52. The USITC instituted the current investigation in 30 September 1998, following receipt of a petition filed by representatives of the domestic hot rolled steel industry[68]. The final phase of the investigation was scheduled by the USITC following notification of a preliminary determination by the Department of Commerce that imports of hot rolled steel products from Japan were being sold at less than fair value. The USITC conducted a public hearing on 4 May 999, and all persons who requested the opportunity were permitted to appear in person or by counsel.[69]

53. The USITC, consistent with Article 12.2 of the Anti-Dumping Agreement, explains its findings and conclusions in this investigation at length and analyzes the extensive evidence collected. The USITC mailed questionnaires to 31 mills believed to produce hot rolled steel products.[70] Twenty-four firms, representing 95 per cent of production of hot rolled steel products in the United States, provided the USITC with data on their hot rolled operations.[71] The USITC also sent questionnaires to 77 firms believed to have imported hot rolled steel products, and received usable data from 52 of the firms.[72] Twenty-four producers, which together accounted for approximately 98 per cent of US commercial shipments of hot rolled steel products in fiscal year 1998, provided financial data.[73] The petition in this investigation listed six firms believed to produce subject merchandise in Japan, and, accordingly, the USITC requested information from each of the six Japanese producers and exporters through their counsel. Counsel on behalf of the Japanese respondents provided complete data for all six mills, believed to account for approximately 90 per cent of Japanese production of hot rolled steel product and about 87 percent of such exports to the

[63] 19 U.S.C. § 1330(c)(3)(A).
[64] 19 U.S.C. § 1677(11) (**Exh. Jp-4(g)**).
[65] *Id.*
[66] The views of (then) Chairman Bragg, Commissioner Miller, Commissioner Hillman, and Commissioner Koplan, finding material injury, constitute the majority opinion of the USITC . Commissioner Crawford also found material injury but provided her views separately. Commissioner Askey found that the domestic industry producing hot rolled steel was threatened with material injury by reason of dumped imports.
[67] USITC Views at 9-10.
[68] USITC Views at 1.
[69] *Id*.
[70] USITC Views at III-1.
[71] USITC Views at III-1.
[72] USITC Views at IV-1. Twelve firms reported that they did not import hot rolled steel products during the period for which data were collected and 13 firms did not respond to the USITC's questionnaires. USITC Views at IV-I, n.1.
[73] USITC Views at VI-1.

United States in 1998.[74] Additional information gathered during the course of this investigation included answers from 63 purchaser questionnaires[75], official statistics, and other public sources.

54. All parties were provided with opportunities to submit prehearing and posthearing briefs, as well as to appear at a public hearing. Additionally, all sides were permitted to submit final written comments on evidence gathered during the course of the investigation. In June 1999, based upon the extensive record developed in the investigation, the USITC determined that an industry in the United States was materially injured by reason of imports from Japan of hot rolled steel products that had been found by the Department of Commerce to be sold in the United States at less than fair value.[76]

2. The USITC's determination

55. The following discussion summarizes some key facets of the USITC determination, particularly addressing misstatements of fact made in the First Written Submission of Japan. At the outset, the USITC determined that there was one like product consisting of all hot rolled carbon steel products within the scope of the investigation.[77] It also defined the domestic industry as all domestic producers of hot rolled steel.[78]

56. The USITC determined that the hot rolled steel industry in the United States was materially injured by reason of the dumped imports from Japan[79], which significantly increased in volume over the period of investigation, had price depressing effects on the domestic industry and had a significant adverse impact on the domestic producers of the domestic like product. Consistent with Article 3.1 of the Anti-Dumping Agreement, the determination of material injury due to dumped imports was based upon an objective examination of the positive evidence. The USITC assessed whether the domestic industry was materially injured by reason of imports and considered all relevant economic factors that bear on the state of the industry in the United States.[80] No single factor was dispositive and all relevant factors were considered within the context of the business cycle and the conditions of competition that are distinctive to the domestic industry.[81]

(a) The Commissioners considered the effects that a significant amount of captive production had on the industry as a whole

57. The Government of Japan is factually incorrect, both as to the relevant statute and USITC practice, when it argues that the captive production provision requires the Commissioners to ignore the domestic industry as a whole and to focus solely on the merchant market.[82] In the present investigation, among the distinctive conditions of competition that the USITC found relevant to its determination was the fact that the domestic industry captively consumes over 60 per cent of its production of the domestic like product for the manufacture of downstream articles.[83] The USITC also recognized that captive production is relatively sheltered from the effects of import competition.[84]

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[74] USITC Views at VII-4. The USITC similarly requested information from the 4 listed Brazilian producers, and 16 firms believed to produce hot rolled carbon steel in Russia. *Id*. at VII-2, VII-4.

[75] USITC Views at II-1.

[76] USITC Views at 3. Commissioner Askey found that the US industry was threatened with material injury by reason of dumped imports. *Id.*

[77] USITC Views at 5.

[78] USITC Views at 6.

[79] Imports from Japan were cumulated with imports from Brazil and Russia, USITC Views at 9, and Japan is not challenging that cumulation.

[80] USITC Views at 9.

[81] USITC Views at 9.

[82] *See* 19 U.S.C. § 1677(7)(C)(iv).

[83] USITC Views at 9.

[84] USITC Views at 19.

58. All six Commissioners voted in the affirmative as to injury to the domestic industry in this investigation. Three Commissioners found that the captive productive provision was not applicable to this investigation, and therefore did not primarily focus on the merchant market.[85] Three Commissioners found that the captive production provision did apply in this investigation[86], and accordingly evaluated the factors listed in the Agreement for both the industry as a whole and as to the merchant market.[87] Under the tie-vote provision[88], either group of three votes would result in an affirmative determination. Thus, there would have been an affirmative determination regardless of the application of the captive production provision.

59. The Government of Japan has also misstated material facts by representing that the USITC failed to consider relevant factors relating to captive production in its analysis of injury and causation and that the USITC allegedly overlooked the fact that captive production is insulated from import competition.[89] The Commissioners evaluated the factors required by Article 3 of the Anti-Dumping Agreement for the whole industry, however, with three Commissioners also focusing on the merchant market.[90] The Commissioners also explicitly noted that some hot rolled steel producers were more sensitive to the injury caused by dumped imports because they had more merchant market sales and less substantial captive operations.[91] Japan 's misrepresentations are explicitly rebutted by the written USITC determination.

(b) The USITC considered all relevant economic factors over the entire period of investigation

60. The Government of Japan has repeatedly and mistakenly stated that the USITC improperly limited its analysis of the domestic industry to two years.[92] The record evidence clearly indicates that the period of investigation was three years, and, accordingly, includes data for the years 1996, 1997, and 1998. Further, despite the incorrect factual assertions made by Japan, the USITC clearly examined trends over the three year period for such relevant factors as absolute volume of dumped imports[93], market share[94], overall consumption[95], domestic shipments[96], prices[97], underselling by

[85] It appears that Japan is not challenging Commissioner Askey 's finding of threat of material injury to the domestic industry due to the dumped Japanese imports. *See* First Submission of Japan at para. 82.

[86] USITC Views at 9, 10.

[87] Japan appears to concede this point in part in their brief, stating that "{u}nder US law, if three commissioners find current injury, this is sufficient for an affirmative determination. Three other commissioners found that the provision did not apply, but one of these commissioners nevertheless *considered the same merchant market data in parallel with data on the industry as a whole*." First Submission of Japan at para. 244 (emphasis added). *See e.g.*, USITC Views at 12, discussing the volume of the dumped Japanese imports as to both the whole industry and the merchant market.

[88] 19 U.S.C. § 1677(11).

[89] First Submission of Japan at para. 226.

[90] See USITC Views at 12-21.

[91] USITC Views at 11, noting that "{w}hen compared to BOF producers, EAF producers are generally more sensitive to competition in the merchant market because more of their production is sold in the spot market, their captive operations are generally not as substantial, and they generally maintain a lower proportion of long term contracts."

[92] Although the Japanese repeatedly assert that the USITC did not use a three year period of investigation, in apparent contradiction to their own argument, they also state that a three year period was used. *See, e.g.* First Submission of Japan at 15, para. 38 stating, "{d}emand for steel continued its growth throughout the period investigated by USITC (1996 through 1998) . . . ."

[93] USITC Views at 12 (dumped imports increased from 1.3 million short tons in 1996 to 3.0 million short tons in 1997 and to 7.0 million short tons in 1998).

[94] USITC Views at 12 (the market share of dumped imports more than doubled from 1996 to 1997, and then doubled again from 1997 to 1998).

[95] USITC Views at 12 (overall consumption in the U.S. market increased throughout the three year period of investigation).

dumped imports[98]. costs of goods sold (COGS)[99], production capacity[100], capacity utilization[101], employment[102], and capital expenditures.[103] It is incongruous to argue that "the first year of the period was ignored"[104], despite the fact that the USITC determination clearly demonstrates that a three year period of investigation was used and that three year trends were extensively discussed.[105]

61. In particular, the USITC discussed the fact that dumped import volumes more than doubled in each year over the three year period of investigation.[106] The USITC also found that the market shares of US consumption of dumped imports doubled from 1996 to 1997, and doubled again from 1997 to

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[96] USITC Views at 12, 13 (domestic producers' merchant market shipments, as measured by volume sold, were 21.5 million short tons in 1996 and 21.8 million short tons in 1998; domestic producers' total shipments by volume were 63.3 million short tons in 1996 and 63.8 million short tons in 1998).

[97] USITC Views at 14 n.76 (average unit value of dumped imports declined from $305.36 per short ton in 1996, to $304.46 per short ton in 1997, and to $266.20 per short ton in 1998. The average unit value of imports from Japan declined from $430.66 per short ton in 1996, to $379.72 per short ton in 1997, and to $298.46 per short ton in 1998. For merchant market sales, domestic producers' average unit values were $347.01 per short ton in 1996, increased to $353.86 per short ton in 1997, and then declined below the 1996 level to $330.51 per short ton in 1998. Overall, domestic producers' average unit values were $343.24 per short ton in 1996, increased to $350.87 per short ton in 1997, and declined below the 1996 level to $335.02 per short ton in 1998.)

[98] USITC Views at 14, 15 (In 1996, there were 29 instances of underselling by dumped imports and 32 instances of overselling. In 1997, the underselling by the dumped imports became more prevalent than in 1996, with 48 instances of underselling by the dumped imports and 16 instances of overselling. In 1998, underselling by the dumped imports was also prevalent with 45 instances of underselling by the dumped imports and 22 instances of overselling. In 1998, the dumped imports from Japan increasingly undersold the domestic merchandise).

[99] USITC Views at 16 (the domestic industry's unit COGS declined during the period of investigation, but this decline was dwarfed by the decline in the domestic industry's average unit values. For merchant market sales, the domestic industry's unit COGS declined by 2.9 per cent from 1996 to 1998 and by 0.9 per cent from 1997 to 1998; whereas the domestic industry's average unit values declined by 4.8 per cent from 1996 to 1998 and by 6.6 per cent from 1997 to 1998. Overall, unit COGS declined by 3.5 per cent from 1996 to 1998 and by 1.8 per cent from 1997 to 1998; whereas average unit values declined by 2.4 per cent from 1996 to 1998 and by 4.5 per cent from 1997 to 1998).

[100] USITC Views at 17 (the domestic industry increased its capacity from 67.3 million short tons in 1996, to 70.0 million short tons in 1997, and to 73.5 million short tons in 1998).

[101] USITC Views at 17 (capacity utilization rates declined from 94.5 per cent in 1996, to 92.6 per cent in 1997, and to 87.5 per cent in 1998).

[102] USITC Views at 18 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998. Hours worked also declined over the three year period from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998).

[103] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[104] First Submission of Japan at para. 265.

[105] Japan appears to endorse Commissioner Askey's analysis and use of the three year trends. *See* First Submission of Japan at para. 266. Commissioner Askey made an affirmative determination based on the threat of material injury by reason of the dumped imports, finding that Japanese imports increased substantially over the period of investigation; that the Japanese hot rolled steel producers had excess capacity; that Japanese market share doubled between 1996 and 1997 and then grew 350 per cent between 1997 and 1998; and that dumped imports are likely to have a significant depressing or suppressing effect on domestic prices. USITC Views, Additional and Dissenting Views of Commissioner Thelma J. Askey at 54-55.

[106] On a quantity basis, the cumulated subject imports increased from 1.3 million shorts tons in 1996 to 3.0 million short tons in 1997, and increased again to 7.0 million short tons in 1998, an overall increase of 419.8 per cent from 1996 to 1998, and of 132.5 per cent from 1997 to 1998. On a value basis, the cumulated subject imports increased from $410 million in 1996 to $914 million in 1997, and increased again to $1.9 billion in 1998, an overall increase of 353.1 per cent from 1996 to 1998, and of 103.3 per cent from 1997 to 1998.

1998.[107] The USITC also found significant the fact that, as the market share of nonsubject imports remained essentially flat over the three year period of investigation, and as the dumped imports' volume and market share were dramatically increasing, the US producers share of the market declined.[108] Over the three year period examined, the harm caused by the Japanese imports also was clear to the USITC from the decrease in domestic producers' merchant market shipments, as measured by volume sold, from 1996 to 1998, at a time of constantly increasing US consumption.[109] One of the key factors in the USITC determination is that, as overall consumption in the US market increased throughout the period of investigation, reaching record highs in 1998[110], the domestic producers were unable to participate in the increasing demand because dumped imports dramatically increased in terms of both volume and market share.[111]

62. The USITC likewise found that price trends and underselling data supported the conclusion that dumped imports had significant price depressing effects on the domestic like product.[112] Although prices for both the dumped imports and the domestic like product showed a mixed trend throughout 1996 and mid-1997, they declined thereafter, both as measured by quarterly pricing data and by average unit values.[113] In nearly all instances, the price of the imported and domestic product declined significantly in 1998, at a time when the rise in the volume of dumped imports reached its highest rate.[114]

63. Instances of underselling by the dumped imports increased over the three year period of investigation. In 1998, the final year of the period of investigation, and thus most probative as to the existence of current material injury, underselling by the dumped imports was prevalent.[115] The increased rate of underselling of Japanese imports in 1998 coincided with a shift by Japanese producers to the sale of more commodity grade products.[116] The USITC found that the increased frequency of underselling supported a finding that dumped imports had significant price depressing effects in 1998.

64. The substantially increasing volume of dumped imports at declining prices had a significant negative impact on the domestic industry, as seen in the declining production, shipments, market

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[107] USITC Views at 12. In the merchant market, the share held by dumped imports increased from 5.0 per cent of apparent US consumption, as measured by volume sold in 1996, to 10.2 per cent in 1997, and then increased again to 21.0 per cent in 1998. For the industry as a whole, the share held by dumped imports increased from 2.0 per cent of apparent US consumption, as measured by volume sold in 1996, to 4.2 per cent in 1997, and then increased again to 9.3 per cent in 1998.

[108] In the merchant market, the domestic producers' market share declined from 80.4 per cent of apparent US consumption in 1996, as measured by volume sold, to 77.8 per cent in 1997, and declined again to 65.6 per cent in 1998. The domestic industry's market share for the industry as a whole, declined from 92.3 per cent of apparent US consumption in 1996, as measured by volume, to 90.8 per cent in 1997, and declined again to 84.8 per cent in 1998. USITC Views at 12. Nonsubject imports' market share of US consumption was 5.7 per cent in 1996, 5.0 per cent in 1997, and 5.9 per cent in 1998. The market share held by all nonsubject imports, by value, was 6.3 per cent in 1996, 5.5 per cent in 1997, and 6.3 per cent in 1998. USITC Views at Table C-1.

[109] USITC Views at 12, 13.

[110] Total apparent US consumption of hot rolled steel rose from 68.5 million short tons in 1996, to 71.0 million short tons in 1997, and to 75.3 million short tons in 1998. On a merchant market basis, apparent US consumption of hot rolled steel rose from 26.7 million short tons in 1996, to 29.3 million short tons in 1997, and 33.3 million short tons in 1998. USITC Views at 10.

[111] *See* USITC Views at 12.

[112] USITC Views at 15, 16.

[113] USITC Views at 14.

[114] USITC Views at 14.

[115] USITC Views at 15.

[116] USITC Views at 15.

share, prices, capacity utilization, and financial condition.[117] As stated above, a key factor in the USITC determination was the fact that the dumped imports captured nearly all of the growth in the market in 1998, at a time of record demand. These dumped imports prevented the domestic industry from increasing its sales in response to overall increasing US apparent consumption.[118] In fact, the domestic industry lost market share throughout the three year period of investigation.[119] The USITC also found that the domestic industry increased its capacity at a rate largely commensurate with the increasing US consumption from 1996 to 1998[120], but this increased capacity almost immediately became excess capacity.[121]

65. The domestic industry's performance indicators indicated a sharp decline in 1998 despite the record demand.[122] From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half.[123] On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998, and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998.[124]

66. The USITC found the domestic industry's performance was substantially poorer than what would be expected given the record levels of demand in 1998.[125] Production and capacity utilization rates for nearly the whole industry showed double digit declines from the first half of 1998 to the second half of 1998, both on an overall basis and for the vast majority of individual firms (including both integrated mills and minimills).[126] For the merchant market, apparent US consumption, when measured by volume, increased by 1.69 per cent from 16.5 million short tons in the first half of 1998 to 16.7 million short tons in the second half of 1998.[127] However, overall apparent consumption, when measured by value, declined by 21.64 per cent from the first half to the second half of 1998. The USITC concluded that this fact further confirmed that prices declined in the second half of 1998, when dumped imports reached their highest levels[128], thus contributing to material injury. A comparison of the financial data reported in the preliminary and final phases of the investigation strongly suggested that the industry's operating income worsened from the first half of 1998 to the second half of 1998, when dumped imports reached their highest levels during the three year period of investigation.[129]

(c) The USITC looked at other potential causes of injury to the domestic industry

67. The USITC examined, as a condition of competition, the fact that the domestic hot rolled steel industry consists of both integrated (or "BOF") and minimill (or "EAF") producers.[130] In doing so, the USITC considered the different conditions under which these producers compete. It found that EAF producers are generally more sensitive to competition in the merchant market than BOF

[117] USITC Views at 20, 21.
[118] USITC Views at 17.
[119] USITC Views at 17.
[120] USITC Views at 17.
[121] USITC Views at 17. The industry capacity utilization rates declining from 94.5 percent in 1996, to 92.6 per cent in 1997, and to 87.5 per cent in 1998. As with the industry as a whole, both integrated producers and minimills' capacity utilization steadily declined from 1996 to 1998, despite the overall increasing US consumption. *Id.*
[122] USITC Views at 17.
[123] USITC Views at 18.
[124] USITC Views at 18.
[125] USITC Views at 20.
[126] USITC Views at 20.
[127] USITC Views at 20.
[128] USITC Views of 20.
[129] USITC Views at 20.
[130] USITC Views at 11.

producers, in part, because their captive operations are generally not as substantial. The USITC also noted that EAF producers were more sensitive to competition because more of their production is sold in the spot market and they generally maintain a lower proportion of long term contracts.[131] In addition, EAF producers are generally more recent entrants to the industry than BOF producers, and, when compared to BOF producers, EAF producers' lower costs and higher productivity permit them on average to sell hot rolled steel at lower prices.[132]

68. The USITC performed a detailed analysis of the competition between these two types of producers in order to ensure that any resulting adverse effects were not attributed to the dumped imports. Although minimills had a competitive advantage and, therefore, somewhat constrained the prices that integrated mills could command, the USITC found it significant that both EAF and BOF producers' prices declined significantly during the period of investigation, as reflected in unit values of shipments and sales.[133] Moreover, domestic producer prices declined dramatically in the latter part of 1998, as dumped import volumes increased at their fastest rate, and domestic prices recovered only as dumped imports exited the market.[134] The USITC concluded from these facts that evidence concerning intra-industry competition did not detract from the evidence establishing that dumped imports caused significant price declines in the latter part of the period of investigation.[135]

69. Further demonstrating this point, the USITC noted that the trends for the industry as a whole, including declines in operating income and the ratio of operating income to net sales, were also apparent for integrated mills and minimills individually.[136] In a comparison of these two types of producers, EAF producers, which are more sensitive to competition from imports, had a worse financial performance than BOF producers in 1997 and 1998.[137] In fact, for merchant market sales, EAF producers had lower operating income to net sales ratios than BOF producers. This lower ratio logically follows from the higher sensitivity of EAF producers to the effects of imports. Tellingly, the EAF producers demonstrated lower operating income to net sales ratios than BOF producers at a period of dramatically increasing dumped imports. Thus, while the USITC recognized that increased competition within the domestic industry was a relevant economic factor, it found that this factor only partially explained the domestic industry's declining performance in 1998.[138] Consistent with its obligation under the Agreement, the USITC examined the known factor of increased competition in the domestic industry, and any injury caused by this factor was accordingly not attributed to the dumped imports.

70. Another condition of competition that the USITC identified was a labour strike at General Motors Corp. ("GM") which lasted for five weeks in June and July 1998.[139] The USITC took into account GM's estimate that the total amount of flat rolled steel (including hot rolled, cold rolled and corrosion resistant steel) that it did not purchase as a result of strike related work stoppages was about 685,000 tons.[140] It evaluated the significance of this fact in light of the total apparent US consumption of hot rolled steel of over 75 million tons in 1998.[141] The USITC further noted that, despite the GM strike, the merchant market and overall consumption of hot rolled steel were at all-time highs in

[131] USITC Views at 11.
[132] USITC Views at 11.
[133] USITC Views at 15.
[134] USITC Views at 15.
[135] USITC Views at 15, 16.
[136] USITC Views at 19.
[137] USITC Views at 19.
[138] USITC Views at 19.
[139] USITC Views at 11.
[140] USITC Views at 11.
[141] USITC Views at Table C-I.

1998.[142] Thus, the USITC found material injury by reason of dumped imports notwithstanding the strike.

71. In light of the increasing dumped import volume and market share and declining dumped import prices, the USITC reasonably determined that the domestic industry producing hot rolled steel is materially injured by reason of dumped imports from Japan.[143] The USITC specifically recognized that other economic factors, including increased intra-industry competition and the GM strike, contributed to the industry's poorer performance in 1998. However, after taking these factors into account, the USITC's determination demonstrates the causal relationship between the substantially increased volume of dumped imports at declining prices and the industry's deteriorating performance, as reflected in nearly all economic indicators.[144]

B. THE USITC REASONABLY ASSESSED CAPTIVE PRODUCTION IN A MANNER CONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. All six commissioners made affirmative determinations regardless of their views on the proper method for examining of captive production

(a) Japan's argument mischaracterizes the role of captive production in the determination

72. As an initial matter, this panel should note that only three Commissioners of the USITC found that the captive production provision applied to the hot rolled steel industry.[145] The three Commissioners that found that captive production provision did not apply[146] likewise made an affirmative determination with respect to imports of hot rolled steel from Japan. The affirmative votes of these three Commissioners who did not apply the provision, standing alone, are sufficient for an affirmative determination against imports of Japanese dumped hot rolled steel.[147] As a result, even if this panel finds that three Commissioners improperly applied the captive production provision, the affirmative determination against Japanese hot rolled steel would be unaffected. Thus, the challenge to the provision as applied in this case necessarily should fail.

73. Perhaps recognizing this limitation, Japan poses an independent attack on the method of analysis actually employed by the majority of Commissioners, accusing them of "ignoring captive consumption as an important condition of competition".[148] While three of these four Commissioners used the captive production provision in their analysis, Chairman Bragg[149] found that the provision did not apply. She further found, however, that she had the discretion to consider the merchant market in her analysis.[150] Thus, Chairman Bragg joined in the majority's views, noting only that she would have reversed the order in which data for the merchant market and the industry as a whole were considered.[151] In order to include Chairman Bragg's views in their challenge, Japan thus remarkably has taken the position that the USITC erred by having "considered, either primarily or secondarily, the

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[142] USITC Views at 16.
[143] USITC Views at 21.
[144] USITC Views at 20, 21.
[145] USITC Views at 35.
[146] USITC Views at 25.
[147] *See* § 771(11) of the Act, 19 U.S.C. § 1677(11). Japan only focuses on the section of the statute providing that an affirmative determination exists when three Commissioners find current material injury. First Submission of Japan at para. 244. This statutory provision clearly provides that a finding of threat of material injury, such as that by Commissioner Askey in this case, constitutes an affirmative determination as well.
[148] First Submission of Japan at para. 250.
[149] The chairmanship of the USITC has changed since the time of the investigation, but, for purposes of this discussion, the Commissioners will be referred to by the titles that they had at the time of the investigation.
[150] USITC Views at 29.
[151] USITC Views at 12-21 & nn. 59, 75, 92.

data for the merchant market...".[152] Therefore, Japan appears to be arguing that the majority's views violate the Anti-Dumping Agreement, the captive production provision notwithstanding.

74. Whether Japan is challenging the use of the captive production provision or contesting the general assessment of captive production in this case[153] is immaterial because the USITC properly considered captive production in this investigation. The three Commissioners applying the provision found that they were not permitted to disregard the industry's captive consumption.[154] They clearly stated that the statute required them to "determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production".[155] Based on this requirement, these three Commissioners, joined by Chairman Bragg, undertook an analysis which explicitly examined the injury factors with respect to both the merchant market and the entire domestic market in this investigation.

75. For example, as a condition of competition, the USITC discussed the rising apparent domestic consumption in both the merchant market and the total US market.[156] Likewise, despite Japan's arguments to the contrary[157], when considering the volume of dumped imports, the USITC specifically referenced the market share of dumped imports in the merchant market and in the domestic market for hot rolled steel as a whole, noting that the market share by volume more than doubled from 1996 to 1997 and then again from 1997 to 1998.[158] The USITC then contrasted these increases with the domestic industry's declining market share in both markets over the period.[159]

76. Based on these findings, the USITC drew conclusions that were consistent with the Article 3.2 directive to "consider whether there has been a significant increase in dumped imports". Notably, this provision does not provide any parameters or limitations for what constitutes a "significant" increase. The significance of the increase depends upon the facts of each case, and, in this matter, the USITC reasonably concluded that the increase was significant.

77. Japan insists that, had the USITC only noticed that import penetration levels never reached double digits, it would have been compelled to find import volumes insignificant. Japan's argument, of course, fails to note that the USITC's findings specifically state the maximum import penetration

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[152] First Submission of Japan at para. 245.

[153] First Submission of Japan at para. 245 ("USITC's application of the captive production provision confirms the provision's flawed analytic approach... ."); para. 247 ("The impact of the captive production provision on USITC's determination of facts, and its analysis of those facts... .").

[154] USITC Views at 35 ("The SAA makes clear, however, that we are not to focus exclusively on the merchant market").

[155] USITC Views at 35.

[156] USITC Views at 10. The three Commissioners who applied the captive production provision were joined in this discussion by Chairman Bragg, who did not apply it.

[157] First Submission of Japan at paras. 245-246. In these paragraphs, Japan also characterizes operating profits as "consistent" and "drop{ping} to break-even levels." The USITC looked at the same evidence and simply came to a different conclusion. The USITC looked at the data for the entire market (Table C-1) and the merchant market (Table C-2) and found that operating income declined by more than half. USITC Views at 18. Simply because Japan has a different interpretation of the same evidence does not render the USITC position illegal. Finally, in these same paragraphs, Japan claims that the U.S. industry's financial performance was better in 1998 than in 1996, and because it looked at the merchant market, the USITC did not consider this fact. Many factors make up a consideration of an industry's financial performance, and it is not clear which factors, in particular, Japan alleges that the USITC did not consider.

[158] USITC Views at 12. The USITC specifically recognized that in the merchant market the market share held by dumped imports increased from 5.0 per cent by volume of apparent US consumption in 1996 to 10.2 per cent in 1997 and 21.0 per cent in 1998. For the industry as a whole, the USITC found that dumped imports held 2.0 per cent of the market in 1996, 4.2 per cent in 1997, and 9.3 per cent in 1998. *Id.*

[159] USITC Views at 12.

reached -- 9.3 per cent.[160] More importantly, Japan fails to note the applicable provisions of the Agreement in making its argument. Article 3.2 does not fix any particular percentage of import penetration as "significant" or "insignificant". Rather, Article 3.2 requires an examination of the increase in imports to determine whey that increase is significant "either in absolute terms or relative to production or consumption". The USITC took all these measures into account, specifically analyzing the doubling and redoubling of the absolute volumes of import, their rapid increase as a share of total consumption (again by several times), and their effects in preventing increases in US production.[161] The USITC, in examining these factors, took into account all relevant economic factors bearing on the state of the industry consistent with Article 3.4 of the Agreement.[162] Japan states no reason why these findings are not in accordance with the Agreement.

78. Similarly, the majority of Commissioners, who focused on the merchant market, continued their analysis by examining the domestic prices in both the merchant market as well as the overall domestic market for hot rolled steel.[163] Moreover, they determined that the price declines were not a result of declining costs because prices were falling more than costs in both the merchant market and the market overall.[164]

79. Finally, in examining the impact of the dumped imports on the domestic industry, and in response to arguments made by respondents during the course of the investigation, the USITC considered and rejected arguments that the domestic industry's troubles were due to intense competition between minimills and the integrated mills because the data for merchant market sales and total sales for both types of domestic producers showed declines in operating income and ratios of operating income to net sales.[165]

80. In making this finding, the USITC took into account the fact that minimills performed worse than integrated producers. It attributed this poorer performance, in part, to the minimill 's "greater dependence on the merchant market, where imports are concentrated".[166] Thus, despite Japan's consistent contention that the USITC ignored this fact[167], the USITC took into account the fact that captive production is largely shielded from the effects of imports.

81. In any event, the trends exhibited in the merchant market mirrored the trends for the industry overall. Consequently, the Japanese challenge to the majority's analysis based on the fact that they considered the merchant market data should be dismissed as irrelevant.

82. Moreover, as noted above, even those Commissioners who did not apply the captive production provision found that they had the discretion to consider the captive production as a condition of competition.[168] These Commissioners examined data for both the domestic industry as a whole and for merchant market operations.[169] Some of these Commissioners merely placed different emphasis on the merchant market data.

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[160] USITC Views at 12.
[161] USITC Views at 12-13.
[162] Moreover, this panel should not heed Japan's emphasis on import penetration and omission of the other factors because, under 3.2 of the Anti-Dumping Agreement, "no one or several of {the} factors can necessarily give decisive guidance." Thus, while Japan hinges its case on few highlighted factors, these are not outcome determinative, and the USITC construed these and other factors in a manner consistent with the Anti-Dumping Agreement.
[163] USITC Views at 14 n.76, 15 n.83.
[164] USITC Views at 16 and n.88.
[165] USITC Views at 19 nn.105 & 106.
[166] USITC Views at 19.
[167] First Submission of Japan at paras. 251, 254.
[168] USITC Views at 29.
[169] USITC Views at 29.

(b) The views of the Commissioners who did not apply the captive production provision do not undermine the validity of the views of those Commissioners who did apply it

83. Japan has made an attempt to discredit the USITC's views by drawing a false distinction between the views of Chairman Bragg (who did not apply the captive production provision) and the views of the Commissioners who did apply this provision. Whereas Japan states that those Commissioners who applied the provision ignored captive production, it avers that Chairman Bragg considered the merchant market "in parallel" with the industry as a whole.[170] Japan appears to differentiate the opinions in this manner despite the fact that, as already mentioned, Chairman Bragg joined in the majority opinion with the three Commissioners who applied the captive production provision. These four Commissioners thus all had the exact same views and analysis, and the Japanese attempt to distinguish them is disingenuous. Japan's characterization of Chairman Bragg's analysis is the correct characterization of the decision -- these Commissioners considered the merchant market "in parallel" with the industry as a whole.

84. Commissioner Crawford stated that she examined the data for the merchant market but chose to base her determination on the "total domestic market and the domestic industry as a whole".[171] Although she used a different approach from the majority of the USITC for analyzing the effects of the significant captive consumption because she did not "evaluate the effects of imports on the merchant market"[172], Commissioner Crawford did examine the effect of having only 40 percent of the domestic like product compete with dumped imports in the merchant market.[173] She found that the dumped imports could " at best be considered as moderate substitutes" for the domestic like product because of the large amount of domestic captive consumption.[174] This finding of a moderate degree of substitutability, in turn, affected her analysis of prices when she found that, at fairly traded prices, it is likely that the demand for dumped imports would have shifted to the domestic like product and that the shift in demand from dumped imports would have been extremely large.[175]

85. The analysis performed by Commissioner Crawford undercuts Japan's argument that the majority made an affirmative material injury finding only because it "ignore{d} the attenuated nature of import competition" in the captive market.[176] As already noted, those Commissioners that explicitly relied on data from the merchant market did not ignore the fact that the captively consumed production is shielded from competition. In any event, even after finding that domestic and imported products have limited substitutability because of the large amount of captive consumption, and thus squarely addressing the shielding issue, Commissioner Crawford still found that dumped imports materially injured the domestic producers. Therefore, Japan's suggestion that proper consideration of the captive production provision should inevitably lead to a negative material injury finding is belied by the material injury finding Japan does not challenge.

86. Finally, although Commissioner Askey also made an affirmative determination, Japan inexplicably relies on her decision in support of its position.[177] Commissioner Askey, like the other Commissioners, found that the financial indicators were worse in 1998 than in 1997 and that dumped imports rose and captured market share by supplying increased demand.[178] She took a different view

[170] First Submission of Japan at paras. 244, 250.
[171] USITC Views at 29 & n.21.
[172] USITC Views at 39.
[173] USITC Views at 44.
[174] USITC Views at 44.
[175] USITC Views at 47.
[176] First Submission of Japan at para. 226.
[177] First Submission of Japan at paras. 251-52.
[178] USITC Views at 52.

of the evidence than the other Commissioners, however, in that she determined that the industry's continued profitability and high capacity utilization rates weighed in favour of a negative material injury determination. Instead, she found that the evidence pointed toward a threat of material injury. Japan claims that Commissioner Askey's recognition that captive production shielded the domestic industry from import competition "led inexorably to her negative determination on present material injury".[179] It fails to take into account, however, that her findings on captive production did not lead her ultimately to make a negative determination in this investigation.

87. Moreover, the logical link from a recognition of the limited competition to a negative material injury determination is not readily evident. As already noted, Commissioner Crawford drew the same conclusion about the nature of competition but still found present material injury. In any event, Commissioner Askey still made an affirmative determination, although it was one based on threat of injury and not material injury. Therefore, any incorrect application of the captive production provision by the other Commissioners not only did not dictate the outcome of this case, but an application of the provision in a manner that Japan deems appropriate would have led to the same result.

88. All six Commissioners made an affirmative determination in this investigation whether or not they applied the captive production provision and whether or not they focused on data for the merchant market. Therefore, the captive production provision is irrelevant to the outcome of this investigation. In any event, those Commissioners who examined data for the merchant market also properly considered the industry as a whole. Thus, the USITC's analysis was consistent with the Anti-Dumping Agreement.

2. Contrary to Japan's argument, the treatment of captive production did not result in different outcomes in the 1993 hot rolled determination and the current hot rolled case

89. Japan seeks to ascribe error to the USITC's determination in this matter by drawing a false comparison between the outcome in this case and the outcome in an earlier hot rolled steel investigation, which was completed before Congress enacted the captive production provision.[180] The facts of these two cases are substantially different, however, so that any comparison between them is meaningless. Therefore, to the extent that the approaches to captive production were different in these two cases, any attempt to impute the different outcomes to this divergence should fail.

(a) The approach to captive production in the 1993 hot rolled case was not pivotal in its outcome or point to a practice contrary to the analysis in this case

90. In 1993, as part of a larger case dealing with flat rolled steel, the USITC issued a negative determination as to hot rolled steel products.[181] In that case, the USITC took a slightly different approach to an assessment of captive production than that articulated in the captive production provision. It took captive production into account as a condition of competition[182], but it did not provide a factor-by-factor assessment for the merchant market and the industry as a whole. Although Japan claims that the recognition of a substantial amount of captive production that was shielded from injury was a "factor that contributed significantly to {the USITC's} negative injury and threat

[179] First Submission of Japan at para. 251.
[180] First Submission of Japan at paras. 248-250.
[181] *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("*1993 Hot Rolled Steel*") (**Exh. Jp-59**).
[182] *1993 Hot Rolled Steel* at 21.

determinations" and "proved pivotal" to the outcome in that case[183], the USITC, in fact, based its negative determination on the lack of a causal nexus between dumped imports and the injury to the domestic injury.[184] In fact, the USITC first analyzed the evidence and found no causal nexus; then, following that finding, and quite apart from it, reiterated its conclusion that the dumped imports had little or no effect on the substantial amount of production that was captively consumed.[185] Therefore, as detailed further below, the difference in approaches to captive production in *1993 Hot Rolled Steel* and the current hot rolled case did not determine the difference in results.

91. As an initial matter, Japan is incorrect in characterizing the approach to captive production in *1993 Hot Rolled Steel* as the "traditional approach" to captive production analysis.[186] Although this type of analysis was used by the USITC in many cases prior to the enactment of the captive production provision, other cases used an approach similar to that codified in the captive production provision. For example, in *Stainless Steel Wire Rod From Brazil and France ("SSWR")*[187] which was completed before Congress enacted the captive production provision, the USITC examined data from the merchant market side-by-side with the data for the industry as a whole in a manner very similar to the way the analysis was done in the current investigation. In *SSWR*, the USITC found that "{a}pparent US consumption (including captive consumption) of SSWR on the basis of quantity increased . . . {and} {o}pen market apparent consumption grew at an even faster rate".[188] It also examined net sales (including company transfers) and "trade only net sales." and "operating income margins" along with operating margins for "trade only operations".[189] Finally, the USITC examined the volume and increase in volume of dumped imports for both the merchant market and the industry as a whole.[190] Thus, the captive production provision is consistent with the analysis performed in investigations predating it.

(b) The facts of the current case and the 1993 hot rolled case are significantly different and do not support Japan's attempted analogy between the cases

92. Nevertheless, to the extent that the analyses in *1993 Hot Rolled Steel* and the current case diverge, the differences did not dictate the different outcomes in these cases. The USITC found no causal nexus in *1993 Hot Rolled Steel* based on conditions of the industry at the time, and these conditions did not exist at the time of the later determination currently under review. For example, the USITC found that "slab offerings", prime quality or secondary products that are sold to purchasers other than the primary purchaser for which they were produced, were sold to about one-fourth of all purchasers and were discounted by 5 to 20 percent.[191] It found that these slab offerings were one of many other factors affecting the domestic industry.[192] Slab offerings were not a relevant factor in the determination currently under review.

93. Also, in the *1993 Hot Rolled Steel* case, in part as a result of a recession, total apparent consumption of hot rolled steel dropped and then rose again, from 51.6 million tons in 1990 to 44.5 million tons in 1991 to 50.6 million tons in 1992.[193] Thus, consumption over the entire period had actually declined slightly. Further, the domestic industry's share of this consumption fell only

[183] First Written Submission of Japan at paras. 219, 239.
[184] *1993 Hot Rolled Steel* at 52.
[185] *1993 Hot Rolled Steel* at 53.
[186] First Submission of Japan at para. 250.
[187] Inv. Nos. 731-TA-636 and 637, USITC Pub. 2721 (January 1994) (**Exh. US/C-11**).
[188] *SSWR* at I-13.
[189] *SSWR* at I-15 nn.53, 54.
[190] *SSWR* at I-21 and nn.98, 99.
[191] *1993 Hot Rolled Steel* at 21.
[192] *1993 Hot Rolled Steel* at 52.
[193] *1993 Hot Rolled Steel* at 21.

slightly over each period in the investigation, from 94.4 percent in 1990 to 93.3 per cent in 1992[194], while the market share of dumped imports remained low over the period, although they increased slightly, ranging from 1.9 to 3.8 per cent in 1990 to 3.3 to 4.4 per cent in 1992. Thus, based on these relatively minor increases in the already low market shares of dumped imports, the USITC concluded that the dumped imports were not significant.

94. The facts of that case stand in stark contrast to the hot rolled case currently under review. During the current period of investigation, demand for hot rolled steel was strong, reaching record highs in 1998.[195] Total apparent US consumption was 68.5 million tons in 1996 and rose to 71.0 million tons in 1997, further increasing to 75.3 million tons by 1998.[196] Domestic producers' total market share declined over this same period, from 92.3 percent of total apparent US consumption in 1996 to 90.8 per cent in 1997 and 84.8 per cent in 1998. Meanwhile, the total market share held by dumped imports from 1996 to 1997 more than doubled each year, going from 2.0 per cent of apparent US consumption in 1996 to 4.2 per cent in 1997, and then doubling again in 1998 to 9.3 per cent.[197] Thus, the USITC noted that, at the same time as dumped imports were increasing their volume and market share dramatically, the domestic industry's market share declined. Moreover, the USITC found that "domestic producers were prevented from participating in the increasing demand as dumped imports increased their market share".[198] The inverse relationship between the dumped imports and the domestic like product that existed during the current period of investigation and the high levels and increases in demand evidenced during that time simply did not exist in the *1993 Hot Rolled Steel* case.

95. In addition, during the *1993 Hot Rolled Steel* investigation, prices of the dumped imports were generally higher than the domestic like product, and, although they fell irregularly over the period, they generally fell less than the domestic prices. In fact, some prices of dumped imports actually rose over the period. At the same time, the prices for the domestic like product fell over the period.[199] A clear correlation between underselling and falling prices thus did not exist during the *1993 Hot Rolled Steel* investigation where overselling was the norm. Once again, these facts bear no resemblance to the facts currently at hand. The USITC found that prices for the dumped imports and the domestic product showed mixed trends through mid-1997, and then fell through the end of the period. It also found a mixed pattern of underselling, with more instances of underselling in 1997 and 1998. It determined that "the increased frequency of underselling is consistent with the price depressing effects of the subject imports in 1998".[200]

96. Finally, the only finding from the *1993 Hot Rolled Steel* case that Japan highlights is the finding about the industry's poor operating performance.[201] Japan correctly notes that the industry's operating performance in that case was substantially worse than that in the present one.[202] For example, in that case, the domestic industry started with an operating income of $39 million in 1990 and saw that sum drop to $1.3 billion operating loss by 1992.[203] In the present case, although the USITC found that the domestic industry's operating income declined by more than half, by 1998 the industry still had an operating income of $560 million.[204]

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[194] *1993 Hot Rolled Steel* at 21.
[195] USITC Views at 10.
[196] USITC Views at 10.
[197] USITC Views at 12.
[198] USITC Views at 12.
[199] *1993 Hot Rolled Steel* at 48.
[200] USITC Views at 14-15.
[201] First Submission of Japan at para. 248.
[202] First Submission of Japan at para. 248.
[203] *1993 Hot Rolled Steel* at 23.
[204] USITC Views at 18, Table C-1.

97. Japan ignores the findings of the USITC in each case that led to this seemingly anomalous result, however. The USITC did not find that the US industry in 1993 was not suffering injury. Rather, it found no injury by reason of dumped imports because it found, "no causal nexus between increases in import penetration and pricing and declines in the domestic industry's performance. For example, the market share of the cumulated subject imports increased more from 1991 to 1992 than from 1990 to 1991. Conversely, profitability of the domestic industry declined from 1990 to 1991 and rebounded slightly from 1991 to 1992".[205] In the current case, as described above, timing issues supported an affirmative determination. For example, the USITC found that the declines in the ratio of operating income to net sales was due largely to declines in the unit values of the domestic industry's shipments and sales, and the unit values "fell significantly in 1998 as subject imports increased in volume and market share".[206] The two cases have different results based on the factual distinctions, not because of any difference in the methodology for analyzing captive production.

C. THE USITC PROPERLY USED A THREE-YEAR PERIOD OF INVESTIGATION AND CONDUCTED AN OBJECTIVE EXAMINATION OF THE DATA COLLECTED OVER THAT PERIOD

98. The USITC correctly analyzed the data it collected by comparing the information within the period of investigation, *i.e.*, from year-to-year and in interim periods, in addition to comparing the information at the beginning of the period with the information at the end of the period. The Anti-Dumping Agreement does not establish any particular period of investigation pertinent to injury determinations, and it certainly does not delimit any method by which the data collected for that period must be analyzed. It is thus within the discretion of the administering authority to ascertain a reasonable means for interpreting the data, and the USITC appropriately analyzed the data in this case.

1. The USITC used a three-year period of investigation

99. The Japanese argument with regard to the USITC's collection and use of data is somewhat misleading and unclear. At times it seems to acknowledge that the USITC used a three year period of investigation[207], while at other times it appears to be arguing that the USITC did not collect data for a three year period.[208] The record clearly reflects that the USITC collected data over a three year period. Table C-1 of the USITC's report provides a summary of the data collected over the course of the investigation.[209] A simple reading of this table shows that data was collected by the USITC staff for the years 1996, 1997, and 1998. Thus, the USITC properly collected data over a three year period.

100. Although its argument is ambiguous, Japan does not appear to be contesting the appropriateness of using a three year period of investigation. Regardless, the Anti-Dumping Agreement is silent as to the period of data collection, and the United States made a reasonable choice in using a three year period. The reasonableness of this decision is underscored by the opinion given by the Committee on Anti-Dumping Practices in a recommendation, including a statement in favour of using at least a three year period for data collection in injury investigations.[210]

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[205] *1993 Hot Rolled Steel* at 52-53.

[206] USITC Views at 18.

[207] First Submission of Japan at para. 261 ("USITC focused on data for only two years of its three-year period of investigation").

[208] First Submission of Japan at para. 262 ("with only two data sets, one cannot know whether a high level for the first year is anomalous or not"); para. 267 ("{i}n manipulating its traditional three year period of investigation...").

[209] USITC Views at C-3.

[210] Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data collection for Anti-Dumping Investigations*, adopted by the Committee on 5 May 2000, G/ADP/6, at para. 1(c).

2. The USITC, consistent with Article 3 of the Anti-Dumping Agreement, established the causal relationship between dumped imports and material injury based upon an objective evaluation of changes in relevant economic factors over the three-year period

(a) The USITC evaluated data over the entire period investigated

101. Japan contests the methodology used by the USITC for analyzing the information obtained over the three year period.[211] Its allegation that the USITC "eschewed its traditional three year analysis and, instead, compared 1998 with 1997" is simply untrue. The USITC, in fact, examined the data over the full three year period. For example, when considering the volume of dumped imports, the USITC found that they "increased over the investigation period, more than doubling from 1996 to 1997 and more than doubling again from 1997 to 1998".[212] In addition, the USITC found that "{t}he market share held by subject imports also more than doubled from 1996 to 1997 and again from 1997 to 1998".[213] With regard to price, the USITC also mentioned the mixed trend of prices for both the domestic like product and the dumped imports from 1996 to mid-1997, and then remarked upon the fact that prices fell for the remainder of the period with the greatest decreases occurring in the third and fourth quarters in 1998.[214] Finally, the USITC discussed the trend of performance over the entire period of investigation for those impact factors listed in Article 3.4 that it determined were relevant to its investigation.[215]

102. Japan merely is asking this panel to reweigh the factors considered by the USITC when it asserts that "all the major domestic industry performance indices improved" over the 1996 to 1998 period and that this improvement normally would result in a finding of no material injury.[216] The USITC looked at these indicators over the entire period and came to a different conclusion. No combination of factors can give decisive guidance as to the ultimate finding of material injury.[217] As already noted, it is not the role of this panel to reassess the factors already considered by the USITC. The USITC may reasonably find that the overall picture shows material injury even when some of the indicators are not declining.[218] In this case, the USITC looked at the state of the domestic industry from 1996 to 1998 and, consistent with the Anti-dumping Agreement, concluded that it was suffering material injury.

(b) Reliance on recent trends is appropriate in determining current material injury because it appropriate recognizes changes in economic circumstances

103. To the extent that Japan correctly notes the USITC's focus on the most recent period for evaluating some factors and is challenging that method of evaluating the facts, its challenge should not prevail. In *Argentina -- Footwear*, the Appellate Body found that, for the purposes of safeguards actions, an examination of recent imports is necessary in order to determine whether the product "is

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[211] First Submission of Japan at para. 263, et. seq.

[212] USITC Views at 12.

[213] USITC Views at 12.

[214] USITC Views at 14.

[215] USITC Views at 12-13 (discussing shipments), 17-18 (discussing capacity and capacity utilization), nn. 100, 101 (discussing productivity, employment, wages, inventory, and factors bearing on profitability -- one firm filed for bankruptcy and unit production costs). Production is accounted for in the USITC's finding that capacity increased commensurate with demand but "the domestic industry's increased capacity almost immediately became excess capacity." USITC Views at 17. In other words, production did not increase.

[216] First Submission of Japan at para. 263.

[217] Article 3.4 of the Anti-Dumping Agreement.

[218] Appellate Body Report, *Argentina -- Safeguard Measures on Imports of Footwear* (*"Argentina -- Footwear")*, WT/DS121/8, adopted Dec. 14, 1999 at para. 139.

being imported" in increased quantities.[219] The Safeguards Agreement and the Anti-Dumping Agreement thus share the same goal of assessing the present condition of the domestic industry and dumped imports. If, for purposes of an injury determination in a safeguards investigation, the Safeguards Agreement *requires* an examination of the most recent period, the Anti-Dumping Agreement can hardly be said to *prohibit* a focus on recent events for an injury finding in anti-dumping investigations.

104. Moreover, the USITC's findings on trends in the most recent period are consistent with Article 3.4's command to examine all relevant economic factors and Article 3.5's dictate to examine all relevant evidence before the authorities. In the present case, as discussed above, the USITC found that the behaviours of dumped imports and the domestic industry underwent a dramatic change in the 1997 to 1998 period. For example, in 1998, total apparent consumption was at a record high.[220] In addition, in 1998, when dumped imports' volume and market share had the largest increases from the previous year, the US industry had its greatest declines.[221] Further, "from 1997 to 1998, total apparent US consumption increased by 6.0 per cent, while domestic shipments declined by 1.0 per cent, as measured by volume".[222] Finally, there was an increased frequency of underselling in 1998.[223] As a result, a focus on this period was warranted. All these factors combined show that the import pattern of dumped imports was changing in the later period, and these changes in the marketplace are relevant economic factors bearing on the decision of whether dumped imports are causing material injury to the domestic industry as a whole. Therefore, the USITC reasonably gave particular attention to this latter period.

105. Regardless, Japan contests the use of the later period in this case because it claims that 1997 was a banner year for the steel industry such that any comparison to this year would necessarily skew the result toward an affirmative determination.[224] Japan's arguments, however, ignore the USITC's findings concerning the changes in relevant economic factors that had occurred over time. The USITC noted, for example, that the domestic industry had greater productivity and lower costs in 1998 than in 1997.[225] As a result, operating income should have been increasing, not decreasing, as it in fact was. Moreover, demand increased from 1997 to 1998 (a point noticeably absent from Japan's banner year argument), yet production and shipments declined and operating income as a ratio to net sales also dropped.[226] These changes created a new economic context for the performance of the industry.

106. The USITC found that numerous factors had declined from 1996 to 1997 and continued to decline in 1998. For example, it specifically noted declines in the domestic industry' s market share[227], domestic shipments[228], prices[229], capacity utilization[230], employment indicators[231], and capital

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[219] *Argentina-Footwear* at para. 130. The Appellate Body found a that "'is being imported' implies that the increase in imports must have been sudden and recent." *Argentina-Footwear* at para. 130. The Anti-Dumping Agreement language does not share in the Safeguard Agreement's suddenness requirement.

[220] USITC Views at 10.

[221] USITC Views at 12.

[222] USITC Views at 13.

[223] USITC Views at 15.

[224] First Submission of Japan at para. 264.

[225] USITC Views at 18.

[226] USITC Views at 10, 12-13, 18.

[227] USITC Views at 12 (the market share of dumped imports more than doubled from 1996 to 1997, and then doubled again from 1997 to 1998).

[228] USITC Views at 12, 13 (domestic producers' merchant market shipments, as measured by volume sold, were 21.5 million short tons in 1996 and 21.8 million short tons in 1998; domestic producers' total shipments by volume were 63.3 million short tons in 1996, and 63.8 million short tons in 1998).

[229] USITC Views at 14 (For merchant market sales, domestic producers' average unit values were $347.01 per short ton in 1996, increased to $353.86 per short ton in 1997, and then declined below the 1996

expenditures.[232] Regardless of those indicators that Japan points to in justifying its banner year argument, the USITC controlled sufficiently for any factors that would distort its reasoning, noted the basis for its determination, and reasonably concluded that the performance in 1998 should have been better than in 1997. Although the factors that Japan focuses on differ from those that the USITC highlighted, Article 3.4 provides that no one or several of these factors necessarily can give decisive guidance. Therefore, this panel should find that the USITC's interpretation of the evidence was reasonable.

(c) Reliance on recent trends is in keeping with USITC practice

107. Contrary to Japan's contention, the USITC's attention to the latter period was in no way "unique".[233] The USITC frequently looks to the most recent period in conducting its analysis. In fact, it has found that "we consider data for the latter part of the period of investigation to be the most probative of the condition of the industry and the impact of subject imports on that industry".[234]

108. The USITC focuses on the latter periods when there is some change in the industry that warrants this type of analysis. For example, even Japan notes that in *Fresh Garlic From the People's Republic of China*[235], the USITC found the domestic industry suffered material injury primarily from price depression and volume displacement of dumped imports in the last year of the period of investigation.[236] In conducting its analysis, the USITC focused on the "massive increase" of dumped imports in the last year of investigation which resulted in domestic industry operating losses for the first time during the period.[237] Similarly, in *Certain Emulsion Styrene-Butadiene Rubber from Brazil, Korea and Mexico*[238], the USITC found that the domestic industry was not materially injured because the increases in dumped imports occurred early in the period of investigation. Moreover, this mode of analysis has been employed by the USITC for many years. In 1982, the USITC made an affirmative countervailing duty determination in *Nitrocellulose from France*[239], noting that "the greatest declines in the indicators of the condition of the domestic industry occurred during the most recent months".

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level to $330.51per short ton in 1998. Overall, domestic producers' average unit values were $343.24 per short ton in 1996, increased to $350.87 per short ton in 1997, and declined below the 1996 level to $335.02 per short ton in 1998.)

[230] USITC Views at 17 (capacity utilization rates declined from 94.5 percent in 1996, to 92.6 percent in 1997, and to 87.5 percent in 1998).

[231] USITC Views at 18 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998. Hours worked also declined over the three year period from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998).

[232] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[232] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[233] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[234] *Fresh Atlantic Salmon from Chile*, 731-TA-768 (Final), USITC Pub. 3116 (July 1998) at 14 (**Exh. US/C-12**).

[235] Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-27 (Nov. 1994) (**Exh. US/C-13**).

[236] First Submission of Japan at n.247.

[237] Japan attempts to assuage the impact of the USITC' s analysis by citing the USITC's acknowledgement of declines in domestic industry profitability throughout the period of investigation. However, simply because the USITC acknowledged other industry conditions within the period is irrelevant. The 576.2 percent increase in the volume of dumped imports in the last year of the period of investigation constituted a significant change in the industry resulting in a sudden and sizable loss of injury to the domestic industry.

[238] Inv. No. 731-TA-794-796 (Final), USITC Pub. 3190 (May 1999) at 16 (**Exh. US/C-14**).

[239] Inv. No. 701-TA-190 (Preliminary), USITC Pub. No. 1304 (Oct. 1982) at 6 (**Exh. US/C-16**).

109. The cases cited by Japan to counter this argument do not have any bearing on the issue at hand. In *Elastic Rubber Tape from India*[240], the USITC found that the performance of the industry in the latter period was a one-time "anomalous" event. It, therefore, properly did not base a decision of injury on that information. In *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*[241], the USITC's determination was negative (a point the Japanese seem to ignore) precisely because of the domestic industry's improvement in the latter part of the period. The USITC noted that in the later period, at the peak of dumped import underselling, the domestic industry's operating profit margins increased.[242] In *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, the USITC made a negative present injury determination, not because of the trends in the latter parts of the period of investigation, but because it found that the adverse impact during this period was "not of sufficient magnitude" to warrant a finding of material injury. Therefore, despite the Japanese allegation to the contrary, considering the later part of the period of investigation and putting emphasis on the condition of the industry at that time is consistent with past USITC practice when the information is relevant to the determination that the USITC must make.

110. The USITC properly collected data for a three year period of investigation. In addition, it evaluated that data in a manner consistent with its obligations under the Anti-Dumping Agreement. It looked at information over the entire period and, in addition, properly gave particular consideration to the information from the later period when changes in the industry's performance warranted such emphasis.

D. THE USITC DETERMINATION, CONSISTENT WITH ARTICLED 3, EXAMINED THE RELEVANT FACTORS AND DID NOT ATTRIBUTE THE ADVERSE EFFECTS OF OTHER KNOWN FACTORS TO THE JAPANESE DUMPED IMPORTS

1. The requirements of Article 3 of the Anti-Dumping Agreement

111. Japan appears to allege that the USITC's determination of injury was inconsistent with the Anti-Dumping Agreement in that its examination of the causal relationship between dumped imports and injury to the domestic industry was inadequate. This objection is completely without merit. The causation standard relevant to this review is set forth in Article 3.5 which states, in part, that "{i}t must be demonstrated that the dumped imports are . . . . causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities".[243] The USITC's determination clearly articulated its reasons for finding the causal link between the dumped imports and material injury. The USITC determination was based upon an objective examination of the positive evidence including the volume of the dumped imports, the effect

[240] Inv. No. 731-TA-805 (Final), USITC Pub. 3200 (June 1999) at 14 (**Exh. US/C-17**).
[241] Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194 (May 1999) at 16-17 (**Exh. US/C-18**).
[242] *See id.* at 15.
[243] Article 3.5 states:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

of the dumped imports on prices in the domestic market, and the consequent impact of these imports on the domestic producers of such products.[244]

112. Japan specifically alleges that the adverse effects of other market factors were wrongfully attributed to the dumped imports. Article 3.5 of the Anti-Dumping Agreement sets forth the relevant obligation with respect to other causes of injury, namely: "{t}he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." The USITC's determination more than satisfied this requirement. It is significant that Japan has not challenged the USITC's factual findings of increasing dumped imports, declines in prices for the domestic product, or the negative impact on the domestic industry of the dumped imports during the period of investigation. As required by the Anti-Dumping Agreement, the USITC demonstrated, through undisputed facts, that the dumped imports are causing injury to the US industry. While the authority is also to examine other known factors, the purpose for doing so is to assure that it is not attributing to dumped imports injury due to other known factors, not to demonstrate what effects other factors may or may not be having. Article 3.5 thus requires only a specific demonstration of the causal link, not a demonstration concerning other known factors.

113. The fact that the USITC did not attribute injury from other causes to the dumped imports is obvious from its discussion of the facts, from which it demonstrated the causal relationship between dumped imports and material injury. Nonetheless, the USITC explicitly discussed alleged alternative causes of injury and gave a detailed discussion of the reasons that it believed that the dumped imports were causing material injury despite any contributions made by these alternative causes. Therefore, the USITC satisfied the requirements of the Article 3.5 second sentence, both by its affirmative findings concerning the significance of dumped imports and by its explicit findings concerning asserted alternative causes.

114. The Anti-Dumping Agreement does not require the USITC to somehow quantify the injury from causes other than the dumped imports supported by the Agreement. The requirement not to attribute the harm from other causes to the dumped imports, as stated in Article 3.4, was interpreted in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87 (27 April1994) (*United States - Atlantic Salmon)*. In that case, which arose under the Tokyo Round Anti-dumping Code, the panel specifically stated that the requirement " not to attribute injuries caused by other factors to the imports ... did not mean that, in addition to examining the effects of imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway".[245]

115. Although Article 3.5 of the Anti-Dumping Agreement clarifies that the USITC is obligated to examine any "known factor" other than the dumped imports which is injuring the domestic injury, it repeats the language of the Tokyo Round Code, defining the obligation not to attribute injuries caused by other actors. As the Code Committee panel observed in *Atlantic Salmon*, that Agreement set out numerous factors that authorities are required to consider in establishing a causal link between dumped imports and injury, but it established no criteria for satisfying the requirement not to attribute injury from other causes to the dumped imports. The same is true of the Anti-Dumping Agreement.

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[244] This examination was consistent with the ITC's obligation under Article 3.1 of the Agreement which states:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

[245] *United States -- Atlantic Salmon* at 555.

Thus, the USITC's analysis in the present case, which expressly, and with particularity, examined other known factors, more than satisfied the requirements in the Agreement.

2. The asserted other factors

116. Japan's arguments simply ignore the USITC's actual findings. Consistent with Article 3.4 of the Anti-Dumping Agreement[246], the USITC found the injury caused by the dumped imports, holding that no single factor was dispositive and that all relevant factors must be considered within the context of the business cycle and noting the conditions of competition that are distinctive to the affected industry. Japan appears to argue that there were four alternative causes of injury to the domestic industry, namely a strike at General Motors (GM), increased intra-industry competition particularly from EAF (Electric Arc Furnace, also known as "minimill") producers, price effects of nonsubject imports, and a decline in demand for a subsection of the hot rolled steel industry. The USITC specifically considered and then rejected these arguments, and its conclusions regarding all other known causes are readily apparent from all the findings it made.

(a) The General Motors strike

117. As to the GM strike, the USITC acknowledged the respondents' arguments that the strike was responsible for declines in domestic prices in 1998. However, consistent with the Agreement, the USITC evaluated the dumped Japanese imports' effects on prices by examining the significant price undercutting by the dumped imports and whether the effect of such imports was otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[247] The USITC explicitly stated that it considered the Japanese argument and did, in fact, agree that the GM strike had some effect on overall demand in 1998 and, hence, played some role in contributing to declining domestic prices.[248]

118. However, the Commissioners observed that the strike only lasted for five weeks and the total quantity of material not purchased during the GM strike (no more than 685,000 tons of all types of flat rolled steel[249]) was not large enough to explain the extent of price declines which occurred in 1998.[250] The GM strike affected a very modest 685,000 tons of US production of all flat rolled steel, in comparison to total apparent US consumption of hot rolled steel of over 75 million tons in 1998;

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[246] *See* Article 3.4 "This list {of relevant economic factors} is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[247] Consistent with Article 3.2, the USITC recognized that the quarterly pricing data indicated a mixed pattern of underselling by the dumped imports, but that the frequency of underselling increased significantly in the later part of the period of investigation. Specifically, in 1998, the USITC found that underselling by the dumped imports was prevalent: with 45 instances of underselling by the dumped imports and 22 instances of overselling. The USITC further found that the increased frequency of underselling was consistent with the price depressing effects of the dumped imports in 1998. USITC Views at 14, 15.

[248] USITC Views at 16.

[249] GM estimated that the total amount of flat rolled steel, including hot rolled, cold rolled, and corrosion resistant steels that was not purchased by it and its suppliers as a result of the strike-related work stoppages was about 685,000 tons. GM did not provide a figure limited to hot rolled steel only. USITC Views at 11. The USITC evaluated the relatively minor 685,000 tons (of which only a portion was hot rolled steel) in light of total apparent US consumption of hot rolled steel, and which was 75,251,116 tons in 1998. *See* USITC Views at 16. *See also* USITC Views at IV-13, Table IV-9.

[250] The quarterly pricing data, in nearly all instances, demonstrated that the price of the imported and domestic product declined significantly in 1998. The USITC found that the price declines were most precipitous in the third and fourth quarters of 1998, at a time when the volume of dumped imports was peaking. USITC Views at 14.

however, average unit values decreased from $308.85 in 1997 to $297.22 in 1998, a 3.8 per cent decrease.[251]

119. The USITC further noted that, despite the GM strike, the merchant market and overall consumption of hot rolled steel were at all-time highs in 1998.[252] One would reasonably expect prices to increase, not decrease, in times of record demand for the product.[253] The USITC, therefore, based on an objective examination of the relevant evidence, reasonably concluded that the GM strike was, at most, a partial explanation for declining prices in 1998.[254] As the Code Committee panel recognized in *United States-Atlantic Salmon*, there may be other causes of price suppression effects and an authority need not isolate the particular effects of dumped imports from the effects of other causes in order to establish that dumped imports have a significant price depressive effect. Rather, the *Atlantic Salmon* panel found it sufficient that the USITC had not attributed to dumped imports "effects entirely caused by 'other factors'.[255] In keeping with that decision, the USITC's findings here make clear that, taking into account the partial price suppressive effect of the GM strike, nevertheless dumped imports caused significant price depression.

120. In blatant disregard for the content of the USITC's determination, Japan alleges that the agency made "no effort to distinguish the effects of the General Motors strike from the effects of the subject imports".[256] The USITC decision demonstrates that the Commissioners examined the performance of the industry in the face of increasing apparent consumption and a substantially increasing volume of dumped imports.[257] The USITC observed that prices declined significantly in the second half of 1998, when dumped imports reached their highest levels. The USITC therefore found, consistent with its obligations under the Anti-Dumping Agreement, that there was a causal relationship between the significant price declines at a time of record US consumption and the rapid increase of dumped imports of hot rolled steel, which were fairly substitutable with the domestic like product. Consequently, the USITC appropriately found that the dumped imports had significant price depressing effects on the domestic product.

(b) Minimill competition

121. The USITC also explicitly considered and rejected respondents' argument that the domestic industry's poor performance in 1998 was not causally related to the dumped imports but rather was a

[251] USITC Views at Table C-I.

[252] USITC Views at 16.

[253] The USITC found that US apparent consumption was strong during the period of investigation, and appeared to be at a record high in 1998. USITC Views at 10.

[254] USITC Views at 16.

[255] *US-Atlantic Salmon* at 557.

[256] First Submission of Japan at 85, para. 277. The USITC's objective examination of the effects of the GM strike discredits Japan's repeated allegations of bias and political motivation. In separate steel investigations, which concerned an industry more sensitive to the consequences of the GM strike, the USITC relied on the effects of that strike in making a negative determination as to material injury by reason of dumped imports. *Certain Cold Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 & 731-TA-829-30, 833-34, 836, & 838 (Final), USITC Pub. 3283 (March 2000) (**Exh. US/C-19**). In those investigations, the GM strike had added importance in that approximately 80 percent of overall GM purchases are of cold rolled and corrosion-resistant steel (as opposed to hot rolled). *Id*. at 23. The USITC noted in that investigation that the majority of responding cold rolled domestic producers and importers reported that the strike had a significant effect on the market, and that the timing of the GM work stoppage corresponded more closely with the drop in domestic prices than does the largest increase in dumped imports. Based on the different facts in those investigations, the USITC found that the contribution of dumped imports to price declines was minimal. *Id.* at 24. The USITC addressed the effects of the GM strike based on an objective examination of the evidence in each investigation it conducted.

[257] USITC Views at 20.

reflection of increased competition within the industry. The USITC acknowledged that a condition of competition pertinent to the hot rolled steel industry was the fact that the domestic industry consists of both integrated (or "BOF") producers and minimill (or "EAF ") producers.[258] Consistent with the obligations under the Anti-Dumping Agreement, the USITC evaluated the increased competition between integrated and minimill producers as a relevant economic factor, and ensured through its analysis that any injurious effect due to this factor was not attributed to the dumped Japanese imports.[259] The USITC specifically addressed the price effects of the increased competition in the domestic industry consistent with the obligation under the Anti-Dumping Agreement not to attribute any injury caused by such competition to the dumped imports. The USITC noted that minimills have lower costs and higher productivity rates than the integrated mills, and that this competitive advantage to some degree constrained the prices the integrated mills could command for their hot rolled steel.[260]

122. However, the USITC reasonably concluded that minimill competition could not have caused the adverse effects observed in the US hot rolled steel industry. The evidence collected over the three year period of investigation suggested that the dumped imports depressed both BOF and EAF prices. Both BOF and EAF producers' prices declined significantly during the period of investigation, as reflected in unit values of shipments and sales.[261] The USITC noted that it was significant that the hot rolled steel prices for an established and efficient minimill producer declined significantly during the latter part of 1998 as dumped import volumes increased at their fastest rate. Furthermore, this producer's prices recovered only as dumped imports exited the market.[262]

123. The USITC noted that the same trends for the industry as a whole, including declines in operating income and the ratio of operating income to net sales, were also apparent in the separate results of both integrated mills and minimills.[263] However, EAF producers, who, lacking substantial captive production, are more sensitive to competition from imports[264], had worse financial performance than BOF producers from 1997 to 1998.[265] For merchant market sales, EAF producers had lower operating income to net sales ratios than BOF producers. Accordingly, as EAF producers are more sensitive to the effects of imports, and, as they demonstrated lower operating income to net sales ratios than BOF producers at a period of dramatically increasing dumped imports, the USITC concluded that there was a causal relationship between the increased dumped imports and the domestic industry's injury. As the EAF producers were more sensitive to the effects of imports, and as their operating results did in fact more clearly reflect injury in 1998 when imports were increasing at a significant rate, the USITC found that operating results for the industry as a whole reflected a causal relationship between the dumped imports and the condition of the domestic industry.

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[258] USITC Views at 11.

[259] *See similarly*, *US - Atlantic Salmon* at paras. 559-560, stating that the USITC had not failed to conduct an examination of other known factors sufficient to ensure that it did not attribute to the dumped imports injury caused by other known factors. A potential other cause of material injury in that investigation involved "internal industry problems," and the USITC discussed the fact that the industry's most recent financial performance was worse than would have been anticipated, even taking into account start-up conditions.

[260] USITC Views at 15.

[261] USITC Views at 15.

[262] USITC Views at 15.

[263] USITC Views at 19.

[264] In comparison to BOF producers, EAF producers are generally more sensitive to competition in the merchant market because more of their production is sold in the spot market, their captive operations are generally not as substantial, and they generally maintain a lower proportion of long term contracts. USITC Views at 11. The EAF producers are more dependent on the merchant market, where imports are concentrated. *Id*. at 19.

[265] USITC Views at 19.

124. Furthermore, the USITC reasonably concluded that domestic competition could not explain the industry declines at the end of the period investigated, at a time of record demand. The USITC specifically rejected the respondents' argument that the domestic industry's poor performance in 1998 was due to increased competition and not the effect of increased dumped imports.[266] The USITC observed that minimill competition was an important condition of competition in 1997, yet the condition of the domestic industry had deteriorated from the relatively successful performance that year.

125. The conditions of competition between integrated producers and minimills were generally similar in 1998, and the domestic industry manifested several economic indicators of material injury. In particular, the USITC observed that minimills substantially increased their capacity from 1996 to 1997, but that there was only an incremental increase in minimill capacity from 1997 to 1998. As the domestic industry's injury was most evident in 1998, it was therefore reasonable to conclude that dramatic increase in the volume of dumped imports, and not the increased capacity, were causally related to the injury to the domestic hot rolled steel industry.[267]

126. Japan attempts to discredit this finding by reiterating arguments made by Japanese respondents before the USITC that there would be a delay between the addition of capacity and increases in output by minimills.[268] This assertion by the Japanese respondents, however, was not borne out by the evidence. The USITC examined the data presented by the industry, and found that the minimill's capacity utilization rose between 1996 and 1997, the time when the capacity was added, and decreased again in 1998, the time when Japan asserts production levels should have been the highest.[269] Moreover, the USITC found that net sales for minimills decreased from 1997 to 1998[270], when Japan claims that their output was the greatest.

127. In other words, in the beginning of the period of investigation there was a substantial increase in minimill capacity but no corresponding injury to the domestic industry. In the latter part of the period of investigation, there was a small increase in minimill capacity and signs of significant injury to the domestic industry; there was a significant increase in the volume of dumped imports at this time. Therefore, it was reasonable for the USITC to conclude that the injury evident in 1998 was due to the dumped imports and not increased competition as seen in the minor increase in capacity.

(c) Nonsubject imports

128. Contrary to Japan's assertions, the USITC conducted an examination of the effects of nonsubject imports that, in keeping with Article 3.5, assured that, in its analysis of the effects of dumped imports, it did not attribute to those imports injury due to imports not sold at dumped prices.

129. The USITC made specific findings concerning the role of nonsubject imports that ensured that any potential negative effects of this factor were not attributed to the dumped Japanese imports of hot rolled steel. Specifically, the USITC indicated that imports from non-subject countries maintained a stable presence in the US market throughout the period of investigation.[271] When measured against

[266] USITC Views at 18, 19.

[267] USITC Views at 19. Most of the increase in minimill "low cost" capacity occurred from 1996 to 1997, rather than from 1997 to 1998. EAF producers increased their capacity for each year over the period of investigation. BOF producers also increased their capacity for each year over the period of investigation. The USITC noted that although the increase in capacity for EAF producers was greater than for BOF producers from 1996 to 1997, that this trend reversed itself from 1997 to 1998. *Id*. at n.104.

[268] First Submission of Japan at para. 274.

[269] USITC Views at 17, n.104.

[270] USITC Views at n.106.

[271] USITC Views at 10.

total US consumption, the market share of nonsubject imports was 5.7 percent in 1996, 5.0 per cent in 1997, and 5.9 per cent in 1998.[272] In contrast, subject imports increased during the three year period of investigation.[273]

130. This analysis assured that, in analyzing the effects of dumped imports, the USITC did not falsely attribute to them effects that were in fact due to nonsubject imports. The USITC found that the dumped imports suppressed US prices not only because they increasingly undersold US product[274], but also because of their rapid increase.[275] The USITC found this rapid increase of fairly substitutable dumped imports to be the key factor explaining why prices declined significantly at a time of record US consumption. The USITC's findings make clear that nonsubject imports could not explain this striking phenomenon.

131. Despite the fact that the USITC determination includes the above explicit findings, the Japanese make the allegation that the "USITC completely ignored the impact of nonsubject imports".[276] The USITC's findings, however, demonstrated that the nonsubject imports cannot be said to have had any significant negative impact on the US industry. There was thus no injury potentially caused by the nonsubject imports that the USITC could have improperly attributed to the dumped Japanese imports. Accordingly, the analysis conducted by the USITC of nonsubject imports was fully consistent with the obligation of the United States under the Agreement.

(d) Pipe and tube demand

132. Japan also erroneously argues that the USITC was specifically required to include a finding concerning a decrease in demand in the pipe and tube subsection of the hot rolled steel industry, and failure to provide an explanation as to this allegation was a violation of the Anti-Dumping Agreement.[277] It states that a faltering demand for pipe and tube products was an alternative source of injury that was "ignored or slighted" by the USITC.[278] The USITC did, however, consider demand as a relevant economic factor having a bearing on the state of the industry.[279] It did so by examining aggregate demand for the domestic product, and found that demand for the industry as a whole increased every year over the period of investigation. This examination was relevant to the factors enumerated in Article 3.4 such as market share, production, and capacity utilization. The evidence demonstrated that US apparent consumption of hot rolled steel increased from 1996 to 1997, and from 1997 to 1998.[280]

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[272] USITC Views at 10.

[273] USITC Views at 10. When measured by total US consumption, the market share of subject imports was 2.0 per cent in 1996, 4.2 per cent in 1997, and 9.3 per cent in 1998. *Id*. at n.49.

[274] USITC Views at 15.

[275] USITC Views at 16.

[276] First Submission of Japan at para. 281.

[277] First Submission of Japan at para. 271. As will be shown, the USITC addressed Japan's concerns. Nevertheless, the United States is compelled to observe that Japan's allegations on this matter are not properly before the panel. The requirements relevant to explanation of determinations are found in Article 12. Specifically, Article 12.2 requires that final determinations shall set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. In its request for a panel the Government of Japan did not allege that the United States was acting in a manner inconsistent with Article 12 of the Anti-Dumping Agreement. As Japan's panel request did not cite Article 12, any argument concerning the inadequacy of the determination for failure to make findings on a particular subject are beyond the terms of reference of this panel under Article 7:2 of the DSU.

[278] First Submission of Japan at para. 271.

[279] Article 3.4 of the Anti-Dumping Agreement.

[280] USITC Views at 10.

133. Thus, despite a fluctuation in one subsection of the industry, the USITC found that aggregate demand was strong during the period of investigation, increasing every year, and, indeed, appeared to have been at a record high in 1998.[281] The USITC found that imports injured the US industry by preventing it from participating in the growth in demand despite the industry's capacity to do so. In this context, it is apparent why the USITC would regard a decrease in one source of demand as immaterial.

134. Given these findings, the USITC cannot be regarded as having attributed to the dumped imports the adverse effects of a decline in demand for pipe and tube. Indeed, in view of rising overall demand, it is difficult to see how falling demand from one set of customers can be regarded as a factor that is injuring the domestic industry within the meaning of Article 3.5 at all. The USITC determination does not in any way even allude to a conclusion that the adverse effects of a decrease in demand in a subsection of the US market was attributable to the dumped imports, nor does Japan allege that it does so. The USITC found that the domestic industry's performance was substantially poorer than what would have been expected given the record level of demand for hot rolled steel.[282] The USITC's determination satisfies Article 3.5 by demonstrating the causal relationship between the substantially increased volume of dumped imports at declining prices and material injury to the domestic industry, without attributing to those imports injury due to other causes.[283]

135. The USITC found a causal relationship between the substantially increased volume of dumped imports at declining prices and the US industry's deteriorated performance, as reflected in nearly all economic indicators. In establishing the causal relationship between the dumped imports and the material injury to the domestic industry, the USITC considered all relevant economic factors and did not attribute to the dumped imports the effects of other known factors. Its decision fully complies with the requirements of Article 3 of the Anti-Dumping Agreement.

[281] USITC Views at 10 and n.49.

[282] USITC Views at 20.

[283] USITC Views at 21. *See also, United States -- Atlantic Salmon* at para. 547 stating that the USITC had not "disregarded" possible other causes of injury when it expressly recognized that some other factors may have adversely affected the domestic industry but that this did not detract from the fact that material injury was also caused by the dumped imports. The Panel further stated that the USITC was required not to attribute injuries caused by other factors to the dumped imports, but not that it was obligated to identify the extent of injury caused by these factors in order to isolate the injury caused by these factors from the injury caused by the dumped imports. *Id*. at para. 555.

PART D: OTHER ISSUES AND CONCLUSION

I. JAPAN'S CLAIMS UNDER ARTICLE X:3 OF THE GATT 1994 ARE UNFOUNDED

A. THE ACTIONS AT ISSUE ARE CONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND DO NOT VIOLATE ARTICLE X:3

1. Having failed to demonstrate that the US law and the application of that law are contrary to the Anti-Dumping Agreement, Japan is trying to get a second "bite at the apple" by turning to Article X:3 of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the Anti-Dumping Agreement, they might violate the Article X:3 requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms "due process").

2. In considering the application of Article X:3 to this case, the Panel should note three things. First, Article X:3 is limited to the administration of certain laws, regulations, judicial decisions and administrative rulings of general application, not to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3. As the Appellate Body said in *Bananas:*

> 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 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.[1]

3. Second, Article X is a general provision of the GATT 1994, which covers the "Publication and Administration of Trade Regulations". The Anti-Dumping Agreement, by contrast, lays out numerous specific rules on the conduct of anti-dumping investigations, and thoroughly addresses not only the substantive requirements of anti-dumping investigations, but procedural, or "due process" requirements as well. Under the general interpretive note to Annex 1A of the Marrakesh Agreement, if there is a conflict between the Article X:3 and provisions of the Anti-Dumping Agreement, the provisions of the Anti-dumping Agreement apply to the extent of the conflict.

4. The Anti-Dumping Agreement specifies in Article 1 that "an anti-dumping measure shall be applied . . . only pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Indeed, Anti-Dumping Agreement Article 1 reflects that, regardless of the extent to which the administration of anti-dumping measures might be subject to the general strictures of Article X:3, the Anti-Dumping Agreement itself was intended to govern specific actions taken under

[1] *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).

domestic laws.[2] The Anti-Dumping Agreement itself provides for procedural requirements applicable to the imposition of anti-dumping measures. 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 Anti-Dumping Agreement reasonably. These provisions show that the Anti-Dumping Agreement was intended to address the policies expressed in Article X:3 with respect to specific actions taken under the Agreement.

5. It is plain that the arguments in Japan's first submission ignore the proper role of Article X:3 in this dispute. The Anti-Dumping Agreement authorizes the actions complained of in this dispute. Japan cannot meet its burden of demonstrating that these actions are not uniform, impartial and reasonable if they are authorized by, and applied consistently with, the Anti-Dumping Agreement. The Anti-Dumping Agreement negotiators would not have gone to the trouble of negotiating detailed rules governing anti-dumping investigations, if they thought those rules could be disregarded.

6. Introducing its Article X:3 claim, Japan explains that

> The US Government essentially decided the case in the favour of the domestic industry before it even began its investigation. This bias surfaced repeatedly when the US Government manipulated the facts and adopted impermissible legal interpretations.[3]

Plainly, whether the US Government manipulated facts and adopted impermissible legal interpretations is decided under Article 17.6 of the Anti-Dumping Agreement, which provides that the Panel should (i) determine whether the establishment of the facts was proper and their evaluation unbiased and objective; and (ii) uphold the authorities actions if they are based on a permissible interpretation of the Anti-Dumping Agreement. It defies logic and law to assert that a Panel might find that an interpretation of the Agreement was permissible under Article 17.6(ii), but impermissible and biased under Article X:3. Article X:3 cannot be used to undercut the specific disciplines agreed upon in the Anti-Dumping Agreement.

7. As another obvious example, Japan asserts several times that the Department's selection of "facts available" was a "disproportionate penalty ", thereby contravening the Article X:3(a) requirement that the administration of laws be "reasonable".[4] As demonstrated above, the Department's use of "facts available" -- including the choice of appropriate facts -- was entirely appropriate and consistent with the very specific and detailed " facts available" requirements set out in the Anti-Dumping Agreement. The Article X:3(a) "reasonableness" requirement cannot be interpreted to prevent what the Anti-Dumping Agreement specifically allows.

8. In addition, in considering Article X:3(a), the Panel should keep in mind that a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. As discussed in the previous sections, administering authorities must have the flexibility, in making its decisions and formulating its policies, to respond to different or evolving factual circumstances. Indeed, the Anti-Dumping Agreement specifically recognizes that many determinations will be decided on the particular circumstances presented. For example, Article 3.4 specifically eschews the proposition that any one particular criterion will control injury determinations. It states that "the examination of the impact of the dumped imports on the domestic

[2] Article 1 of the Anti-Dumping Agreement provides that "The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations".

[3] First Submission of Japan at para. 294.

[4] *Id.*, at para. 316.

industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and proceeds to list examples of such factors and indices. The last sentence of the article repeats that "[t]his list is not exhaustive" and adds, "nor can one or several of these factors necessarily give decisive guidance." Article 3.4 not only refrains from telling investigating authorities *how* to evaluate the various relevant factors, it also rejects the notion of applying a particular benchmark linked to any one of the factors. In doing so, it rejects the notion of "uniformity" that Japan seeks to impose on decision-making by its comparisons between the results in this investigation and the results in other investigations.

9. In addition, the Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the Anti-Dumping Agreement – from other Article X:3(a) disputes, in which the overall administration of some programme 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*[5] 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.

10. 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 Japan uses Article X:3 in the present case. Japan 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. Rather, it disagrees with the specific results in this proceeding.

11. Thus, for each of the issues raised by Japan, which are discussed in sections B and C above, the Panel should apply the Anti-Dumping Agreement before considering whether, in light of the provisions of the Anti-Dumping Agreement, there is any violation of Article X:3(a). The United States submits that, for the reasons outlined below, there is no such violation.

B. THE UNITED STATES' ACTIONS WERE CONSISTENT WITH GATT ARTICLE X:3

12. The United States' actions were consistent with GATT Article X:3, because, as the United States established in Parts B and C of this submission – regarding the determinations of the US Commerce Department and the US International Trade Commission, respectively – they were authorized by and implemented consistently with the pertinent, substantive provisions of the Anti-Dumping Agreement. The repetitious nature of much of Japan's first submission regarding its alleged due process claim[6] bears out the point, established above, that Article X:3 cannot be used as a method to circumvent proper review under the pertinent WTO agreement.

13. With regard to Japan's first Article X:3 claim that Commerce unfairly accelerated this proceeding[7], the United States has explained in the introductory section in Part A above, and has elaborated upon with regard to critical circumstances in Part B above, that the extraordinary circumstances of this period, involving an unprecedented surge of imports resulting from the Asian financial crisis, fully justified the acceleration under both US domestic law and the AD Agreement. It does not matter what the Department did in 70 out of 76 subsequent cases, as Japan seems to believe, or what it did with regard to questionnaires in all other cases in 1998.[8] What matters is what the

[5] *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.

[6] First Submission of Japan at 91-100.

[7] First Submission of Japan at 91-93, point 1.

[8] First Submission of Japan at 91-92, notes 286 and 291. With regard to questionnaires, Japan does not make the claim, and cannot, that any of its three responding mills were deprived of the requisite amount of time

Department did in this case, and the reasons for it. That is the issue for the Panel to review, under the pertinent provisions of the Anti-Dumping Agreement.

14. Next, Japan claims that the Department acted in a biased manner in not applying to NKK its normal practice of correcting significant errors in preliminary determinations, shortly after those determinations are issued.[9] While Japan is correct in its recitation of the facts concerning Commerce's failure timely to correct the error – a correction not required under any provision of the Anti-Dumping Agreement[10] – Commerce did make the correction in its final determination. Indeed, as we explained in the introductory section of Part A above and as Japan itself points out, Commerce not only corrected the error, but did so retroactively to thirty days following NKK's original allegation of the error.[11] Commerce 's oversight in this matter was nothing more than that: an oversight subsequently corrected. It was hardly an act of bias against Japan.

15. Japan's third bias contention regarding Commerce's critical circumstances determination[12] is completely rebutted in the pertinent discussion above, as well as in the introductory section above, and needs no further discussion here.

16. With regard to the application of facts available in this case, Japan attempts, in its fourth bias count, to claim a pattern of disparate treatment between Commerce and the USITC, as to respondents and petitioners, which allegedly constitutes bias.[13] There is no such pattern. With regard to the Commerce Department, each application of facts available to NSC, NKK, and KSC is fully justified on the individual, specific facts, as explained in detail in Part B above, and is consistent with the Agreement. To the extent that Japan is challenging the Commission's alleged use of facts available, it failed to include such a claim in its panel request, and thus the matter is outside this Panel's terms of reference, for the reasons explained in the preliminary objections section of Part A, above.

17. In any event, Japan's contrast between the Department's proceedings and the USITC's, in which domestic producers were asked to provide information after the USITC completed its hearing, cannot provide any basis for an allegation of bias. What Japan fails to recognize is that, in the investigations at issue here, both agencies merely followed their routine procedures for data collection. Japan's contention ignores the fundamental differences between the way that the two authorities conduct their investigations in every case. The differences between the willingness of the two agencies to accept late-filed information spring, not from any difference in attitude toward the information providers, but from systematic differences in the procedures that the authorities have developed for making the different types of decisions they are called upon to make.

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allowed under US domestic law and the Agreement for responding to questionnaires. Indeed, they received extensions of time in numerous instances, as explained in both Parts A and B above.

[9] First Submission of Japan at 93-94, point 2.

[10] *See* Part A, Introduction, above. Moreover, Japan's complaint regarding this matter arises under U.S. law, not under the Agreement. The task of a panel is to review the consistency of a member's actions with the Agreement and not with that member's domestic laws, regulations or practices. 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. . . ." Further, Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." 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 a covered agreement.

[11] First Submission of Japan at 94, paras. 302-304, n. 209.

[12] First Submission of Japan at 95-96, point 3.

[13] First Submission of Japan at 96-99, point 4.

18. It was by no means extraordinary for the USITC Commissioners to request at the USITC's hearing information that prior efforts had been unable to obtain. At the USITC, Commissioners participate in the information-gathering process by taking part in a hearing following the receipt of questionnaire responses and prehearing briefs from the parties. Under its rules, the USITC may obtain "relevant and material facts with respect to the subject matter of the investigation" during the hearing.[14] The Commission's rules provide that participants in the hearing may also file written answers to questions or requests made at the hearing.[15] It is thus routine for Commissioners to request information from parties -- both those favouring and those opposing an anti-dumping petition -- beyond what questionnaires have yielded.

19. In contrast, the data collection process of the Department of Commerce is geared toward having full information disclosure before the staff travel to the respondent companies for on-site verification of their data.[16] Parties may submit any information they believe to be relevant, in addition to all of the information specifically requested in the Department's questionnaires, prior to this date. After this date, information gathering generally is complete. The Department has the authority to request information after this date; however, such requests are not a part of the Department's normal data collection process. Although the Department may also hold a hearing, such a hearing is held after verification and is solely for the purpose of presentation of legal arguments, rather than for introduction of factual information.[17]

20. These differences in process reflect fundamental differences in the nature of the facts into which the two authorities are inquiring. As Article 2 of the Anti-Dumping Agreement demonstrates, the dumping calculation is largely an inquiry focusing on the sales prices and, where necessary, costs of specific, foreign firms. An authority in making the relevant determination is making detailed findings concerning what is often hundreds or even thousands of specific transactions by particular firms, which are usually located overseas. Thus, for purposes of the requirement of Article 6.6, that authorities "during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based," Commerce relies primarily on the on-site verification of records of specific transactions by qualified professional staff, in keeping with Article 6.7. Correspondingly, the timely provision of information regarding each company's transactions subject to investigation becomes of the utmost importance.

21. While the USITC, the US authority concerned with injury determinations, also is concerned with obtaining timely and accurate responses, the nature of its investigation leads to a different approach, because of its focus on aggregate effects on the industry. It is also concerned with assuring that, pursuant to Article 3.4, it has evaluated "all relevant economic factors and indices having a bearing on the state of the industry." Whereas the Department's consideration of each price or cost factor leads to an adjustment in its dumping margin calculation, the Commission's determination is not controlled by its findings as to each particular factor. As Article 3.4 provides, not "one or several of these factors necessarily gives decisive guidance." Moreover, as Japan has pointed out, the injury determination is concerned, not with transactions by individual companies, but rather with the effect of all dumped imports on the domestic producers as a whole, pursuant to Article 3.1 and Article 4. Consequently, the USITC's hearing helps assure thorough examination of the parties' views of the relevant economic factors and the weight to be accorded to each factor. The ability of the

[14] 19 C.F.R. § 201.13(g).

[15] 19 C.F.R. § 207.25.

[16] *See* 19 C.F.R. § 351.301(b)(1) which generally sets the deadline for submission of factual information in an investigation seven days before the date on which on-site verification is scheduled to commence.

[17] *See* 19 C.F.R. § 351.301(c) which provides that during a hearing "an interested party may make an affirmative presentation only on *arguments* included in that party's case brief and may make a rebuttal presentation only on *arguments* included in that party' s rebuttal brief." (Emphasis added.)

Commissioners to have the questions that they ask at the hearing answered allows them to assure that they have comprehensive information with which to evaluate the various asserted factors.

22. Thus, the USTIC is engaged in a very different endeavour than that engaged in by Commerce, and their respective data gathering processes reflect these differences. The Department is engaged in a calculation. The accuracy of each piece of data is fundamental to ensuring that the ultimate margin of dumping calculated is as accurate as possible. By contrast, the USTIC is engaged in a process of balancing a large amount of potentially contradictory data in which no one piece of data is determinative of the outcome.

23. These differences are also reflected in the different ways that the two authorities use "facts available", as provided for in Article 6.8. The United States Congress recognized these systematic differences in enacting implementing legislation following the Uruguay Round. Specifically, the Statement of Administrative Action to the Uruguay Round Agreements Act states as follows:

> Commerce and the Commission use the facts available in different ways. In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive. Therefore, new section 776(a) generally will require the Commission to reach a determination by making such inferences as the evidence of record supports even if that evidence is less than complete. In contrast, Commerce generally makes determinations regarding specific companies, based primarily on the information obtained directly from those companies. Section 776(a) generally will require Commerce to reach a determination of filling gaps in the record due to deficient submission or other causes.[18]

24. As this Statement describes, and as was discussed above, the Department uses facts available, both adverse and non-adverse, in filling gaps necessary to make the calculations necessary to deriving dumping margins. In contrast, the USITC does not similarly "fill gaps". It almost never takes adverse inferences, against any party. This is both because its findings amalgamate data from numerous firms, some responsive and others not, and because, even if it could take an adverse inferences as to evidence concerning one relevant factor, such an inference would not inform it as to how weigh that factor against the evidence of other factors.

25. In short, that the Department took an adverse inference when data was not timely provided and that the Commission asked for and received information after its hearing data that had not been previously provided does not reflect any bias. Rather, it reflects systematic differences in the ways the authorities, consistent with the Anti-Dumping Agreement, conduct their investigation. Indeed, in their comments to the USITC on the data that domestic producers submitted in response to the Commission's request[19], Japanese respondents did not advise the Commission that the Department had rejected a submission in circumstances that they regarded as similar. There is no basis for ascribing to the Commission any improper motive in the conduct of its proceedings.

26. In fact, far from indicating any prejudgement of the case, the Commissioners' request for additional data on domestic producers' captive production shows that they had an open mind and were determined to obtain the most complete picture possible of effects on the industry. It shows that they were deeply concerned with knowing as much as possible about operations that the Japanese respondents regarded as critical to their position. Obtaining additional information about petitioners' captive operations would be likely to assist, rather than prejudice, respondents, since captive

[18] SAA at 869.
[19] Respondents' Comments on Final Release of Information, filed 7 June 1999

operations are most insulated from the effects of imports. There is no merit whatsoever in Japan's bias claims.

27. Finally, there is also no merit, either legal or factual, in Japan's statement that the USITC did not give Japanese respondents an adequate opportunity to respond to the information that domestic producers provided in response to the Commissioners' questions. Going beyond the requirements of Article 6.9 of the Anti-Dumping Agreement, the USITC throughout its proceeding disclosed to interested parties all information under consideration and provided repeated opportunities for submissions by which they could defend their interests. To assure that interested parties also have time to defend their interests as to information presented in posthearing briefs, the USITC under its rule 19 C.F.R. § 207.30 (a), specifies a date before it finally closes the record on which it will disclose to all parties to the investigation all information it has obtained on which the parties have not previously had an opportunity to comment. Parties are then given an opportunity under 19 C.F.R. § 207.30 (b) to comment on any information they have received (including information in other parties' posthearing briefs) that they have received since they filed their posthearing briefs.

28. The Commission provided such an opportunity in this case. Consequently, Japanese respondents had an opportunity to respond to the domestic producers' submission. They did not contend that the time allowed was inadequate. Nor does Japan's panel request in this proceeding, although it alleges that the Department violated Article 6, allege that the USITC violated Article 6 in any respect, including the requirement of Article 6.9 concerning providing sufficient time for parties to defend their interests. Thus, Japan's statements that the USITC allowed domestic producers to provide information too late for Japanese interests to have an adequate opportunity to respond are merely rhetorical flourishes unsupported by the facts and beyond the claims that Japan has brought in this case.

29. Japan's final argument is that the USITC deviated from its prior practice and ignored the US industry's financial performance early in the period. As demonstrated in Part C above, Japan's claim is untrue, and is based on a misrepresentation both of the USITC's practice and its determination in this investigation.

30. In conclusion, the Panel must disregard Japan's arguments that alleged inconsistencies by the United States, amounting to an alleged denial of due process, constitute a violation of Article X:3. Instead, the Panel must judge each of these issues on its facts, with regard to the specific Anti-Dumping Agreement provision invoked, and not be drawn into vague allegations of general bias under a section of the GATT

II. THE SPECIFIC REMEDY SOUGHT BY JAPAN IS INCONSISTENT WITH ESTABLISHED PANEL PRACTICE AND THE DSU

31. In its first submission, Japan has asked this Panel to recommend that, if the Panel's findings result in a determination that the imported product was not dumped or did not cause injury, or that product was dumped to a lesser extent than the duties actually imposed, the DSB request that the United States revoke its anti-dumping duty order and reimburse anti-dumping duties collected.[20] In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

[20] First Submission of Japan at para. 325 (d) and (e).

32. The specific remedy[21] of revocation requested by Japan goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country "bring its measures . . . into conformity with GATT".[22] This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.[23]

33. This well-established practice is codified in Article 19.1 of the DSU, which provides:

> 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. (footnotes omitted).

34. Indeed, in the first case to work its way through the WTO dispute settlement system, the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.[24]

35. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter," and Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred." To this end, Article 11 of the DSU directs panels to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.[25]

36. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

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[21] By "specific" remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

[22] *See, e.g., Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, Report of the Panel adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States will spare the Panel a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

[23] *See, e.g., Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korean Resins*, ADP/92, para. 302.

[24] In *Reformulated Gasoline*, the Appellate Body recommended "that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*." WT/DS2/AB/R, p. 29. The panel in that case issued a virtually identical recommendation. WT/DS2/R, Report of the Panel, as modified by the Appellate Body, adopted 20 May 1996, para 8.2.

[25] As noted by Prof. Jackson:

> One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than "punishment" or imposing a "sanction" or obtaining "compensation." This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the " withdrawal" of a measure inconsistent with the General Agreement.
>
> John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted).

37. In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.[26] Thus, while it is appropriate for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

38. Japan's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Japan contests certain aspects of the Department's dumping margin calculations, even if the Department were to calculate the margins as Japan prefers, it would still find Japanese imports to be sold at dumped prices. Likewise, as has been seen, Japan does not contend that the Commission could not reach an affirmative determination on the evidence before it, but rather that certain findings in one of the three USITC opinions reaching an affirmative determination were erroneous. Indeed, even if Japan were successful in its challenge to the United States statute's captive production provision, such a holding by the panel would not affect the decisions of a dispositive plurality of USITC Commissioners. Thus, even on Japan's own arguments, it would be possible for the United States authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the anti-dumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse Panel findings.

39. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

40. In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Japan's request for specific remedies should be rejected.

CONCLUSION

41. Based on the foregoing, the United States respectfully requests the Panel to find that:

- The information submitted to this Panel by Japan that was not made available to US authorities during the course of the anti-dumping investigation at issue will be disregarded in this proceeding;

- Japan's claim concerning the United States's general practice with respect to "facts available" 21 July 2000 was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference;

- The specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are consistent with the provisions of the Anti-Dumping Agreement identified by Japan in its submission at para. 325 (a);

[26] Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

- None of the actions identified by Japan in its submission at para. 325 (b) was inconsistent with Article X:3 of the GATT 1994;

- The United States' anti-dumping laws, regulations, and administrative procedures governing the issues identified by Japan in its submission at para. 325 (c) are not inconsistent with the provisions of the Anti-Dumping Agreement identified in that paragraph.

- The specific remedies requested by Japan in its submission at para. 325 (d) and (e) are contrary to established practice and the DSU.

ANNEX A-3

Response of Japan to the Preliminary Objections of the United States

(10 August 2000)

1. Japan hereby responds to two preliminary objections raised by the United States in its 24 July 2000 First Submission to the Panel in this dispute.

A. EXTRA-RECORD POST-INVESTIGATION EVIDENCE

2. The United States first claims that certain documents referred to in Japan's First Submission were not part of the administrative record of either the US Department of Commerce ("USDOC") or US International Trade Commission ("USITC") and should therefore be disregarded by the Panel. This objection, however, is premised on (1) a misinterpretation of the Anti-Dumping Agreement, (2) a misunderstanding of the purpose of the documents included in Japan's First Submission, and (3) in some cases, a misrepresentation that the documents were extra-record when in fact they were on the record.

1. The United States' Interpretation Of Article 17.5 Of The Anti-Dumping Agreement Is Simply Wrong

3. The United States bases its objection to so-called "extra-record" evidence on what it considers to be limiting language in Article 17.5(ii) of the Anti-Dumping Agreement. The United States' reliance on this provision, however, is misplaced. Article 17.5(ii) requires the Dispute Settlement Body ("DSB") to establish a panel to examine a matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". The provision says nothing about what was on or off the "administrative record" as defined by the authority. Instead it addresses facts "made available in conformity with appropriate domestic procedures." Inherent in this clause is the possible existence of facts that were not on the official administrative record, but were, in fact, "made available in conformity with appropriate domestic procedures", such as the information submitted by NSC and NKK that was expunged from the record by USDOC (as discussed in greater detail in paragraphs 15 through 17 below). Also inherent in the provision is the possibility that the domestic procedures adopted were not "appropriate". In many instances, this is exactly what Japan has argued: that the procedures adopted by the United States were biased and non-objective and therefore not "appropriate". It may be rational to interpret Article 17.5 to preclude Members from submitting, for example, a new inland freight adjustment to a Panel when that information was not provided to and examined by the authority in the original investigation. However, Members must be permitted to submit evidence that explains or demonstrates how the authority's investigation procedures or determinations were unfair, unreasonable, or biased.

4. Indeed, much of what the United States calls "extra-record" information in its objection has been provided to the Panel precisely *because* it was not on the administrative record. Remember that part of the purpose of bringing this dispute is that under Article 17.6 of the Anti-Dumping Agreement the United States has (a) acted in bad faith by conducting a biased and non-objective investigation and/or (b) failed to establish the facts properly. If an authority has acted in bad faith, it is no wonder

that evidence of such acts are not on the administrative record.[1] It stands to reason, therefore, that if a party is to prove that an authority has acted in bad faith, then non-record evidence must be considered by the Panel. Likewise, if an authority has failed to establish the facts properly, then it is quite possible that it improperly excluded facts from the record. The Panel must be made aware of such facts to determine whether, in fact, the authority has failed in its obligation to establish the facts properly. Blind adherence to the US position would only encourage authorities to remove information from the record so that it could not be used against them in dispute settlement proceedings before the WTO.

5. Conveniently, the United States appears to ignore the fact that under US trade law, the rules of evidence do not work in the same way as they work before US courts (as well as other courts around the world). Under the judicial rules of evidence, there are methods by which a party may object in order to record the fact that a judge acted in a biased fashion. Trade cases are different. Even if a party submits information, USDOC sometimes returns that information to the party and expunges it from the record (as it did in this case). USDOC's role as prosecutor, judge, and jury therefore gives it leeway to prohibit certain information from entering the record. Furthermore, these multiple roles make it virtually impossible for the respondent to claim bias during the course of an investigation.

6. Furthermore, the United States' position is in direct contrast to positions taken in other WTO proceedings. For example, the United States itself has promoted the submission of amicus curiae briefs by non-governmental organizations that contained factual analysis opposed by interested Member countries.[2] In another recent case, the United States convinced the panel to accept other "extra-record" evidence that supported its legal arguments, under panels' broad discretion to accept evidence under DSU Articles 11 and 13.[3] The United States cannot now be allowed to take a contradictory position in this case and oppose the submission of factual information essential to Japan's legal claims. Rather, the Panel should exercise its substantial discretion to accept evidence. DSU Article 11 states that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Disregarding facts put forth by one of the parties that go to the heart of the issues being examined by a panel would violate DSU Article 11. Moreover, the Appellate

[1] As discussed in greater detail below, much of the challenged "extra-record" evidence were press articles, reporting the political atmosphere surrounding the anti-dumping investigation. The articles reported statements by USDOC officials or meetings between the US industry representatives and relevant US government officials. In fact, one of the Japanese respondents argued during the investigation that USDOC should formally place such evidence on the administrative record -- that is, that it be "made available in conformity with appropriate domestic procedures" under Article 17.5(ii). USDOC denied the request and thereby kept this damaging evidence of bias off the record. *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24347 (Exh. JP-12). The United States interpretation of Article 17.5, which would allow consideration of only the administrative record the United States deems "official," would deprive a panel of probative evidence and lead to absurd results.

[2] *See United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 10 May 2000, at para. 38; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at para. 79.

[3] The United States itself has aptly argued that "it could attach as an Exhibit to its submission in an anti-dumping case the phone book of Mexico City. The issue would not be its admissibility, but rather what evidentiary weight the Panel should attach to the information in the phone book." *See Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, WT/DS132/R, 28 January 2000, at n.540. Importantly, the Panel sided with the United States in that preliminary dispute under the Anti-Dumping Agreement by accepting extra-record evidence. *Id.* para. 7.34.

Body has made it clear that, based on DSU Articles 12 and 13,[4] it is the responsibility of the panel to determine the admissibility and relevance of evidence proffered by the parties to a dispute.[5]

7. By relying on an unreasonably narrow reading of Article 17.5(ii), the United States implicitly argues that Article 17.5(ii) trumps the "objective assessment" requirements of DSU Article 11. This argument fails. The Appellate Body has held that a provision from the Anti-Dumping Agreement trumps the language of a more general provision only when there is a direct *conflict*.[6] Specifically, the Appellate Body stated:

> In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.[7]

8. The Appellate Body specifically addressed Article 17 of the Anti-Dumping Agreement in particular, stating, "[t]o read Article 17 of the *Anti-Dumping Agreement* as *replacing* the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU."[8] The Appellate Body, therefore, concluded that the Panel had "erred in finding that Article 17 of the Anti-Dumping Agreement 'provides for a coherent set of rules for dispute settlement specific to anti-dumping cases . . . that replaces the more general approach of the DSU."[9]

9. In this situation, there is no conflict between Article 17.5(ii) of the Anti-Dumping Agreement and Article 11 of the DSU. Indeed, Article 11 is *necessary* in order for a Panel to ensure that the procedures were "appropriate" under Article 17.5(ii) and that the facts were "proper" and analyzed in an "unbiased and objective" manner under Article 17.6(i). The US Submission asserts the existence of a conflict, but it never actually identifies any conflict.

10. Moreover, Japan raises *both "on-its-face" and "as-applied" challenges* in this case. Japan's *on-its-face* challenges do not depend on administrative record evidence. As discussed in more detail below, for example, the statisticians' affidavit supports, *inter alia*, Japan's *on-its-face* challenge

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[4] DSU Article 12.2 provides that "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports." Article 13.1 states, "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate." Similarly, Article 13.2 begins, "Panels may seek information from any relevant source . . . ."

[5] *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras. 104-106. The Appellate Body stated:

> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements*." (Emphasis added in the report.)

[6] *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, adopted on 2 Nov. 1998, WT/DS60/AB/R, para. 65.

[7] *Id.* (emphasis in original).

[8] *Id.* at para. 67 (emphasis in original).

[9] *Id.* at para. 68 (original emphasis removed).

against the United States 99.5 per cent arm's length test.[10] Article 17.5(ii) guides the Panel only with respect to challenges of actual investigations. It does not, however, guide the Panel with respect to a *on-its-face* challenge pursuant to, *inter alia*, Article 18.4 of the Anti-Dumping Agreement, which requires Members to ensure the "conformity of its laws, regulations and administrative procedures." Perhaps the United States is confused, or it is now trying to confuse the Panel, but much of the so-called "extra-record" information speaks directly to the statutory, regulatory, and practical implementation of the Anti-Dumping Agreement.

11. In addition to the Article 17.5 argument, the United States bases its challenge to allegedly extra-record, post-investigation evidence on Article 6.1 of the Anti-Dumping Agreement, claiming that the Japanese respondents had ample opportunity to place evidence on the record during the investigation. This assertion is not entirely true, for the reasons discussed below. All of the evidence to which the United States refers in making its arguments under Article 6 is relevant to this dispute—particularly in light of the requirements of Article 17—and should not be eliminated from the Panel's consideration.

12. Finally, Japan's claims in the case are *not* limited to challenges under the Anti-Dumping Agreement. Importantly, *Japan has also raised claims under Article X of the GATT 1994*. These claims are to be examined *in conjunction* with the claims made by Japan under the Anti-Dumping Agreement. Obviously, Article 17.5(ii) of the Anti-Dumping Agreement does not apply to challenges made under the GATT 1994. The United States has provided no legal basis at all to dismiss so-called "extra-record" evidence that relates directly or indirectly to the Article X claims in this case. The United States ignores the GATT 1994 challenges.

2. Each Piece Of Evidence To Which The United States Objects Is Relevant To The Dispute And Should Not Be Disregarded

13. Each piece of evidence to which the United States objects is relevant to the dispute and should not be disregarded. We address each category of evidence below.

(a) Attorney Affidavits

14. The attorney affidavits provide the Panel with concrete evidence of the margin impact of various violations committed by USDOC. Japan felt compelled to provide such evidence to the Panel because other panels (incorrectly, Japan believes) have rejected arguments that were not accompanied by proof that the violation had an impact on the margin being calculated.[11] It is not USDOC's practice to include on its record what the margin results would have been, had it adopted any number of other possible margin calculations; indeed, we would not expect it to do so. Furthermore, it would not be in USDOC's interest to do so as it would prevent them from trying to remove certain factual information from a panel's consideration, as it is doing here. We would be surprised if the United States argued for two mutually exclusive rules in disputes before the DSB: one that says proof of impact is required, but another that says such proof may not be presented. It simply makes no logical sense.

15. Beyond this proof-of-impact information, the only other non-record information in the attorney affidavits is that which is proffered to show USDOC was either biased in its investigation or failed to establish the facts properly. In particular, the affidavits of Mr. Porter and Mr. Plaine provide information about the disputed weight conversion factors that USDOC improperly expunged from the

[10] It also supports the Government of Japan's "as applied" argument, in that it demonstrates the bias with which USDOC analyzed the facts.

[11] *See, e.g., United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, 41S/229 BISD, at para. 483.

record, such as how the factors were calculated. The affidavits also present facts describing USDOC's verification procedures: USDOC verified NKK's weight conversion factor, but affirmatively refused to verify NSC's factor or the circumstances that led to NSC's mistaken belief it could not provide the factor. USDOC excluded such clearly relevant information from its verification report, which constitutes the administrative record of the verification.

16. In his affidavit, Mr. Porter also explains what guidance USDOC officials gave regarding NKK's response to supplemental questions about the weight conversion factor. Indeed, USDOC should have placed the content of this conversation on its administrative record because it was part of its administrative proceeding. The failure of US authorities to maintain complete records of the administrative proceeding does not negate the status of the information as part of that proceeding. This conversation is not new factual information that was not made available to the authorities; the same official that participated in that conversation drafted the dumping determinations.

17. The affidavits are the only way to inform the Panel of USDOC's improper establishment of the facts. The rashness of USDOC's actions and the resulting unreasonable application of adverse facts available are at the heart of Japan's claims that USDOC's application of the US statute was inconsistent with the Anti-Dumping Agreement. Importantly, all of the facts in the affidavits were "made available in conformity with appropriate domestic procedures" in accordance with Article 17.5(ii). USDOC itself violated those same domestic procedures by removing some facts from the record or failing to place other facts on the record. As demonstrated above, it makes no sense to reject information from a panel's consideration when the whole point of the argument is that the authority failed to conduct a proper investigation.

18. The odd arguments presented in Paragraphs 66 and 67 of Part A of the US First Submission also make no sense. The United States appears concerned that members of the US domestic industry are not being afforded an opportunity to respond to the allegations made in the affidavits by attorneys representing the respondents in the underlying investigation. The United States could easily sit down with members of the US domestic industry and provide affidavits of its own if it so desired. However, the United States did not and probably would not do this because the information in the affidavits does not challenge the substance of this investigation, but rather it demonstrates the *bias demonstrated by the US anti-dumping authorities in carrying out this investigation*. The proper party to respond to these allegations is the US Government.

(b) Statisticians' Affidavit

19. The United States' challenge to the statisticians' affidavit is beyond the pale.[12] The point of the affidavit is to offer additional proof that the arm's length test is *unfair*—an obviously relevant inquiry in determining whether the test results in a "fair comparison" as required by Article 2.4 of the Anti-Dumping Agreement. In other words, this affidavit is not offered to provide the Panel with extra-record evidence; rather it represents expert testimony to assist Japan in making a legal argument about what is and is not "fair."

20. The United States appears to confuse an important distinction between disputes before the WTO and disputes before its own courts. The body of law that governs this dispute is the WTO Agreements; the body of law that governs an internal US dispute is US law. Under US law, Japanese respondents would not have had a reason to argue the meaning of the words "fair comparison" as they appear in the Anti-Dumping Agreement. We obviously do here, and must not be constrained in crafting arguments concerning the meaning of those words.

[12] US First Submission, para. A-62 to A-67; Japan First Submission, para. 168 & Exh. JP-56.

21. Moreover, all of the data on which the statisticians' more detailed analysis and conclusions were based was indeed on the record of the original investigation. So, what the United States appears to be arguing with respect to this affidavit is that no new *legal* arguments may be devised by parties before the WTO with the assistance of experts if they were not raised before the authority in the administrative proceeding that is the subject of the dispute.

22. This simply cannot be the case. First, we note that such testimony has been permitted before other panels.[13] Second, it would be absurd to require parties to anticipate all possible WTO objections during an anti-dumping proceeding, and then anticipate all possible expert opinion in support of these WTO legal theories, and submit those opinions during the proceedings. In fact, there is no international law equivalent in WTO proceedings of "exhaustion of administrative remedies". A Member does not lose its rights to make legal claims under the WTO if it does not raise that claim under the domestic law proceedings of a Member country. Third, Japan is *not* urging the Panel to adopt any specific statistical test. Rather, the affidavit is intended solely to support the legal argument that the current US practice is "unfair."

(c) Newspaper Articles and Scholarly Commentary

23. The United States also argues that some of the citations in Japan's First Submission are "extra-record" material and therefore should also be disregarded.[14] Many of the documents the United States identifies as extra-record, however, were in fact on the record and therefore "made available" to USDOC, having either been cited or submitted by one or more of the respondents; others merely reflect the substance of the arguments made before USITC or USDOC. The remaining documents describe the political pressure brought to bear on the US authorities during the investigation; without these facts, the Panel cannot evaluate whether the United States acted in bad faith or properly established the facts.

(i) The United States Incorrectly Identified Articles As Not On The Record

24. The following table summarizes where several of the challenged articles either appeared on the record or were cited in submissions on the record:

US First Submission Reference	**Challenged Citation**	**Citation to Administrative Record**
Part A, footnote 85	*Preston Pipe & Tube Report* (Nov. 1998) (Exh. JP-67)	attached to Respondents' USITC Prehearing Brief as Exhibit 21B
Part A, footnote 85	*Preston Pipe & Tube Report* (Sept. 1998) (Exh. JP-67)	attached to Respondents' USITC Prehearing Brief as Exhibit 21D
Part A, footnote 85	Scott Robertson & Frank Haflich, "US mills lift slab purchases," *American Metal Market* at 1 (Feb. 8, 1999) (Exh. JP-32)	attached to Respondents' USITC Prehearing Brief as Exhibit 4T

[13] *See, e.g., United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, 41S/229 BISD, at para. 170 (accepting and considering an affidavit presenting a statistical analysis).

[14] *See* US First Submission at A-23 to A-24.

US First Submission Reference	Challenged Citation	Citation to Administrative Record
Part A, footnote 86	PaineWebber, "*Steel: A Gauntlet for All, Rewards for the Select*," Steel Strategies #24 (June 1998) (Exh. JP-34)	cited at Respondents' USITC Prehearing Brief, n.127-28, *inter alia*
Part A, footnote 86	Charles Yost, "Thin Slab Casting/Flat-Rolling: New Technology to Benefit US Steel Industry," in USITC, *Industry Trade and Technology Review*, 1996 ITC Lexis 428 (Oct. 1996) (Exh. JP-34)	attached to Respondents' USITC Posthearing Brief, Answers to Questions from Commissioners, as Exhibit 1
Part A, footnote 86	Donald Barnett and Robert Crandall, "Steel: Decline and Renewal," in *Industry Studies* (2nd ed. Larry Duetsch, ed. 1998) (Exh. JP-35)	attached to Respondents' USITC Prehearing Brief as Exhibit 17

25. There can be no question that these articles were part of the original administrative record, were "made available" in accordance with Article 17.5(ii), and constitute a valid basis for arguments raised in Japan's First Submission.

(ii) Other Documents Are Simply Alternative Sources For Arguments Made During The Investigations

26. The United States challenges other citations in Japan's First Submission, which do not appear in the administrative record, but are alternative sources for substantive arguments made during the investigations.[15] Contrary to the US Government's assumption, the citation to alternative sources does not indicate a weakness in the factual basis on the record.[16] Rather, the substantive arguments were argued in full, with ample opportunity for rebuttal, in the underlying proceedings.

27. Specifically, the condition of the US steel industry during the period investigated was raised at USDOC and USITC. In a 26 October 1998, submission to USDOC, opposing petitioners' request for early critical circumstances preliminary determination, the Japanese respondents discussed the US industry's positive financial performance and strong domestic demand for hot-rolled steel.[17] Respondents' letter provided documented statistics about US producers' profits from 1995 to June 1998—much of the same period summarized in the chart criticized by the US submission. At USITC, respondents analyzed the financial condition of the US industry, devoting significant portions of their postconference, prehearing, and posthearing briefs to the subject.[18] There were volumes of information on the record to support their analysis. And where US producers had not provided

[15] *See id.* at A-24, n.85 (citing a Graph of Hot-Rolled Industry Composite - Profit From Operations and *World Bank Annual Report 1999* (Exh. JP-33)); A-24, n.87 (citing Transaction Pricing Service, *Purchasing Magazine* (Exh. JP-36)).

[16] For example, compare Exhibit JP-36 (Transaction Pricing Service, *Purchasing Magazine*) to Exhibit 6 to Respondents' Posthearing Brief, Answers to Question from the Commission, using the same source to plot hot-rolled steel prices.

[17] Willkie Farr & Gallagher letter to USDOC of 26 Oct. 1998, at 15-22 (Exh. JP-57).

[18] Respondents' USITC Posthearing Brief, at 17-20 (12 May 1999); Respondents' USITC Prehearing Brief, at 25-47 (29 Apr. 1999); Respondent's USITC Postconference Brief, at 19-25 (27 Oct. 1998).

complete information, respondents made reasonable assumptions from the record and other evidence. The fact that Japan's First Submission cites two other sources to make the same argument does not negate the extensive debate that occurred in the underlying investigations. For the convenience of the Panel, Japan chose the most succinct documentary support available. But if the Panel prefers more voluminous information from the record, additional excerpts from respondents' briefs that did not appear in Japan's First Submission are provided in an exhibit hereto.[19]

28. Similarly, the United States challenges Japan's reliance on a series of articles documenting US producers' purchases of imported steel to feed their downstream operations.[20] Respondents addressed this issue in detail in their USITC prehearing brief as evidence of an acute shortage of hot-rolled steel in early 1998—an important alternative cause of injury.[21] Much of the specifics of this discussion was based on US producers' proprietary information. Japan did not have access to this proprietary information to prepare its First Submission, but the argument is important nonetheless. Therefore, it was necessary to find alternative sources to support the discussion. Because the issue was raised and argued during the USITC investigation, the US industry has not suffered from a lack of opportunity to rebut the substance of the discussion. To alleviate the US Government's concerns about so-called extra-record evidence, excerpts of respondents' USITC prehearing brief are provided at **Exhibit JP-77**.

(iii) Evidence Of Bias Cannot Be Submitted During The Investigation

29. Article 17.6(i) charges the Panel with examining whether the authorities' evaluation of the facts on the record was "unbiased and objective." Political pressure from interested parties is one source of bias that can clearly affect objectivity. The remaining sources questioned by the United States concern the highly charged political climate that surrounded the US anti-dumping investigations.[22] The US steel industry and unions lobbied the US administration and Congress aggressively to influence the outcome of the hot-rolled investigation. Obviously, if these efforts were successful (and the evidence suggest that they were), the US officials responsible for the investigations would not react favourably to allegations by respondents that questioned the integrity of the system. Respondents' most effective arguments before the agencies that stood as prosecutor, judge, and jury were the straight-forward factual and legal arguments presented throughout the proceedings. While there was a suspicion and concern that the lobbying efforts would bias the agencies' decision-making, there was always the possibility that the authorities would resist that pressure and instead make decisions based on law and facts. Unfortunately, the bias won.

30. The Panel must consider this evidence to determine whether the authorities were biased or unobjective. Without this context, the Panel would be reviewing the record *as created by the authorities themselves*. Logically, the authorities would not themselves place evidence of such strong political pressure on the record or even allow such evidence to appear in the record. In fact, NSC tried to force USDOC to place on the record certain *ex parte* discussions between USDOC officials and US producers and others, but USDOC refused.[23] Under the US anti-dumping law, USDOC is required to maintain a record of all *ex parte* meetings between USDOC officials and "interested parties" (including representatives of petitioners) at which information relating to an anti-dumping proceeding is presented or discussed.[24]

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[19] *See* Exhibit JP-77.

[20] *See* US First Submission at A-24, n.85 (citing articles regarding US mills' purchases of semi-finished steel (Exh. JP-32)).

[21] Respondents' USITC Prehearing Brief, at 109-113 (29 Apr. 1999).

[22] *See* .. First Submission, at A-24 n.88 (citing press articles at Exhibits JP-16 to JP-23, JP-25 to JP-26 and the introduction of Japan's First Submission).

[23] *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24347 (Exh. JP-12).

[24] 19 U.S.C. § 1677f(a)-(c).

31. USDOC routinely breached this fundamental obligation. After the petition was filed, numerous meetings occurred between USDOC officials (and other members of the Administration) and representatives of the petitioners or other domestic interested parties. However, no memoranda memorializing these or any other *ex parte* meetings between petitioners or other interested parties and members of the Administration concerning the issues presented in this matter were written and placed in USDOC's official record. Absent this other evidence that USDOC deliberately excluded from the record, the Panel should exercise its discretion under Article 13 and consider these press articles about the political atmosphere of the hot-rolled steel investigations and their impact on USDOC's decision-making.

B. ESTABLISHED PRACTICE OF APPLYING ADVERSE FACTS AVAILABLE TO PUNISH RESPONDENTS

32. The United States has challenged Japan's claims concerning USDOC's established practice and method of applying adverse facts available as outside the Panel's terms of reference.[25] The United States is simply wrong.

33. First, it is important for the Panel to recognize that the United States is intentionally blurring the distinction between challenging a statute on its face and challenging a general practice established under a statute. Japan has not challenged the US statutory provision permitting the application of adverse facts available, but rather the manner in which that provision has been applied in general practice by USDOC. Therefore, the comparison set forth by the United States (First Submission, Part A, Para. 70) between the panel request with respect to facts available and the panel request with respect to "on its face" violations involving statutory provisions is misplaced. Japan's use of certain language when making a direct challenge to the precise words of a statute did not preclude its ability to challenge the application of a general practice using different language to describe the violation.[26]

34. Not surprisingly, the United States dismisses—as it has with nearly all of Japan's non-Anti-Dumping Agreement claims—the basis for Japan's claims against established practices. Paragraph 60 of Japan's First Submission states as follows:

> 60. The Panel should therefore deem USDOC's established practice of applying adverse facts available to punish respondents as inconsistent with Articles 6.8 and Annex II. Such established practices are subject to facial challenge under Article XVI:4 of the WTO Agreement which requires that "Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements."[27] The Panel in *US—Section 301* found that

[25] US First Submission, at A-24 to A-27, para. 69-76. Noticeably, the United States did not make a similar challenge to Japan's claim regarding the USDOC's 99.5 per cent arms' length test. There as well, Japan specified only the "dumping determination," but has included a general attack of the practice because it was that general practice that was employed by USDOC and applied to the Japanese respondents. *See* Government of Japan, Request for the Establishment of a Panel, para. A-1; Japan First Submission, para. 151. With respect to both the arm's length test and adverse facts available, USDOC applied a general practice that should be addressed both generally as well as in the context of this specific case.

[26] In its panel request, Japan argued against USDOC's application of facts available "*under its statute.*" *See* Government of Japan, Request for the Establishment of a Panel, para. A-2. USDOC applied facts available in this case based on a general practice that it regularly employs "*under its statute*." In other words, what was applied by USDOC in this case *was a general practice*.

[27] Article 18.4 of the Anti-Dumping Agreement confirms in substantially identical terms the same requirement for domestic anti-dumping laws. According to Article XVI:3 of the WTO Agreement, any conflict between a provision of the Anti-Dumping Agreement and a provision of the WTO Agreement has to be resolved in favour of the provision of the WTO Agreement. This suggests that Article XVI:4 of the WTO Agreement ranks higher than Article 18.4 of the Anti-Dumping Agreement in the hierarchy of WTO provisions. Japan will

the phrase "laws, regulations and administrative procedures" in Article XVI:4 should be read broadly, stating:

> even though the statutory language granting specific powers to a government agency may be prima facie consistent with WTO rules, *the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation . . .* "[28]

A Panel must therefore examine a Member's anti-dumping law as a whole, including the generally applicable interpretations of those laws and regulations adopted by the domestic anti-dumping authorities.[29] This includes interpretations such as USDOC's policy with respect to adverse facts available.

35. In short, Japan's challenge to the established practice of applying adverse facts available in a manner to punish respondents is based on Article XVI:4 of the WTO Agreement (as well as Article 18.4 of the Anti-Dumping Agreement). Japan's panel request clearly stated:

> E. CONFORMITY
>
> By maintaining the above-detailed laws, regulations and administrative rulings of general application which are not in conformity with its obligations under the WTO agreements, the United States has acted in a manner inconsistent with Article XVI: 4 of the Marrakesh Agreement as well as Article 18.4 of the Anti-Dumping Agreement.

36. The panel on *United States—Anti-Dumping Act of 1916* pointed out that when a domestic law has been applied in specific instances, its WTO-conformity must be determined on the basis of the actual practice under the law. Specifically, the panel ruled that in such a case the issue was not only whether the domestic law as such could possibly be interpreted in a WTO-consistent manner, but also whether the law as actually interpreted and applied by the domestic authorities was WTO-consistent. That panel therefore examined whether the Anti-Dumping Act of 1916 "as currently applied" by the US courts and administration was consistent with the United States' WTO obligations.[30] As pointed out above, the panel that examined US Section 301 similarly concluded that the consistency of statutory provisions had to be determined in light of the criteria and procedures used to implement them. The United States was thus fully aware of the fact that Japan's claim that the US laws, regulations, and administrative rulings specified in the panel request are inconsistent with Article 18.4

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therefore focus its discussion below exclusively on Article XVI:4. However, if the Panel were to regard Article 18.4 of the Anti-Dumping Agreement as the applicable provision, Japan's references to Article XVI:4 should be understood as references to Article 18.4 of the Anti-Dumping Agreement.

[28] *United States—Sections 301-310 of the Trade Act of 1974*, 22 Dec. 1999, WT/DS152/R, at paras. 7.24-7.27 (emphasis added) ("*US—Section 301*").

[29] Article XVI:4 reflects the fact that domestic law at odds with WTO law generally creates uncertainty for private operators, thereby adversely affecting the competitive opportunities for the goods or services of other Members. The WTO agreements seek to ensure that goods or services of domestic and foreign origin are accorded equal competitive opportunities. A party does not act in good faith if it accepts an obligation stipulating one behaviour, but adopts domestic law calling for another. The *US—Section 301* Panel embraced this view. *Id.* paras. 7.81, 7.90.

[30] *United States—Anti-Dumping Act of 1916—Complaint by the European Communities*, 31 Mar. 2000, WT/DS136/R, paras. 6.85-6.89 (unadopted).

of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement would entail an examination of the interpretation and application of those laws by the US authorities. By including in its panel request a reference to all "above-detailed laws, regulations, and administrative rulings" and explicitly claiming them to be inconsistent with Article XVI:4 of the WTO Agreement, Japan thus made it perfectly clear to both the United States and interested third countries that the matter it was submitting to the DSB comprised not only the actions taken in the specific case but also the US anti-dumping law on which these actions were based. This includes the law governing the application of facts available as interpreted and applied by USDOC. It is therefore unclear to Japan how the United States can seriously claim to be surprised by Japan's request for a ruling on this topic.

37. Finally, regardless of whether Japan could have been more precise in its panel request with respect to this issue, the United States has not demonstrated how Japan's panel request has prejudiced United States' ability to defend itself.[31] As for the US argument that third parties have now missed the opportunity to reserve their rights to intervene, these are third party rights, not US rights. Even if third parties would have been interested in the dispute if they had known more details, this will happen in every case -- unless the complaining party includes a copy of its entire first submission along with its panel request. This has nothing to do with the ability of the United States to defend itself.

38. In any event, the dispute surrounding the established US facts available practice serves first and foremost to support Japan's legal argument that the United States applied adverse facts available against the three respondents based on an impermissible interpretation of the Anti-Dumping Agreement. Even if the Panel were to decide that Japan has improperly broadened its challenge against the US practice in general, the Panel should still consider the section of Japan's First Submission titled "USDOC's Established Practice of Applying Adverse Facts Available To Punish Respondents Is Inconsistent With Article 6.8 and Annex II of the Anti-Dumping Agreement" as general support for the argument that the United States acted inconsistently with the Anti-Dumping Agreement in the hot-rolled steel investigation.

* * * *

39. The United States has failed to provide adequate justification for the Panel to reject the evidence and arguments challenged in the preliminary objections contained in the US. First Submission. Instead, the US challenge to these items in Japan's First Submission has merely served to highlight several of Japan's claims, including (a) that USDOC's establishment of the facts was improper (*see* Anti-Dumping Agreement, Art. 17.6(i)); (b) that USDOC's evaluation of those facts was biased and non-objective (*see* Anti-Dumping Agreement, Art. 17.6(i)); and (c) that WTO Agreement Article XVI:4 provides justification for the Panel to rule on and issue a remedy addressing established practices rather than merely the effects of those practices in any given dispute.

Japan hereby respectfully requests that the Panel reject the US preliminary objections.

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[31] The Appellate Body has placed the burden on the responding country to demonstrate how it was prejudiced by the method of listing violations in the panel request. *See Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products*, 14 Dec. 1999, WT/DS98/AB/R, at para. 129-131. Even the mere listing of articles can be sufficient if no prejudice is demonstrated. *Id.* at para. 131.

ANNEX B

Third Party Submissions

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ANNEX B-1

Submission of Brazil as a Third Party

(31 July 2000)

INTRODUCTION

1. Like Japan, many of Brazil's exports to the United States have been subjected to US anti-dumping measures. Also like Japan, these measures have often been aimed at steel products as the US steel industry has moved from grey measure protectionism in the form of trigger prices and voluntary restraint agreements in the 1970s and 1980s to anti-dumping and countervailing duty measures in the 1990s.

2. Brazil and its exporters have long argued that something should be done to curtail the abuses of the US "unfair trade" laws. Japan's first submission before this Panel addresses some of the most egregious of these abuses, as applied in the hot-rolled steel investigations. Given Brazilian exporters' first-hand knowledge of such abuses in this and other cases, Brazil joins Japan in its effort to bring them to a halt.

3. The instant anti-dumping investigation was particularly troubling for Brazil given its small participation in the US market. At their peak in 1998, imports from Brazil accounted for only 0.6 per cent of US consumption. In the period examined, imports from Brazil increased less than 200,000 tons, while US consumption increased by nearly seven million tons, 35 times the size of the increase in imports from Brazil. Yet, imports from Brazil were nonetheless included along with those of Japan and Russia in the US Government's investigation of hot-rolled steel imports.

4. Despite its own involvement and knowledge of these investigations, Brazil does not intend to focus in this third-country submission on the specific factual abuses raised by Japan. Instead, we intend to address US practices that raise broad, systemic concerns for Brazil and all other countries subjected US anti-dumping measures. These include:

- the US Department of Commerce's ("USDOC") established practice of applying "adverse" facts available in a manner inconsistent with both the spirit and letter of the Anti-Dumping Agreement ("AD Agreement"), and the inclusion of such facts available margins in the calculation of the all others rate;

- USDOC's established practice of applying the unfair 99.5 per cent "arm's length" test that not only inappropriately excludes bona fide home market sales from the calculation of normal value, but also results in the burdensome requirement that the resales made in the home market by affiliated customers be reported in order to replace sales that fail the arm's length test;

- USDOC's new critical circumstances policy, which permits the application of retroactive duties despite the absence of sufficient evidence of any of the factors required under the AD Agreement, and chills trade regardless of whether the USITC ultimately agrees to require importers to pay retroactive duties;

- the captive production provision of US law that requires USITC, under certain factual scenarios, to ignore the domestic industry's internal transfers in its injury and causation analysis; and

- the failure of the USITC to distinguish between injury caused by imports and injury caused by other factors, in particular the increase in production by US minimills during the period of alleged injury.

In addition to the unfair dumping margins and affirmative injury determinations that result from these abuses, the Panel should also bear in mind one other inevitable result: companies are simply choosing not to participate in USDOC anti-dumping investigations, hoping instead that the USITC will prove a more reasonable forum in its injury investigation. The Panel should curtail the application of anti-dumping measures that lead to such results.

I. THE CONCEPT OF GOOD FAITH SHOULD GUIDE THE PANEL

5. Before turning to the specific abuses identified by Japan, Brazil wishes to elaborate on the arguments concerning good faith that Japan addressed in its first submission. Unlike most cases brought before the Dispute Settlement Body ("DSB"), the political nature of the hot-rolled steel investigations conducted by the United States raises serious questions of whether or not those investigations were conducted in good faith. As the Panel considers the substantive issues raised by Japan, it should be mindful of the requirement placed on all Members to implement their obligations under the WTO Agreements -- including the application of anti-dumping measures -- in good faith.

A. THE CONCEPT OF GOOD FAITH IS AN ELEMENTAL TOOL OF INTERPRETATION

6. The concept of good faith has become increasingly important as an interpretive tool for defining the rights and obligations of WTO Members under various provisions of the WTO Agreement. Article 3.2 of the DSU directs that existing provisions are to be clarified "in accordance with customary rules of interpretation of public international law." Perhaps the most important of such "customary rules" is the concept of "good faith" as set forth in Article 26 of the Vienna Convention.[1]

7. The Appellate Body has recognized repeatedly the importance of the concept of good faith in ensuring due process rights and fundamental fairness, when a Member provides its government officials with discretion.[2] In general, the Appellate Body has instructed that the *abusive* exercise of a

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[1] Article 26 of the Vienna Convention mandates good faith implementation of all treaty obligations. *See* Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 *International Legal Materials* 679 ("Vienna Convention"). Article 26 establishes the concept of *pacta sunt servanda* and is appropriately titled as such. *Id.* The provision states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." *Id.*

Article 26 is directly incorporated into Article 31 of the Vienna Convention through Article 31(3)(c), which provides: "There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties." Numerous scholars describe good faith as a fundamental principle of international law. *See e.g.*, T.O. Elias, *The Modern Law of Treaties* 40 (1974); Virally, M. "Review Essay: Good Faith in Public International Law," 77 *Am. J. Int'l L.*130, 130 (1983) (reviewing E. Zoeller, *La Bonne Foi en Droit International Public* (Paris Editions A. Pedone 1977)).

[2] *See e.g., United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, adopted on 6 Nov. 1998, WT/DS58/AB/R at para. 158 and n. 156 (*"US—Shrimp"); United States—Tax Treatment for "Foreign Sales Corporations*," adopted on 20 Mar. 2000, WT/DS108/AB/R, at para. 166 (*"US—Foreign Sales Corporations"*).

treaty right results in a breach of the treaty rights of other Members.[3] In this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations.

B. GOOD FAITH IS THE KEY TO A PROPER INTERPRETATION OF THE WTO AD AGREEMENT

8. The concept of good faith is particularly important when interpreting the WTO AD Agreement.[4] Anti-dumping procedures take the form of investigative and quasi-judicial procedures, both of which impart a large amount of discretion to the administering authority. In this way, anti-dumping procedures are particularly susceptible to abuse. Due process must, therefore, be a central feature of any anti-dumping regime.

9. The concept of good faith and the importance of due process are prevalent throughout the text of the AD Agreement. As a threshold matter, the specific factual *and* legal standards of review set forth in Article 17.6 are expressions of the obligation of good faith. The standards of review provide:

> 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;
>
> 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.

(Emphasis added.) The terms used in the factual standard of review directly reflect the principles of due process established by the Appellate Body in *US – Shrimp*: "unbiased and objective."[5] Similarly, the legal standard of review directs the panel to interpret the provisions in accordance with the tools of legal interpretation, which include good faith. Indeed, good faith becomes all the more important under the "permissible" prong of the legal standard of review, given the usefulness of the tool in defining legal limitations.

10. In this case, the US Government did not serve its supposedly neutral investigative and judicial function in an unbiased manner; rather, the US Government unabashedly took the side of the US steel industry. For each issue raised by the Government of Japan, the text of the AD Agreement imposes an obligation on the administering Member to implement the provisions *in good faith*.

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[3] *US —Shrimp* at para. 158.

[4] While the Government of Japan emphasized the importance of this concept of good faith in the section of its brief dealing with Article X of the GATT 1994, we would also like to point out its relevance to the Panel's interpretation of the AD Agreement.

[5] *See also, Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, adopted on 28 Jan. 2000, WT/DS132/R, at para. 7.94 ("*Mexico—High Fructose Corn Syrup*") (citing Guatemala--Antidumping Investigation Regarding Portland Cement from Mexico, adopted 19 Jun. 1998, WT/DS60/R, at para. 7.57) (in determining whether sufficient evidence existed to initiate an investigation, the Panel evaluates "whether 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" its decision) (emphasis added).

Facts Available	• Factual Standard of Review • Legal Standard of Review • Article 6.8: "reasonable period" • Annex II, Paragraph 7: "careful circumspection"
All Other's Rate	• Legal Standard of Review
Arm's Length Test	• Factual Standard of Review • Legal Standard of Review • Article 2.4: "fair comparison"
Critical Circumstances	• Factual Standard of Review • Legal Standard of Review
Injury	• Factual Standard of Review • Legal Standard of Review • Article 3.1 "objective examination"

11. The Panel should adhere carefully to this overriding obligation of good faith. As discussed in greater detail below, the types of abuses perpetrated by the US Government in this case against Japan and our own exporters must be stopped.

II. THE US ABUSE OF FACTS AVAILABLE SHOULD NOT BE ALLOWED TO CONTINUE

12. In accordance with the Article 6.8 and Annex II of the AD Agreement, the US statute authorizes USDOC to apply "facts available" when an interested party or any other person (1) withholds information, (2) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (3) significantly impedes a proceeding, or (4) provides such information but the information cannot be verified.[6] However, the US statute goes beyond the AD Agreement and authorizes the use of "adverse inferences" to punish participants that "failed to cooperate by not acting to the best of its ability to comply with a request for information."[7] Although the US courts have constrained USDOC to some extent in its application of this statutory provision, current US practice continues to give USDOC considerable latitude. Indeed, on its face the established practice is punitive and, in turn, inconsistent with the AD Agreement..

A. FOR YEARS, USDOC HAS MAINTAINED AN UNFAIR, PUNITIVE APPROACH TO FACTS AVAILABLE.

13. A review of prior anti-dumping investigations involving imports only from Brazil demonstrates a consistent trend of applying facts available to Brazilian respondents' margins. Of the 43 final dumping decisions since 1990, USDOC applied adverse facts available (or best information available under the old statute) in nearly half of the decisions (20 of 43).[8] Reasons varied, including small deficiencies, failure to respond to USDOC's requests for information, withdrawal from the proceeding, deficiencies discovered during verification, and refusing verification. The extent to which USDOC used adverse facts available also varied, ranging from partial facts available for relatively minor deficiencies to total adverse facts available. Significantly, in twelve of these cases, respondents either did not participate in the proceeding or withdrew their participation. The burden and bias of USDOC's investigations have therefore discouraged foreign producers from participating in the process.

[6] 19 U.S.C. § 1677e(a).

[7] 19 U.S.C. § 1677e(b).

[8] The 43 decisions include final determinations from original anti-dumping investigations and final results of administrative reviews. (A list of these decisions appears at the end of this submission. **Exhibit Brazil-1**.)

14. USDOC all too often resorts to what it calls adverse facts available, a practice under which USDOC chooses nearly the most adverse facts available. It does so in order to make an example of the respondent against which such adverse information is applied: the information must be adverse enough, according to USDOC policy, so as to deter other respondents from not cooperating with the investigation. Notwithstanding the fact that this practice is often misapplied -- meaning that the deterrent is applied to respondents who do not deserve it, such as the Japanese respondents in this case -- the policy itself violates the AD Agreement on its face.

B. THE US FACTS AVAILABLE STATUTE AND PRACTICE, ON ITS FACE, VIOLATES ART. 6.8 OF THE AD AGREEMENT

15. Article 6.8 of the AD Agreement and its related Annex II define specific circumstances in which facts available may be applied. The US, however, in its legislation and its practice fails to adhere to these strict rules.

16. First, the text of Article 6.8 and its related Annex make clear that the resort to facts available is intended to be a *neutral* option for an administering authority. The only mention of a use of facts available that may be in any way unfavourable to the respondent's position is the weakly phrased second sentence of paragraph 7 of Annex II:

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation *could* lead to a result which is less favourable to the party than if the party did cooperate . (Emphasis added.)

The statement is written in the passive voice, emphasizing the lack of a control factor. In other words, the sentence does not provide an authority with a tool to *choose* a less favourable source for facts available, but simply recognizes that the lack of available information means that the choice *may ultimately result* in a less favourable position for the interested party.

17. The US statute turns this neutral tool into an instrument of punishment when the US authorities decide that a respondent is not "acting to the best of its ability." However, paragraph 7 in no way reflects a policy of deterrence or retribution by permitting the choice of a "sufficiently adverse" fact available so as to affect future behaviour. To the contrary, the first sentence of paragraph 7 directs the authority to use "careful circumspection" when selecting a secondary source as facts available, suggesting that an authority exercise caution, not aggressive behaviour. The US has created a policy of retribution and deterrence behind the facts available provision that does not exist, and has thereby abused its rights under the AD Agreement.

18. In this respect, we note that Articles 3.2 and 19.2 of the DSU caution that DSB recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements." The United States, through its leaps in logic and inference attempts to add to its rights under the Anti-Dumping Agreement. The United States adds the right to punish exporters and the right to deter exporters from failing to cooperate.

19. However, nowhere in the Anti-Dumping Agreement does it say that countries may require exporters to cooperate in anti-dumping proceedings or that anti-dumping authorities may use facts available to try to encourage exporters to cooperate in proceedings. Indeed, as discussed in more detail below, because of the built-in biases with which USDOC operates, Brazilian exporters now *regularly choose not to participate in the investigations before USDOC* and instead focus on the injury investigations conducted by the USITC. When an exporter refuses to cooperate, according to the second sentence of paragraph 7 of Annex II, anti-dumping authorities are free to resort to facts available which "could lead to a result which is less favourable to the party than if the party did cooperate." Exporters choose not to proceed in these investigations at their own risk, recognizing

that, if representative information is not available to the authority, then it will likely resort to allegations in the petition. Exporters should not, however, fear artificially inflated margins because they chose not to devote the enormous resources necessary to defend against the built-in bias of the USDOC.

20. Indeed, that same paragraph 7 admonishes the anti-dumping authorities to use "careful circumspection" when resorting to secondary information such as the petition. This cautionary requirement contradicts any US claim that the text of the Anti-Dumping Agreement permits it to affirmatively, punish or deter exporter behaviour by choosing facts available plugs that purposefully inflate the respondents' margins. Facts available is not about taking aggressive action, it is about acting with caution to fill-in holes in information.

21. The US statute and practice also violate the AD Agreement in other respects. The US statute and practice omits the requirement that the choice of facts available may render the respondent's position "less favourable" only when the documents are "withheld." Similarly, the US statute sets a hard and fast presumption that a submission "deadline" should be equated with the "reasonable period" mandated by Article 6.8. The term "reasonable" however is an ambiguous term that can only be decided on a case- and fact-specific basis.

22. The experience of the Japanese respondents amply demonstrates the abusive nature of the US statute. The facts surrounding the treatment of all three Japanese respondents – Kawasaki Steel Corporation ("KSC"), NKK Corporation ("NKK"), and Nippon Steel Corporation ("NSC") are remarkable. KSC was punished with the use of "sufficiently adverse" facts available so as to deter similar "uncooperative" behaviour in the future, despite the fact that it was a petitioner, California Steel Inc. ("CSI") , that refused to cooperate with USDOC, not KSC. KSC never had control over CSI's information and it made the reasonable decision that it could not get that information using what it considered appropriate means. Similarly, in the context of this enormous, accelerated investigation, NKK and NSC were punished not for withholding information, but for failing to meet the strict USDOC deadlines with respect to information that affected only a handful of sales, despite their overall cooperative behaviour throughout the investigation. The "punishment" simply does not fit the "crime".

23. In its First Submission, the US repeats over and over what a complex and difficult case this was, and what enormous companies the Japanese respondents were; yet, when it comes time to determine what is a "reasonable period," the US Government reacts angrily to any notion that it should have acted flexibly toward what were, in the broad scheme of things, minor difficulties faced by the exporters with respect to low priority issues. Instead, the United States equates its statutory benchmark of the submission deadline with a "reasonable period" without any thought as to what is meant by "reasonable" in the context of the specific documents that were submitted late and why. The USDOC argues that a deadline is a deadline and agencies need to proceed with their investigations. This belies the flexibility and good faith responsibilities imposed on an anti-dumping authority by the facts available provision in the Anti-Dumping Agreement. Article 6.8, the governing provision, does not use the word "deadline," but rather "reasonable period." Therefore, in Annex II, whenever the word "timely" is used, it refers back to the governing language of Article 6.8, "reasonable period".

24. The harsh language contained in the US First Submission with respect to the three Japanese exporters reflects the inflexible and bad faith position of the USDOC throughout the proceeding. The US First Submission tries to paint the respondents as "evasive" and in need of the most basic handholding. But the Panel should always keep in mind the truly *inordinate* amount of information that these respondents did actually submit to the USDOC. The mountain of information submitted belies any notion that NKK or NSC acting in an "evasive" manner or that KSC was not cooperating to the "best of its ability". This attack on three private companies that submitted thousands of pages

of information and enormous sales databases does not belong in a dispute settlement proceeding before an international tribunal.

25. These issues demonstrate the importance of the concept of good faith in carrying out the legal standard of review under the AD Agreement. While the US might try to argue that its interpretations meet the outer limits of WTO AD Agreement provisions, the Panel should consider whether these inflexible and punitive rules meet a test of good faith.

C. USDOC'S TREATMENT OF BRAZILIAN RESPONDENTS IN THIS VERY CASE PROVIDES FURTHER EVIDENCE NOT ONLY OF THE US ABUSES OF FACTS AVAILABLE, BUT OF THE POLITICAL NATURE OF THIS CASE AND THE FAILURE OF THE UNITED STATES TO CONDUCT ITS INVESTIGATIONS IN GOOD FAITH

26. In the hot-rolled steel investigation, USDOC seemed to strain itself to find reasons to apply adverse facts available to each respondent. With respect to Companhia Siderurgica Nacional ("CSN"), a significant issue was date of sale, which determines what set of sales are analyzed in the dumping calculation. USDOC rejected substantial evidence that the commercial invoice date was the more appropriate date of sale for CSN's US sales and instead used ex-factory shipment date. CSN did not submit data on a small number of sales with ex-factory shipment dates during but commercial invoice dates after the period investigated. USDOC determined that CSN had not cooperated to the best of its ability and applied the highest margin to the unreported sales. USDOC determined further, without any explanation or analysis, that "this margin is indicative of CSN's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." The fact that the facts available margin was the highest margin and not the mean does not support USDOC's conclusion that the margin is "indicative of CSN's customary selling practices" and there is no evidence to support the finding that the margin is "rationally related to the {affected} transactions".[9]

27. USDOC applied adverse inferences with a vengeance in the margin calculation for Usinas Siderurgicas de Minas Gerais and Companhia Siderurgica Paulista ("USIMINAS/COSIPA").[10] USDOC applied adverse inferences to the following: (1) USIMINAS' reported costs; (2) USIMINAS' unreported US sales where the nota fiscal date--the date of sale--was within the period investigated but the commercial invoice date fell outside the period; (3) downstream sales data; (4) USIMINAS' home market inland freight; (5) USIMINAS' US inland freight; (6) USIMINAS' warranty expense; (7) COSIPA's home market inland freight; (8) COSIPA's brokerage and handling expenses; (9) COSIPA's packing; and (10) USIMINAS' failure to report its affiliated supplier's actual cost of production.[11]

28. With respect to USIMINAS' reported costs, USDOC gave USIMINAS insufficient notice of any deficiencies. USIMINAS relied successfully on the same cost allocation methodology in prior proceedings. Yet, at no point in the hot-rolled steel investigation or the prior proceeding did USDOC ask USIMINAS to resubmit its costs using its normal financial cost accounting system, which violates the letter and the spirit of paragraph 6 of Annex II: "If evidence of information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period…". USIMINAS presumed USDOC's findings in the previous review were valid. USIMINAS presumed USDOC was well aware that there would be differences between the per-unit costs generated by each system. USDOC nonetheless

[9] Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38756, 38768 (19 July 1999) ("Brazil's Final Dumping Determination").

[10] Due to the degree of affiliation between these two Brazilian steel producers, USDOC treated USIMINAS and COSIPA as one entity ("collapsed" the two companies) for purposes of determining dumping. *See Brazil's Final Dumping Determination* at 38759.

[11] *Id.* at 38758, 38774-84, 38786-90.

found that USIMINAS' costs were not representative of its normal business records and recalculated USIMINAS' costs using adverse facts available.

29. The main basis for USDOC's use of adverse facts available for the other nine instances was failure to verify information submitted by USIMINAS and COSIPA. The sales verification reports indicate, however, that USDOC did not follow proper verification policies. In particular, the breadth and depth of USDOC's verification agenda virtually made certain that USDOC would be unable to review all of the information in the verification agendas. In addition, USDOC insisted on verifying in depth all items appearing on the verification agenda. This is obvious not only from the length and language of the verification reports themselves, but also from the extensive documentation compiled by USDOC. Indeed, more than 2,000 pages of exhibits were reviewed and collected by USDOC. Thousands of other pages of documents were reviewed and not taken. And, thousands of other pages of documents were prepared but not examined.[12]

30. Brazil would note that lack of time to verify information due to a self-imposed heavy agenda is a far cry from the conditions set out in Article 6.8 and Annex II that would allow the use of facts available. The USDOC failure to verify information provided by respondents is in direct conflict with the language of paragraph 3, Annex II: "All information which is verifiable … should be taken into account when determinations are made."

31. In addition to the problems associated with the verification agenda, USIMINAS and COSIPA noted other troubling aspects of the sales verification reports. First, the reports contained numerous inconsistencies and mistakes of fact. These mistakes and inconsistencies undermined the credibility and findings of the reports. Second, significant portions of the reports contained characterizations of facts that appeared to exhibit a bias against respondents. Indeed, it often appeared that USDOC sought to portray mistakes or inconsistencies in the light most damaging to respondents, rather than simply recording and articulating the facts observed in a neutral manner.

32. After rejecting USIMINAS/COSIPA's protestations about the fairness of the proceeding, USDOC applied adverse facts available. In some cases, USDOC applied the highest dumping rate to certain transactions, making the same unfounded conclusion that "this margin is indicative of USIMINAS/COSIPA's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied."[13] USDOC's pervasive and groundless use of adverse facts available can be described only as biased and unobjective. USDOC's final determination expressed more concern for defending its flawed administrative proceeding than conducting a fair investigation.

D. THE ABUSIVE USE OF FACTS AVAILABLE IS UNFAIRLY PREJUDICING UNINVESTIGATED EXPORTERS

33. As with Japan, the application of partial adverse facts available in USDOC's hot-rolled steel investigation of Brazil also drove up the all others rate: the all others rate was calculated based on a weighted average of the dumping margins of the mandatory respondents involved in the investigations. Yet the AD Agreement is very clear in its prohibition against the inclusion of facts

[12] Moreover, USDOC did not prioritize its review of verification subjects. This is particularly true regarding sales trace documentation and sales adjustments, where USDOC devoted substantial amounts of time verifying expenses such as inland insurance and inventory carrying costs at the neglect of more important topics, such as sales prices, sales quantities, invoice dates and numbers, and product characteristics. Even a cursory review of the verification exhibits demonstrates this fact. Indeed, there were more than sixty-three exhibit pages for inland insurance alone, which was one of the smallest expenses on the sales lists. Similarly, USDOC took more than one hundred exhibit pages for indirect selling expenses, a field that is not even used in USDOC's margin calculations.

[13] *Brazil's Final Dumping Determination* at 38779-80 (concerning downstream sales data and unreported sales resulting from a change in the date of sale).

available rates -- adverse or otherwise -- in the calculation of the all others rate. As Japan explains in its first submission, Article 9.4 of the AD Agreement states that the all others rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers…provided that the authorities shall disregard…margins established under the circumstances referred to in paragraph 8 of Article 6." Given that the other margins for both Japan and Brazil in this case were based on facts available that can only find their authority in Article 6.8 (though no authority exists for *adverse* facts available), the all others rates calculated by USDOC violated the AD Agreement. This clear violation of the AD Agreement should be halted, along with the abusive use of adverse facts available.

34. The United States argues in its First Submission that the phrase "margins established under the circumstances referred to in paragraph 8 of Article 6" in Article 9.4 must mean margins based *entirely* on facts available. But, this is not what Article 9.4 says. If the Members had meant this, they would have used the phrase "margins established *in their entirety* under the circumstances referred to in paragraph 8 of Article 6" or something to that effect. But this is not what the Members negotiated. The word "entire" does not appear in Article 9.4. Whether one agrees with the United States or not that there are an infinite number of permissible interpretations of the Agreement, an interpretation that writes into a provision a word that does not exist and substantively changes the meaning of the provision is hardly a permissible interpretation.

III. USDOC'S TREATMENT OF AFFILIATED HOME MARKET CUSTOMERS -- INCLUDING THE USE OF THE SO-CALLED "ARM'S LENGTH" TEST AND THE REQUIREMENT TO REPORT AFFILIATED CUSTOMERS' RESALES -- IS UNFAIR

35. Under the guise of price manipulation, USDOC treats sales to affiliated home market customers with circumspection. If USDOC determines that the respondent's relationship to a customer is close enough to be deemed "affiliated" under the US statute, USDOC applies a test that excludes the sales to affiliated customers for whom average prices are lower than sales to unaffiliated customers and not sales to affiliated customers for whom the average prices are higher. It then requires the respondent to report the affiliates' downstream sales. The threshold of affiliation, however, is unrealistically low, leading USDOC to require submission of sensitive, proprietary sales information of the affiliated customer whether or not the respondent has *effective* control over the affiliate. In Brazil, respondents' shareholdings in affiliated customers are often relatively small and do not necessarily give respondents the power to force the affiliate to provide the requested information.[14] Similar to KSC's experience with its US affiliate, gathering affiliated customers' sales data has proven extremely burdensome and sometimes impossible for Brazilian exporters. As a result, in addition to driving up margins, USDOC's policy on affiliated home market customers has often forced the unfair application of adverse facts available, or discouraged participation all together at USDOC.

A. US LAW AND ADMINISTRATIVE PRACTICE

36. The US statute provides that "if the foreign like product is sold . . . through an affiliated party, the prices at which the foreign like product is sold . . . by such affiliated party may be used in determining normal value."[15] USDOC's policy for determining whether downstream sales should be used in the calculation normal value is:

[14] *See, e.g., Certain Cut-to-Length Carbon Steel Plate from Brazil: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18486 (15 Apr. 1997) (affiliation found despite minority stake in customer, among other practical limitations to respondent's ability to control the customer).

[15] 19 U.S.C. § 1677b(a)(5).

> If {USDOC} determines that an affiliate made downstream sales of a foreign like product, {USDOC} usually will not require the reporting of both the sales to the affiliate and the downstream sales by the affiliate. We will examine the sales between the affiliated parties under paragraph (c). If sales to the affiliate fail the arm's-length test, {USDOC} will require the respondent to report that affiliate's downstream sales. *If sales to the affiliate pass the arm's-length test,* {USDOC} normally will *not require* the respondent to report the affiliate's downstream sales and will calculate normal value based on sales to the affiliate.[16]

37. USDOC must first determine whether a customer is "affiliated." The US statute provides that "the following persons shall be considered to be 'affiliated' or 'affiliated persons':

> (A) Members of a family . . . .
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per cent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.[17]

38. This definition casts a fairly broad net. In Brazil, manufacturers often have relationships with or own shares in other companies that resell their product. As a result, USDOC often applies the arm's length test to sales to affiliated customers. As explained by the Government of Japan, due to the analytical shortcomings of USDOC's arm's length test, these sales to affiliated customers are commonly deemed abnormal (i.e., outside the ordinary course of trade), requiring respondents to report the affiliate's resales for the calculation of normal value.

B. BRAZILIAN EXPORTERS' EXPERIENCE IN THIS VERY CASE PROVES THE BURDENSOME NATURE OF USDOC'S TREATMENT OF AFFILIATED HOME MARKET CUSTOMERS

39. In the hot-rolled steel investigation, USDOC required USIMINAS and COSIPA to report the resales of three affiliated customers -- Rio Negro Comercio e Industria de Aco S.A. ("Rio Negro"), Fasal S.A. Comercio e Industria de Produtos Siderurgicos ("Fasal"), and Dufer SA.[18] USIMINAS

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[16] *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27296, 27356 (19 May 1997) (emphasis added). USDOC's arm's length test (or "99.5 per cent" test) is described and analyzed in detail in the Government of Japan's First Submission. The Government of Brazil supports that discussion and incorporates it by reference here.

[17] 19 U.S.C. § 1677(33) (emphasis added).

[18] CSN also sold subject merchandise to affiliated customers during the period investigated. However, CSN was not required to report these sales because they represented a small share of CSN's total home market sales. *See* CSN Section A questionnaire response, at 37.

owned virtually all of the voting capital (99.99 per cent) of Rio Negro Centro Participacoes Ltd., a stockholding company for Rio Negro, a local distributor that purchased subject merchandise as well as other flat-rolled steel products for resale. USIMINAS owned 50 per cent of a holding company, Siderholding Ltda., the sole purpose of which is to hold stock in Fasal, a distributor that inventories and further processes steel products, including plate. COSIPA owned 51 per cent of the stock of Dufer, a distributor which resold the like product during the period investigated.[19]

40. USIMINAS/COSIPA laboured to collect and report these affiliates' resale information. The resale information was then subject to verification as part of the large volume of information submitted by USIMINAS/COSIPA. As described above, verification was seriously complicated by the involvement of these affiliates. Due to the relatively short time allowed and the inordinate volume of information and issues to cover, USDOC did not fully review the affiliates' sales data. As a result, USDOC "used the downstream data reported by USIMINAS and COSIPA for CONNUM matching purposes only. In cases in which the best match is to a downstream home market sale, {USDOC} applied as adverse facts available the highest calculated margin for any USIMINAS/COSIPA CONNUM".[20]

41. Brazilian respondents were required to report affiliated customers' home market resales in many other previous cases.[21] As with USDOC's use of facts available, USDOC's policy concerning sales to affiliated parties has taken its toll on Brazilian respondents. For example, in the recent investigation of cold-rolled steel products from Brazil, CSN withdrew its participation in part because of the difficulties it experienced with an affiliated reseller. The burden of collecting and ensuring the accuracy of the affiliate's sales information forced CSN's withdrawal and resulted in the application of total adverse facts available.[22] As USDOC continues to apply its policy concerning sales to affiliated home market customers, respondents will continue to face the dilemma of complying with USDOC's burdensome reporting requirements or declining to participate in the proceeding. This is an unfair choice to make, considering the lack of authority in the AD Agreement for USDOC's policy and practice.

C. THE AD AGREEMENT PROVIDES NO LEGAL BASIS TO DEEM AN AFFILIATED PARTY AS OUTSIDE THE ORDINARY COURSE OF TRADE BASED ON FAILURE OF THE US ARM'S LENGTH TEST

42. The Government of Japan correctly presents the WTO inconsistencies of USDOC's "arm's length" test. While Brazil believes there are instances when affiliated party sales may be deemed outside the ordinary course of trade, the US practice goes way too far:

- the standard for affiliation is far too low;

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[19] *See* USIMINAS/COSIPA Section A questionnaire response, at 3, 9-10, 48.

[20] *Brazil Final Dumping Determination*, at 38779.

[21] *See, e.g., Certain Cut-to-Length Carbon Steel Plate from Brazil: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18486 (15 Apr. 1997) (sales to affiliated home-market customer failed arm's length test and disregarded); *Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil*, 60 Fed. Reg. 31960 (19 Jun. 1995) (same); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicomanganese from Brazil*, 59 Fed. Reg. 31195 (17 Jun. 1994) (same); *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Certain Steel Flat Products*, 58 Fed. Reg. 7080 (4 Feb. 1993) (same); *Certain Iron Construction Castings From Brazil; Final Results of Antidumping Administrative Review*, 55 Fed. Reg. 26238 (27 Jun. 1990) (same).

[22] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 Fed. Reg. 5554, 5554 (4 Feb. 2000).

- prices that are clearly "comparable" under any reasonable standard are being disregarded as outside the ordinary course of trade because of an outrageously biased and nearly impossible 99.5 per cent test;

- the averaging methodology used by USDOC not only removes prices that might even be higher than most sales to unaffiliated customers, but in doing so also removes products that might prove to be a more appropriate match to export sales.

Under any definition of the concept of fair, this is simply not a fair test. It violates Article 2.4 of the AD Agreement.

43. Moreover, there is no textual basis for USDOC's replacement of certain affiliated party sales with the *resale* prices of the downstream sale. The AD Agreement, particularly Article 2, makes absolutely no mention of using resale prices in the domestic market context. This silence stands in stark contrast to the specific rule set forth in Article. 2.3 with respect to the export market. There, the AD Agreement recognizes that sales to related importers can be manipulated to achieve specific results in an anti-dumping investigation. The underlying policy of Article 2.3 is logical given that the objectives of the importer and exporting manufacturer are often aligned when anti-dumping measures are imposed because both entities' business is affected by anti-dumping measures. On the other hand, a similar assumption is illogical in the domestic market context because a manufacturer's domestic customers are economically ambivalent to any anti-dumping measures the manufacturer might be facing abroad.

44. The US First Submission suggests that Article 2.2 permits the use of downstream sales, but it appears that the United States has misread this provision. It states in Paragraph 234 of Part B that "Article 2.2 plainly states that normal value may be based on third country sales prices or on constructed value…." In fact, Article 2.2 plainly uses the word "shall," not "may." The Unites States is reading into the Agreement another permissive interpretation where the language is clearly mandatory.

45. USDOC's replacement of certain home market sales with downstream resales is also inconsistent with Article 2.4 of the AD Agreement. Article 2.4 requires that a "fair comparison" be made between the export price and the normal value, at the same level of trade, normally at the ex-factory level." The substitution of higher downstream resale prices increases normal value so as to vitiate any "fair comparison." Moreover, the use of resale prices results in a comparison of ex-factory prices in one market to a comparison of a downstream resale price in another market. This asymmetry is inconsistent with the Article. 2.4 mandate of a "fair comparison" normally at the "ex-factory price" level. Finally, Article 2.4 states that on authority "shall not impose an unreasonable burden of proof" on parties whose sales are subject to investigation. To the extent USDOC punishes respondents who have difficulty obtaining the necessary data from their affiliates -- as it often does with Brazilian respondents -- USDOC is violating this part of Article 2.4 as well.

46. The fact that USDOC disregards *only* the lower priced sales that fall outside the 99.5 per cent test and replaces certain related-party sales with *higher* downstream prices demonstrates the bad faith manner in which the US Government has implemented the AD Agreement. These skewed statistical choices manipulate the dumping margin by inflating normal values. These rules, therefore, are biased against the foreign respondents, a sign that respondents' due process rights are being denied.

IV. THE NEW US CRITICAL CIRCUMSTANCES POLICY UNFAIRLY CHILLS TRADE AND VIOLATES THE AD AGREEMENT

47. Brazil also supports Japan's challenge of the US Government's new critical circumstances policy. As the Government of Japan aptly points out, USDOC's policy was implemented in bad faith, *after it had already initiated the hot-rolled steel investigation*, and it is inconsistent with WTO rules.

48. First, Article 10.6 of the AD Agreement governing critical circumstances does not allow for a critical circumstances decision based on solely the threat of material injury -- the basis for the USITC's affirmative preliminary determination. Unlike the other paragraphs of Article 10 that specify when "threat" is relevant to the analysis, Article 10.6 specifies only current "injury." The United States seems to suggest in its First Submission that USDOC can make its own injury determinations, regardless of what the USITC does. Yet, Article X:3(a) of GATT 1994 clearly requires that the decisions made by an authority be uniform. In any event, to impute to importers knowledge of something two US federal agencies cannot even agree on clearly goes too far.

49. Moreover, the US reached its preliminary determination of critical circumstances on the basis of only speculative evidence, in violation of both Article 10.6 and the "sufficient evidence" standards set forth in Article 10.7. Article 10.6 requires determinations of dumping and injury before application of retroactive duties. Yet, no such determinations were made at the time of the preliminary critical circumstances finding in the hot-rolled steel investigation of Japan. Even if one accepts the US point that the USITC's preliminary threat determination was sufficient to meet the injury requirements for applying retroactive duties (which Brazil does not accept), there was still no determination of dumping at the time of the preliminary critical circumstances determination. The chapeau of Article 10.6 clearly requires such determination to have been made, given that retroactivity is permitted only "when the authorities determine *for the dumped product in question* that . . . ." No such determination had been made; USDOC simply assumed dumping existed. It therefore violated Article 10.6.

50. Furthermore, there was far from sufficient evidence to support USDOC's "findings." There was no evidence of dumping -- only petitioner allegations. There was no evidence of injury -- only unsubstantiated press reports. And, there was no evidence of "massive dumped imports" -- only, again, unsubstantiated press reports. Allegations are never "sufficient evidence" under GATT and WTO legal interpretation.[23] The United States itself admits, in another context (Paragraph 72 of Part B), that "information submitted in a request for initiation is likely to be adverse to the interests of the responding party." In other words, petitioners include information in their petitions that is as adverse and one-sided as possible. How this, without more, could meet the sufficient evidence standard is unclear.

51. Beyond the failings inherent in relying on petitioner allegations, the United States also violates the sufficient evidence standard when applying its arbitrary threshold for imputing knowledge of dumping to importers. Why a 25 per cent margin of dumping -- alleged or even determined -- means the importer knew or should have known the product it was buying was dumped is non-sensical. Importers rarely know the price of their suppliers' product in the home market.

52. The failure of the US Government to comply with the WTO standards in the hot-rolled steel investigation is explained in part by the fact that the US statute itself is inconsistent, on its face, with the requirements of Articles 10.6 and 10.7. First, the US law fails to require a finding that the massive dumped imports are "likely to seriously undermine the remedial effect" of the duty, contrary to the specific requirement in Art. 10.6(ii). Second, far from requiring "sufficient evidence," the US statute requires only "a reasonable basis to believe or suspect," a substantially lower threshold. The common

[23] *See United States—Measures Affecting Imports of Softwood Lumber from Canada*, adopted 27 Oct. 1993, BISD 40S/358, at para. 332 (*"US—Softwood Lumber"*) (explaining that sufficient evidence means "more than mere allegation or conjecture, and could not be taken to mean just 'any evidence.' In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement."); *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, adopted 25 Apr. 1997, WT/DS33/AB/R, at 15 ("*US—Wool Shirts"*) (commenting that "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof").

meaning of the terms dictate that a "basis" that leads one to "suspect" a fact simply cannot meet the degree of support necessary to provide "sufficient evidence" of a fact.

53. The Panel should not be constrained to rule on this issue by the fact that critical circumstances were ultimately not applied in this case. The policy on its face violates the AD Agreement. Further, the impact of the policy is felt not only when it is ultimately applied, but by its mere existence. Exporters tend not to ship product when their importers face the possibility of paying retroactive duties. Such tendency is even greater when the USDOC policy is to make affirmative critical circumstances determinations with only flimsy -- not "sufficient" -- evidence.

V. THE CAPTIVE PRODUCTION PROVISION IS A CLEAR VIOLATION OF THE AD AGREEMENT'S REQUIREMENT THAT AN AUTHORITY ANALYZE THE DOMESTIC INDUSTRY "AS A WHOLE"

54. While most of the US abuses of the AD Agreement occur at USDOC, one troubling aspect of the USITC's investigations is the statutory requirement that -- when certain facts exist -- the USITC must "focus primarily" on a domestic industry's merchant market sales to the exclusion of their captive sales (internal transfers). This so-called captive production provision was passed by the US Congress following the enormous political pressure brought to bear by the US steel industry when it failed to convince the USITC that it was materially injured by reason of imports in the 1992-1993 round of flat-rolled steel cases. As Japan thoroughly documents in its first submission, there is now ample WTO jurisprudence for the notion that Articles 3.4, 3.5 and 4.1 -- in conjunction with one another -- require an authority to examine the domestic industry "as a whole," not merely a part of it, when determining injury and causation.

55. The exclusion of the captive portion of an industry can have a dramatic effect on an authority's analysis. For instance, by focusing on the merchant market, the USITC can miss the fact that an industry has chosen on its own to decrease its merchant market shipments in favour of captive shipments to downstream production that reaps higher profits. In this example, while the industry might or might not appear more healthy with the internal transfers, the industry's condition is certainly explained at least in part by the production decisions made by the industry -- factor that must be considered as an alternative cause of the industry's condition. The fear in this case would be that the USITC would attribute to imports the effects of other causes -- in this case the industry's own self-imposed causes.

56. Whatever the results, the bottom line is that consideration of only one segment of an industry is simply not permitted under the AD Agreement. Even if the US can argue that the captive portion of the industry does not compete with the merchant market, this is irrelevant: if there is one like product, then there is one industry. There is no reason such competitive conditions cannot be considered on a case-by-case basis, without tying the hands of the authority and requiring it to ignore the captive portion of the market when certain statutory conditions are met, as the US captive production provision does.

VI. USITC'S FAILURE TO DISTINGUISH BETWEEN INJURY CAUSED BY IMPORTS VERSUS INJURY CAUSED BY OTHER FACTORS VIOLATES THE AD AGREEMENT

57. Without addressing in detail Japan's fact-specific claims with regard to the USITC's causation analysis as applied to the hot-rolled steel case, Brazil suggests that the Panel examine whether US practice with respect to alternative causes is sufficiently rigorous. As evidenced from this as well as other cases, Brazil believes it is not.

58. Article 3.5 states, in pertinent part, that "The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the

injuries caused by these other factors must not be attributed to the dumped imports." In other words, imports must, in and of themselves, be a cause of material injury to the industry -- not a cause that, when combined with other factors, results in material injury. This is the only logical interpretation of Article 3.5. Otherwise, the prohibition against attribution would be meaningless.

59. As other Members have argued before the DSB (including in *US -- Wheat Gluten Safeguards*), ensuring that the effects of other factors are not attributed to imports requires a sophisticated analysis that isolates the effects of each relevant factor. The USITC has undertaken such sophisticated analysis in other cases (i.e., the recent cold-rolled steel case[24]), but does so only infrequently.

60. In the hot-rolled steel case, other factors were critical. Though imports had admittedly increased in volume, so had domestic mill capacity, particularly that of the minimills: 17 million tons of new minimill capacity were commissioned during the period of investigation, much of which came on line by 1998. The increase alone represented 78 per cent of all domestic industry merchant market shipments in 1998.[25] While the USITC discussed minimills -- as well as the General Motors strike, another important factor in the market during 1998 -- absolutely no effort was made to isolate the effects of these factors versus the effects of imports. Therefore, the USITC did not ensure against the attribution to imports of the effects of other factors. The Panel should instruct the United States to change this practice, not only in this case but in other cases as well.

CONCLUSION

61. The United States has made a valiant and lengthy effort to rebut the arguments set forth in Japan's First Submission. Yet, Brazil is unconvinced that the abuses Japan has identified are unworthy of rectification. The United States too often uses its anti-dumping and countervailing duty laws as a tool to protect politically influential US industries from import competition. If it did so in accordance with the rules agreed to by the Members to the WTO, then no one could complain about the political influence these industries maintain. The problem is that the political influence is infecting the proper adoption of international norms. We hope the Panel will help bring it to an end.

[24] *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa, and Thailand,* Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000), at 18-24.

[25] *Certain Hot-Rolled Steel Products from Japan,* Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (Jun. 1999) at IV-12.

ANNEX B-2

Submission of Canada as a Third Party

(31 July 2000)

I. INTRODUCTION

1. This dispute arises out of the anti-dumping measure(s) imposed by the United States effective 23 June 1999 on certain hot-rolled steel products from Japan.

2. This dispute was initiated by a request by Japan on 18 November 1999 for consultations with the United States under Article 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII:1 of GATT 1994 and Article 17.2 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement). The resulting consultations were held on 13 January 2000.

3. On 11 February 2000, Japan requested the establishment of a panel pursuant to Article 6.1 of the DSU. The Dispute Settlement Body (DSB) established this panel on 20 March 2000. Pursuant to Article 10.3 of the DSU, Canada provided notice that it had a substantial interest in the matter and requested the opportunity to participate as a third party to the dispute.

4. Canada welcomes this opportunity to participate as a third party in this proceeding and provide its views on certain issues raised by Japan which are identified below. Canada has a substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement and in particular, the issues which Canada's submissions address. The fact that Canada has not made submissions with respect to all matters raised before this Panel should not be understood to imply that Canada either agrees with or objects to interpretations of the Anti-Dumping Agreement or practices of investigating authorities raised by these issues.

5. Canada's submissions will address the following issues: (i) the use of "adverse inferences" in applying the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii) the US approach to "captive production" in injury investigations.

II. LEGAL ARGUMENT

A. APPLICABLE PRINCIPLES OF TREATY INTERPRETATION

6. Article 3.2 of the DSU requires that the covered agreements be interpreted in accordance with "customary rules of interpretation of public international law."

7. For purposes of the WTO Agreement, the *Vienna Convention on the Law of Treaties* (Vienna Convention)[1] sets out applicable rules of international law. The rights and obligations of WTO

[1] 8 ILM 679 (1969).

Members under the Anti-Dumping Agreement must therefore be interpreted in accordance with the Vienna Convention, and in particular Article 31.[2]

8. According to Article 31 of the Vienna Convention, an international treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". According to Article 32, supplementary means of interpretation may also be referred to, to confirm an interpretation of the agreement or to resolve ambiguities in the text.

B. ISSUES ADDRESSED BY CANADA

(i) "Facts Available"

9. Canada notes that the United States has challenged whether Japan's claim concerning the US general practice regarding "facts available" is properly before this Panel. Canada takes no position on this jurisdictional question. However, Canada makes the following submissions with respect to Japan's claim concerning the US general practice regarding "facts available" in the event that the Panel decides that it has jurisdiction over this claim.

10. In the investigation conducted by the United States Department of Commerce (DOC) in this matter, the margin of dumping for certain respondents was based on the use of the "facts available" provisions of US anti-dumping law.

11. Japan submits that the US "practice of applying adverse facts available to punish respondents" is inconsistent with Article 6.8 and Annex II to the Ant-Dumping Agreement because neither Article 6.8 nor Annex II use the word "adverse". Japan contends that neither Article 6.8 nor Annex II contemplates the punitive use of "facts available" and that the purpose of any use of "facts available" is to fill in gaps in information in a manner consistent with existing data.

12. Canada submits that the wording of Article 6.8 makes clear the circumstances under which an investigating authority may have resort to the "facts available" provisions of the Anti-Dumping Agreement. This is possible where "any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation". In construing the words "facts available" in their context, one must necessarily have regard to the direct link between the factual circumstances of non-co-operation or impediment by the interested party and the use of "facts available". Canada submits that this means that the use of "facts available" is, to a large degree, predicated on actions by interested parties that are intended to hamper or have the effect of hampering an investigation by an investigating authority. Thus, Japan's interpretation of Article 6.8, which encourages an interested party not to co-operate with investigating authorities, is clearly at odds with the wording of Article 6.8.

13. Canada further submits that Article 9.3 of the Anti-Dumping Agreement provides that anti-dumping duties may be imposed in an amount equal to the margin of dumping. Where an investigating authority has recourse to "facts available" as a result of an interested party's refusal to co-operate or its efforts to impede the investigation, the drawing of adverse inferences is appropriate so as to ensure that the imposition of duties under Article 9.3 is not frustrated by the non-co-operating party obtaining the benefit of a dumping margin that is lower than would otherwise have been the case.

[2] see for instance, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, report of the Appellate Body issued 29 April 1996 at pp. 16-17; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/DS10/DS11/AB/R issued on 4 October 1996 at p. 10.

14. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-Dumping Agreement, including, in particular, paragraph 7 of Annex II. Paragraph 7 provides, in part, that "[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, the situation could lead to a result which is less favourable to the party than if that party did cooperate." In other words, non-co-operation can lead to higher dumping margins.

15. Further, Canada submits that if in applying "facts available" an investigating authority is precluded from drawing adverse inferences in the face of non-co-operation or efforts to impede an investigation, then the result would be to frustrate the object and purpose of the Anti-Dumping Agreement to the extent that the Agreement provides that duties may be imposed as a result of an investigation conducted in a manner consistent with the requirements of the Agreement. If adverse inferences could not be drawn, an interested party who refuses to co-operate or attempts to impede an investigation would benefit from actions that the Anti-Dumping Agreement condemns. Canada submits that an approach to "facts available" that would clearly encourage non-co-operation, as opposed to co-operation, cannot be consistent with the Anti-Dumping Agreement.

(ii) Captive Production

16. As part of its final injury determination in this matter, the United States International Trade Commission (ITC) took into account section 771(c)(iv) of the *Tariff Act of 1930*, as amended. This provision provides that in investigations involving domestic producers who internally transfer significant production of like products, the ITC, when considering certain injury factors, will "focus primarily" on the domestic merchant (i.e. commercial) market for the goods involved in such investigations.

17. Japan submits that the use of the captive production provision in US law is inconsistent with Articles 3 (Determination of Injury) and 4 (Definition of Domestic Injury) of the Anti-Dumping Agreement because these provisions do not expressly allow for a "focus" on anything less that all domestic production. Japan, although apparently recognizing the existence of different segments within a domestic industry[3], submits that in particular, the definition of "domestic industry" in Article 4.1 of the Anti-Dumping Agreement precludes segmentation of internal transfers from the "merchant market". Japan bases this position to a significant extent on the phrase "domestic producers as a whole of the like products" in that definition.[4]

18. Canada first notes that Canadian practice with respect to investigations involving domestic producers who internally transfer significant production of like products is similar to that of the United States. [5]

19. In Canada's view, the purpose of providing an investigating authority with the ability to focus on sales to the merchant market in appropriate circumstances is because it is in the merchant market that the dumped imports being investigated compete directly against domestically produced like products. For example, in the flat-rolled steel sector, domestically produced hot-rolled steel may be sold and used as an end product or may be further processed into, for instance, cold-rolled or corrosion-resistant steel. Imported hot-rolled steel does not compete with domestically produced hot-rolled steel destined for further processing into, for example, cold-rolled steel or corrosion-resistant steel.

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[3] See, for instance, First Submission of Japan at paragraph 36.

[4] See in particular First Submission of Japan at paragraphs 225 and 226.

[5] While an analogous provision does not exist in Canada's anti-dumping legislation (The Special Import Measures Act (R.S.C. 1985, c. S-15, as amended) this practice has been developed by the Canadian International Trade Tribunal, the investigating authority that deals with injury investigations in Canada.

20. Canada submits that the Anti-Dumping Agreement contains no express provision with respect to how captive production or internal transfers should be considered by investigating authorities. That being said, the fact that like product is internally transferred for further processing into different goods for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

21. Canada also submits that the Japanese position blurs the distinction between the concepts of "domestic industry" and "domestic market(s)". This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include "…an objective examination of…the effect of the dumped imports on prices in the domestic market for like product…."

22. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products "in the domestic market for like products", i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, this will be the merchant market.

23. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

24. Accordingly, for these reasons, failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Anti-Dumping Agreement its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

III. CONCLUSION

25. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with "facts available" and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

ANNEX B-3

Submission of Chile as a Third Party

(31 July 2000)

INTRODUCTION

1. Chile is exercising its right under Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the belief that the issue before this Panel is important for the proper functioning of the multilateral trading system. The increasing use of anti-dumping measures is a source of special concern to a country such as Chile whose economic development is based on an export model. Particularly worrisome is the way in which some countries are resorting to such measures to keep out imports and protect uncompetitive industries. These concerns are confirmed by Japan's complaint concerning measures applied by the United States to certain hot-rolled steel products and the latter country's long history of anti-dumping proceedings against the steel industry of Japan and the world in general.

2. What is even more serious is that some national regulations are incompatible with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement). In particular, the present case shows that certain provisions of the Tariff Act of 1930 and its amendments, many of which were intended to "adapt" it to the WTO's Anti-Dumping Agreement, are in fact inconsistent with the latter and that the Panel should therefore recommend that they be adapted as soon as possible.

3. After consultations between the parties had failed to resolve the dispute, on 11 February 2000 the Government of Japan requested the establishment of a panel pursuant to Article XXIII:1 of GATT 94, Articles 4 and 6 of the DSU, and Article 17 of the Anti-Dumping Agreement.

4. At its meeting on 20 March 2000, the Dispute Settlement Body established a panel to examine the dispute and Chile, along with other Members, declared its interest in participating in the dispute as a third party. The panel was constituted on 24 May 2000, with the standard terms of reference laid down in Article 7 of the DSU.

5. Moreover, under the general provisions of the DSU, Chile has an interest in transmitting its Government's serious concern about the way in which some Members of the WTO, important trading partners for Chile, interpret the fulfilment of their obligations within the context of the Organization and, more especially, the way in which the United States interprets the fulfilment of its obligations under the Anti-Dumping Agreement.

6. In this respect, Chile considers it essential that the WTO's Dispute Settlement Mechanism, through its rulings, should confirm the principles of transparency and fairness on which the Agreements are based. The function of the Dispute Settlement Mechanism is to provide Members of the WTO, especially the smaller economies, with a guarantee that the multilaterally agreed principles and rules will be fully respected and, in particular, that the disciplines of the Anti-Dumping Agreement will be strictly observed. Moreover, in Chile's opinion, within the multilateral trading system the application of Article VI of GATT 94 and the Anti-Dumping Agreement constitute an exceptional trade protection instrument, to be used only under the conditions laid down in the Agreement itself.

7. Anti-dumping duties may not be imposed until there has been an investigation to determine the existence, degree and effects of the alleged dumping which, moreover, must be based on the principles mentioned above. The Government of Chile is concerned about the way in which some Members of the WTO habitually resort to such measures, even though all the circumstances envisaged in Article VI of GATT 94 and the Agreement are not always present, thereby giving the impression that the intention is to protect a local industry rather than to remedy real and effective injury.

8. Consequently, Chile's participation in this dispute is an expression of a systemic interest, under Article 10 of the DSU, and a result of the way in which in its legislation and practice the United States interprets the provisions of Article VI of GATT 94 and the Anti-Dumping Agreement, which, in Chile's opinion, deviates not only from their true meaning and scope but also from the letter and spirit of the Agreement.

SUMMARY OF CHILE'S LEGAL ARGUMENTS

9. In its first written submission, in the opinion of the Chilean Government, Japan clearly established how in this dispute the United States has violated:

(a) Articles 2, 6, 9 and 10 of the Anti-Dumping Agreement in conducting its USDOC investigation;

(b) Articles 3 and 4 of the Anti-Dumping Agreement in conducting its injury investigation;

(c) Article VI of GATT 94 in determining dumping, injury and causation;

(d) Article X:3 of GATT 94 in not carrying out a complete investigation and not making its determinations in a uniform, impartial and reasonable manner, as required by that provision, and

(e) Article XVI:4 of the Agreement establishing the WTO and Article 18.4 of the Anti-Dumping Agreement, by maintaining a law, regulations and administrative procedures that do not conform with its obligations under the WTO Agreements.

10. In this submission Chile wishes to concentrate its arguments on the following aspects which merit closer consideration:

(a) The "captive production" provision was not considered in determining injury, in accordance with Articles 3 and 4 of the Anti-Dumping Agreement.

(b) In its investigation USITC did not consider all the factors relating to the determination of injury, in accordance with Article 3 of the Anti-Dumping Agreement.

(c) In calculating the normal value, USDOC deliberately excluded certain home market sales between related enterprises which were subsequently replaced by the higher resale price made by affiliates for unaffiliated customers, in open contravention of paragraphs 1, 2 and 4 of Article 2 of the Anti-Dumping Agreement.

(d) USDOC accused one of the enterprises investigated of not cooperating with the investigation, applying duties higher than those which would have been appropriate. This was questionable due to the fact that the information requested could not be provided since the North American affiliate was one of the petitioners. Thus,

USDOC failed to apply the provisions of Articles 6.13 and 2.3 of the Anti-Dumping Agreement.

(e) A determination of "critical circumstances" based solely on the information supplied by one of the petitioners cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement.

"CAPTIVE PRODUCTION" PROVISION

11. Under Articles 3 and 4 of the Anti-Dumping Agreement, the determination of injury must relate to the whole of domestic production, irrespective of whether it is sold on the domestic market or used by the petitioner to produce a product with greater value added. In determining injury to the domestic industry, the United States considered only the production sold on the domestic market, excluding production for own consumption. On the one hand, this approach infringes a basic principle that follows from both Article VI of GATT 94 and the Anti-Dumping Agreement, according to which in determining injury the entire domestic industry affected or threatened by increased imports must be considered. On the other hand, it necessarily leads to a finding of greater injury than would have been the case if the whole of production had been considered. Consequently, if captive production had been included, the imports would have had less effect.

12. It is important to note the discretionary nature of the United States' analysis of the figures. Thus, as Japan points out, if the import penetration figures and the operating margins for the years 1993 and 1999 are analysed, it becomes apparent that in 1993 the United States enterprises were reporting losses while import penetration was very similar (6 per cent and 9.3 per cent, respectively) to the year 1999 when there were no operating losses.[1]

USITC DID NOT CONSIDER ALL THE FACTORS RELEVANT TO THE DETERMINATION OF INJURY

13. In focusing on only two years rather than three, USITC chose to ignore alternative injury-causing factors such as non-subject imports, contradictions in demand and technological developments. This violated Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement. Likewise, by taking only one three-year period it disregarded many industry performance indices that had improved and which might therefore have led to the conclusion that there had been no injury. Thus, the provisions of Article 3.1 were infringed by not basing the determination of injury on "positive evidence" and not undertaking an "objective examination".

14. For example, the effect on prices of increased production from new-generation plants ("mini-mills"), the General Motors strike and the recession in the pipe and tube industry caused by the collapse in steel prices was not taken into account.

EXCLUSION OF CERTAIN HOME MARKET SALES AND THEIR REPLACEMENT BY SALES TO UNAFFILIATED ENTERPRISES

15. Chile considers that in calculating the normal value USDOC excluded certain home market sales between related enterprises. Thus, those sales to affiliates whose weighted price was less than 99.5 per cent of the price for sales to unaffiliated customers were not considered. These excluded sales were replaced by the higher resale price made by affiliates for unaffiliated customers. All of this is inconsistent with Articles 2.4, 2.1 and 2.2 of the Anti-Dumping Agreement.

[1] "United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" (WT/DS/184).

16. On the one hand, the 99.5 per cent test used by the United States only treats low prices as abnormal since high prices can be extremely high and still be normal. This test affects the comparison between the normal value and the export price. In this respect, a 0.5 percentage point differential is too small for deciding whether sales to affiliates are or are not made in the ordinary course of trade.

"ALL OTHERS" RATE

17. USDOC's treatment of investigated enterprises which, for legitimate reasons, could not cooperate and which, as a result, had a much higher rate applied to them than would have been the case if they had not been so treated clearly contravenes Article 6.13 of the Anti-Dumping Agreement, according to which "the authorities shall take due account of any difficulties experienced by interested parties…". Likewise, Article 9.4 of the Agreement was violated by including in the calculation of the margin of dumping for all other exporters or producers the rate calculated with information that was insufficient and "adverse" with respect to the enterprise accused.

DETERMINATION OF "CRITICAL CIRCUMSTANCES"

18. Chile considers that a determination of "critical circumstances" based solely on information supplied by the complainant cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement. There was no preliminary determination of dumping by USDOC or preliminary determination of injury by USITC whose action was based merely on the allegations made by the United States petitioners. Authorizing the retroactive imposition of provisional measures prior to an affirmative preliminary determination of dumping and consequent injury was a violation of Article 10.

CONCLUSIONS

19. In the light of the above, Chile requests that the Panel find that certain provisions of the United States legislation conflict with WTO Agreements, in particular the Anti-Dumping Agreement, and that their application is undermining the foundations of the multilateral trading system by creating disguised restrictions on trade, and more especially that:

(a) The provisions of United States law and USDOC's administrative practices make it possible to exclude "captive production" in determining injury, which affects the impact of imports, in clear violation of Articles 3 and 4 of the Anti-Dumping Agreement.

(b) In considering the injury to its industry, USITC focused on only two years instead of three and ignored other injury-causing factors such as non-subject imports, in violation of paragraphs 1, 4 and 5 of Article 3 of the Anti-Dumping Agreement.

(c) In calculating the normal value, USDOC deliberately excluded certain home market sales between related enterprises which were subsequently replaced by the higher resale price made by affiliates for unaffiliated customers, in open contravention of paragraphs 1, 2 and 4 of Article 2 of the Anti-Dumping Agreement.

(d) In its investigation, USDOC accused one of the Japanese enterprises of not cooperating in the investigation. This was very questionable, especially as that enterprise could not provide the price information requested concerning the affiliate in the United States because the latter was one of the petitioners and completely outside the Japanese enterprise's control, and constituted an infringement of Articles 6.13 and 2.3 of the Anti-Dumping Agreement.

(e) A determination of "critical circumstances" based solely on information supplied by one of the petitioners cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement.

ANNEX B-4

Submission of Korea as a Third Party

(31 July 2000)

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I. INTRODUCTION

1. This submission is made by the Government of the Republic of Korea with respect to the challenge by the Government of Japan to the US imposition of anti-dumping measures on Hot-Rolled Flat-Rolled Carbon-Quality Steel Products ("hot-rolled steel") from Japan. In general, Korea supports the views put forth by Japan in its submission dated 3 July 2001.[1] The purpose of this submission is to provide the Korean Government's views with respect to certain select legal issues in the case as summarized and discussed below.

II. LEGAL ARGUMENTS

A. SUMMARY OF LEGAL ARGUMENTS

1. Fair Comparison

2. Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") stipulates that "{a} fair comparison shall be made between the export price and the normal value". The Anti-Dumping Agreement's requirement in Article 2.4 that dumping margins will be established based on a "fair comparison" has been violated by the United States in the case with respect both to the Commerce Department's application of Facts Available and to Commerce's use of the Arm's Length Test to determine whether sales to affiliated parties are "outside the ordinary course of trade". The Commerce Department also erred in excluding affiliated party sales and using instead the sales by resellers to calculate normal value without making appropriate cost and profit adjustments to those sales.

2. Critical Circumstances

3. The US improperly found critical circumstances to exist, in violation of Article 10.6 of the Anti-Dumping Agreement. Article 10.6, read together with Article 10.2, clearly limits retroactive application of duties to circumstances where a determination of current injury, not just a threat of injury, has been made. Furthermore, the US finding of critical circumstances does not comport with the limited purpose of the provision allowing for a retroactive effect. In the case of threat of injury, prospective final duties to prevent future injury are sufficient.

3. Injury to the Industry As a Whole

4. Articles 3.4, 3.5 and 4.1 of the Anti-Dumping Agreement require that the domestic industry as a whole be analyzed for purposes of determining injury and causation from dumped imports. This analysis of injury and causation must be based on all relevant economic factors, including conditions of competition in particular market segments, but always within the context of the industry as a whole.

B. THE ARTICLE 2.4 "FAIR COMPARISON" REQUIREMENT IS A GENERAL OVERARCHING OBLIGATION GOVERNING ALL ASPECTS OF THE DETERMINATION OF DUMPING

5. The "fair comparison" requirement of Article 2.4 is a free-standing obligation that requires that any comparison between export price and normal value be "fair". The fair comparison requirement by its own terms is not conditioned on any other provision of the Anti-Dumping Agreement; it is not limited to particular adjustments or specific situations.

[1] First Submission of the Government of Japan in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184 (3 July 2000) ("Japan's First Submission").

6. The "fair comparison" requirement of Article 2.4 is set forth in a separate, mandatory sentence. This is in stark contrast to the more limited "fair comparison" language of the prior Tokyo Round Anti-Dumping Code:

> 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.[2]

7. The language of the Tokyo Round Anti-Dumping Code thus arguably 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. However, whether or not one could have argued before the Uruguay Round that a comparison that simply complied with the level of trade and timing requirements of the Anti-Dumping Code was "fair[3], unquestionably that is no longer the case.

8. The "fair comparison" requirement is set forth independently of the other requirements of Article 2.4 in the current Anti-Dumping Agreement and must be read this way in conformity with its plain meaning, in light of its context. Thus, the "fair comparison" requirement of the first sentence of Article 2.4 imposes a general obligation, in addition to the specific disciplines set forth in the remaining provisions of Article 2 of the Anti-Dumping Agreement. It interposes a general "fairness" requirement in the administration of anti-dumping proceedings which is consistent with the overall purpose of the Anti-Dumping Agreement to combat unfair trade. It would be absurd to conclude otherwise and permit signatories to knowingly engage in "unfair" comparisons in anti-dumping proceedings.

9. Finally, any interpretation that ignored this independent fair comparison requirement would render the first sentence of Article 2.4 of the Anti-Dumping Agreement useless and superfluous, which is contrary to Article 31 of the Vienna Convention on the Law of Treaties and previous decisions of the Appellate Body.[4]

C. THE USE OF FACTS AVAILABLE AGAINST A RESPONDENT EXPORTER, WHERE A US PETITIONER COMPANY AFFILIATED WITH THAT RESPONDENT EXPORTER REFUSED TO COOPERATE WITH THE INVESTIGATION, VIOLATES THE ARTICLE 2.4 REQUIREMENT FOR A FAIR COMPARISON

10. The Commerce Department applied Facts Available to Japanese Respondent Kawasaki Steel Company ("KSC"). The details are described in paragraphs 61-89 of Japan's First Submission, but the essential elements for purposes of this discussion are the following:

-- KSC was a Japanese Respondent which exported a portion of its exports to the United States to California Steel Industries (" CSI"), a company which was 50- per cent owned by KSC and 50- per cent owned by the Brazilian mining company Companhia Vale de Rio Doce ("CVRD").

-- CSI not only was affiliated with KSC, it was also a petitioner in the anti-dumping case, and CSI testified against KSC and the other Respondents at the US International Trade Commission's Injury Hearing.

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[2] Tokyo Round Anti-Dumping Code, Article 2:6.

[3] *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 Anti-Dumping 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.'").

[4] *See, e.g., US -- Standards for Reformulated and Conventional Gasoline* (20 May 1996), WT/DS/AB/R at 23.

-- Because CSI is "affiliated" with KSC under Commerce Department rules governing affiliation, Commerce required CSI to report its further manufacturing and re-sale price data for hot-rolled coil imported from KSC. This data was in the exclusive possession of CSI -- KSC did not have access to it.

-- KSC not only made substantial efforts to obtain the data, it documented its efforts to cooperate and CSI's refusal to do so. KSC also reported all cost and price data in its possession, including its prices to CSI.

-- Commerce applied Facts Available against KSC for CSI's failure to cooperate with the investigation. Commerce selected as Facts Available "the second-highest margin" calculated from among KSC's other US sales.

-- The resulting anti-dumping margin for KSC of 67.14 per cent was a single margin composed of actual transaction-to-transaction comparisons and, for sales to CSI (which composed a sizeable portion of all of KSC's US sales), KSC's second-highest margin from these price-to-price comparisons as Facts Available.

11. The US application of Facts Available in this situation in no way satisfies the fair comparison requirement. Article 6.8 provides that, in cases in which "any interested party refuses access to . . . necessary information", Facts Available may be used in conformity with Annex II. The question in this case goes to the heart of the issue of fairness -- which interested party "refused" access to data and against which party were Facts Available applied. CSI, who was the party who refused to cooperate, had no reason to cooperate with the Commerce Department. As a Petitioner, it had an interest in seeing the highest possible margin imposed on KSC.

12. The party who Commerce punished, of course, was KSC. KSC was penalized by an anti-dumping duty margin which was improperly inflated by the application of Facts Available to the CSI sales, and then this inflated duty rate was applied to all of KSC's imports. KSC tried to cooperate with the information request but could not do so due to CSI's refusal. Thus, the "less favourable" result was not applied against the party which did not cooperate in accordance with Annex II.7.

13. Moreover, Annex II.5 of the Anti-Dumping Agreement provides that "Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it provided the interested party has acted to the best of its ability." There were a number of reasonable and fair alternatives available to Commerce that would have been consistent not only with US law, but also with US obligations under the Anti-Dumping Agreement, including the obligation to conduct a "fair comparison." For example, Commerce could have used KSC's prices to CSI. Since it was clear from CSI's actions in this matter that it acted independently from KSC, there was no obvious reason to assume that KSC's price to CSI was not at arm's length. Commerce also could have used the weighted-average margin on the sales to unaffiliated parties as a surrogate margin for the sales to CSI. This was certainly a valid source of secondary information in accordance with Annex II.7.

14. At a minimum, Commerce should have established two separate margins applicable to KSC: (1) a margin for its sales to CSI, based on the application of Facts Available to CSI; and (2) a separate margin for KSC applicable to its other US sales. While this result would still have punished the Respondent for the failure of a Petitioner to cooperate in the investigation, it at least would have minimized the effect and focused the impact on the party that withheld information.

15. Unfortunately, the approach which the Commerce Department did select -- *i.e.*, to punish a respondent and reward a petitioner for that petitioning company's failure to cooperate in an investigation of the respondent-- and then give maximum effect to that "penalty" by applying it to all sales, was not "fair" and violated the requirement of Article 2.4. Commerce should have used one of

the available reasonable approaches that fully complied with the US obligations under the Anti-Dumping Agreement.

D. THE US FAILURE TO USE REASONABLE AND AVAILABLE DATA FROM SECONDARY SOURCES FOR SALES COMPARISONS VIOLATED THE OBLIGATION UNDER ARTICLE 2.4 TO MAKE A FAIR COMPARISON.

16. The Commerce Department also applied Facts Available to certain transactions by NKK Corporation ("NKK") and Nippon Steel Corporation ("NSC"). Commerce determined that a single variable -- the factor to convert theoretical weight to actual weight for a small number of sales in the home market to make them comparable to the US sales -- was deficient because the companies failed to submit that conversion factor in what Commerce considered to be a timely manner.[5] Commerce decided not to obtain the specific missing data from a secondary source (*e.g.*, KSC provided a conversion factor that Commerce verified and used.[6]) and then calculate margins based on a fair comparison. Rather, Commerce simply substituted the margin (a very high margin) calculated for another sale by these companies as Facts Available for sales where the conversion factor was required.

17. The Government of Japan addresses numerous errors committed by the US with respect to this issue. For example, Japan effectively demonstrated that the necessary data was presented and in a timely fashion.[7] The Government of Korea's comments address only the US failure to conduct a fair comparison of the sales in accordance with Article 2.4 of the Anti-Dumping Agreement and its failure to comply with Annex II.

18. The US decision to rely on a high margin from another sale as Facts Available rather than seeking a secondary source for the single factor needed to convert sales volumes to a common weight measure does not meet the requirements of Article 2.4 or Annex II.

19. Most fundamentally, Commerce never offers any reason why secondary information, for what was a very minor sales adjustment, could not have been used to obtain a conversion factor and therefore make an actual sales comparison. But even apart from the fundamental error of not using as Facts Available specific information available from a secondary source, the dumping margin Commerce selected as the surrogate simply is not comparable. It appears the US made no attempt to determine whether the margin chosen was derived from a sale that was in any manner comparable to the sales in question, nor was any such justification offered.

20. Article 2.4 requires a "fair comparison" between the export price and normal value in order to calculate the margin of dumping. Furthermore, Article 2.4 provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability . . . ." In this case, by not seeking a secondary source for the weight conversion factor and instead, resorting to a high margin on sales that were not justified as comparable, Commerce failed to make a fair comparison and failed to assure price comparability.

21. The Government of Korea does not dispute that, when a respondent fails to produce a piece of information which is a necessary part of a proper price comparison for a certain sale or group of sales, the authority may use surrogate information in the form of Facts Available to fill the gap (Article 6.8 and Annex II). Moreover, if the interested party does not cooperate and relevant information is withheld, the authority may use surrogate data that "could lead" to a "less favourable" result for the interested party (Annex II.7). However, nothing in Annex II either implicitly or explicitly permits the

[5] *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329, 24,363 (Dep't Commerce 6 May 1999) (final determination of sales at less than fair value).

[6] Japan's First Submission at paragraph 97.

[7] See Japan's First Submission at paragraphs 91-99, 105-108.

investigating authority to abandon its obligation to make a fair comparison between export prices and normal value when it resorts to a secondary source of data.

22. To the contrary, Annex II, read as a whole, supports the view that the authorities are to make every effort to assure that the information relied on results in a fair comparison. For example, Annex II.5 requires the use of less than ideal information rather than Facts Available, if the interested party has acted to the best of its ability. Even if a resort to secondary sources is justified, the source selected must also be chosen with "special circumspection" and the secondary information should be checked against independent sources (Annex II.7).

23. In the instant case, therefore, Commerce, in order to fulfill its obligations to conduct a fair comparison, should have looked for data from a secondary source to replace the single variable which was allegedly not timely provided -- the factor to convert theoretical weight to actual weight. A possible and obvious source for such data was the conversion factor provided by KSC in the investigation.[8]

24. Finally, the Commerce Department's punitive purpose for not engaging in a transaction-by-transaction comparison for those sales, and instead applying a margin from other sales is neither recognized nor permitted by Annex II nor the Anti-Dumping Agreement as a whole. Commerce did not seek secondary information on a conversion factor in order to make a fair comparison because it "sought a margin that is sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information".[9]

25. As noted, the Anti-Dumping Agreement allows an authority to use secondary data to make a fair comparison, even when the result may be less favourable to the party (Annex II.7). However, the distinction is that here the US sought unfavourable data for the sole objective of inflating the margin to serve some " punitive" purpose. Even when other secondary data which would have permitted a fair comparison was available, the US did not use it in clear violation of the Anti-Dumping Agreement.

E. COMMERCE'S ARM'S-LENGTH TEST, AND THE APPLICATION OF THE TEST TO DETERMINE THAT SALES TO AFFILIATED PARTIES ARE "OUTSIDE THE ORDINARY COURSE OF TRADE," ARE INCONSISTENT WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT.

26. The United States disregarded most home market sales of the Japanese Respondents to affiliated parties after determining that those sales were "outside the ordinary course of trade".[10] The basis of this decision was the application of the so-called "Arm's-Length Test" to home market sales. This test requires that, in order for sales to an affiliated party to be used in the calculation of normal value, the weighted-average price for all sales to that affiliated party equal at least 99.5 per cent of the weighted-average price of all sales to non-affiliated customers. Since most sales to affiliated parties did not meet this standard in this case, those affiliated party sales were not used.

27. The volume of affiliated party sales was significant for each Respondent, so Commerce used instead the resale prices by those affiliated home market customers to unaffiliated customers as normal value. Under the Commerce Department's methodology, no adjustments are made for differences in price comparability due to the additional costs and profit for resellers.

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[8] See discussion in Japan's First Submission at paragraph 97.

[9] *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329, 24,369 (Dep't Commerce 6 May 1999) (final determination of sales at less than fair value).

[10] Japan's First Submission at paragraph 154.

28. In this case, the United States violated the requirement of Article 2.4 of the Anti-Dumping Agreement when it disregarded the home market sales to affiliated parties as outside the ordinary course of trade on the arbitrary basis of the Arm's-Length Test.

29. The Anti-Dumping Agreement only recognizes one basis for disregarding sales as "outside the ordinary course of trade." Article 2.2.1 of the Anti-Dumping Agreement provides that sales at prices below the cost of production, plus administrative, selling and general costs, "may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value," but only under certain prescribed conditions.

30. The conditions that must be met under this Article for finding sales below cost to be outside the ordinary course of trade are that: (1) they are made within an extended period of time; (2) they are in substantial quantities; and (3) they do not provide for the recovery of all costs within a reasonable period of time. In particular, the Anti-Dumping Agreement, at Footnote 5, provides that sales below cost cannot be treated as outside the ordinary course of trade unless, by quantity, they represent at least 20 per cent of the volume of sales under consideration.

31. It is significant that even below cost sales cannot be excluded under the Anti-Dumping Agreement unless certain specified requirements are met. (Of course, if there were below cost sales to affiliated parties that met the requirements of Article 2.2.1, they would also be excluded.) Logically, given this careful attention to the treatment of below cost sales and consistent with the overall requirement that comparisons be "fair," above cost sales cannot be excluded in an arbitrary manner.[11]

32. The application of the Arm's-Length Test in this case was arbitrary. Commerce's Arm's-Length Test compared all sales to each affiliated party to the weighted-average price of all sales to unaffiliated parties. Thus, the Arm's-Length Test indiscriminately mixed together all models of subject merchandise sold to affiliated and unaffiliated parties. The US took no account of the differences in prices and/or product that existed independent of the factor of affiliation which could have caused the weighted-average prices between an affiliated party and unaffiliated parties to vary more than 0.5 per cent.

33. In essence, the Arm's-Length Test arbitrarily assumes that such a difference in the weighted-average price is due solely to affiliation, and Commerce disregarded all sales to the affiliated party on that basis. Thus, the test is logically flawed and is not a fair ("apples-to-apples") comparison and cannot be sustained.

34. Finally, the test has a bias because Commerce disregards only those affiliated party sales which have weighted-average prices lower than the weighted-average price to unaffiliated customers. Affiliated party sales that equal or exceed 99.5 per cent of the weighted-average price to unaffiliated parties are included in the database. This guarantees that only higher-priced sales remain in the database for the calculation of normal value, and margins of dumping are increased.

[11] The US theory is that all its interpretations are permissible as long as the Anti-Dumping Agreement is silent with respect to a certain methodology (*See* First Submission of the Government of the United States of America in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184 at A-29-31 (July 24, 2000)). Such a broad interpretation cannot be accepted since the illogical result of such a theory would be that the more creatively arbitrary the methodology is, the less likely it is to come within the specific terms of the Anti-Dumping Agreement and, therefore, would be a permissible interpretation. In any event, the free-standing requirement of Article 2.4 that a "fair comparison" must be made between export price and normal value also prevents such an absurd result.

F. COMMERCE'S FAILURE TO MAKE ADJUSTMENTS TO THE RESALE PRICE OF AFFILIATED PARTY SALES VIOLATED THE FAIR COMPARISON REQUIREMENTS OF ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT.

35. Another independent legal error with respect to this issue of the treatment of affiliated party sales is that when Commerce disregarded the sales to affiliated parties as outside the ordinary course of trade and used the downstream sales of these affiliated parties to calculate normal value, Commerce did not make adjustments for differences in costs incurred for such sales for purposes of price comparability. Specifically, Commerce deducted neither the costs incurred by the affiliated reseller in the resale of the merchandise, nor its profits. Yet, both costs and profits directly affected price comparability. As a result, the normal value for these affiliated party resellers is arbitrarily inflated.

36. It is noteworthy that Article 2.3 provides that an authority concerned that an affiliation between the exporter and importer reduces the reliability of the export price to the affiliated importer may use the constructed export price (CEP) to the first unaffiliated buyer. In addition, the fourth sentence of Article 2.4 provides that when such sales are used, the authorities should make allowances for costs incurred between importation and resale, and for profits accruing to the affiliated reseller.

37. Obviously, these provisions in the Anti-Dumping Agreement with respect to export sales are not directly applicable to home market sales and the Anti-Dumping Agreement makes no provision for excluding affiliated party sales in calculating normal value. Yet, if Commerce uses the resale price for affiliated party sales in the home market, then it must recognize that the sales require cost adjustments to make them comparable. Article 2.4 of the Anti-Dumping Agreement explicitly requires that due allowances be made "for differences that affect price comparability." Furthermore, the failure to follow a complete and accurate methodology for the treatment of these sales in the home market, when such adjustments are explicitly provided for and made for constructed export price, falls far short of a "fair" comparison. By not making comparable adjustments for costs and profit on sales by affiliated resellers in the domestic market as it does in the export market, Commerce 's methodology is in violation of Article 2.4 of the Anti-Dumping Agreement.

G. THE COMMERCE DEPARTMENT IMPROPERLY BASED A DETERMINATION OF CRITICAL CIRCUMSTANCES SOLELY ON A THREAT OF INJURY DETERMINATION BY THE ITC RATHER THAN THE REQUIRED CURRENT INJURY DETERMINATION

38. On 23 November 1998, the Commerce Department announced its preliminary critical circumstances finding pursuant to the Policy Bulletin that Commerce had issued on 8 October 1998, which announced its new critical circumstances policy. At the time of the preliminary critical circumstances determination, the only US injury finding that was in effect was an affirmative threat determination -- the USITC did not find current injury in its preliminary determination. Also, at the time of the critical circumstances finding, Commerce had yet to issue a decision regarding the level of dumping, if any -- Commerce's critical circumstances finding preceded its announcement of preliminary dumping margins by almost three months.

39. For the Panel to sustain Commerce's finding of critical circumstances, Article 10.7 requires that the record must contain "sufficient evidence" to support a finding of injury. In this case, Commerce's preliminary announcement of critical circumstances violated the provisions of Article 10.6 of the Anti-Dumping Agreement since the USITC made a negative preliminary determination of current injury and an affirmative preliminary determination of threat of injury only.[12] Therefore, this determination of critical circumstances was nothing more than an obvious and

[12] *Certain Hot-Rolled Steel Products from Brazil, Japan and Russia*, USITC Pub. 3142 (Nov. 1998) (preliminary determination) at 1.

effective means of chilling imports even before the preliminary determination of dumping and violated the Agreement.

40. Article 10.6 of the Anti-Dumping Agreement, read together with Article 10.2, establishes the limited conditions under which anti-dumping duties may be applied retroactively. Article 10.2 provides the circumstances under which duties can be applied back to the provisional duty period. Article 10.6 provides the additional circumstances under which definitive duties can be applied during the provisional duty period and 90 days prior to the provisional duty period.

41. Article 10.2, which provides authority for retroactive application during the provisional period, explicitly states that it can only be applied in the case of a determination of injury; threat of injury is not a sufficient basis. Therefore, Article 10.6, which covers that same provisional period as well as the 90 days that precede it, must be read in conjunction with Article 10.2, and thus, the provision can only apply when a finding of current injury is made. For retroactive application of duties, present injury is required; threat of injury is insufficient.[13]

42. The plain language of Article 10.6 also supports this interpretation. The grounds for critical circumstances apply only where importers know both that dumping is occurring and that the dumping would cause injury. Thus, if dumping is occurring but no injury is being caused, then the Anti-Dumping Agreement's requirements for critical circumstances are not met.

43. This is not a new or unique interpretation of the requirement of Article 10.6. To the contrary, until late 1997, the Commerce Department endorsed it, stating:

> When {USITC} has preliminarily found no reasonable indication that a US industry is experiencing present material injury by reason of the dumped subject merchandise, but only a threat of injury, {Commerce} has determined that it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury.[14]

44. Finally, such an interpretation that only a present injury finding can support a critical circumstances determination, also comports with the limited object and purpose of Article 10.6, which is to assure that the remedial effects of final duties are not eviscerated. If only threat of injury exists, the remedial effect of the final dumping duty is not undermined since its prospective application will prevent injury from occurring (Article 10.6(ii)). It is only in the case of present injury that the remedial effects of a final anti-dumping duty could be undermined.

45. Commerce's invocation of critical circumstances in this case, therefore, did not serve its stated purpose nor did not conform to the requirement of Article 10.6. It pre-empted the normal timing of the investigative process and resulted in an impermissible action intended solely to chill and disrupt the flow of trade which should be beyond the reach of anti-dumping measures. That, in fact, appears to have been the purpose both of Commerce's announcement of the policy bulletin changing Commerce's practice concerning critical circumstances less than ten days following the filing of the petition and of Commerce's announcement of critical circumstances almost three months in advance of the preliminary dumping determination and in the absence of a preliminary determination of current injury or dumping margins.

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[13] A limited exception provided in Article 10.2 allows retroactive duties to be levied after finding threat of injury, but only if there would have been a final injury determination absent provisional measures. There was no finding in this case to support the application of this exception.

[14] *Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9160, 9164 (28 Feb. 1997) (final determination of sales at less than fair value).

46. Thus, regardless of the Panel's determination regarding the merits of the evidence of current injury employed by Commerce in its determination of critical circumstances, the Panel should find that, for a critical circumstances determination to be valid, there must be "sufficient evidence" of current injury upon which the determination is based.

H. ARTICLES 3 AND 4 OF THE ANTI-DUMPING AGREEMENT REQUIRE THAT INJURY AND CAUSATION DETERMINATIONS BE BASED ON AN ANALYSIS OF THE INDUSTRY AS A WHOLE

47. The Japanese Government asserts that the USITC's injury analysis did not properly consider injury to the "domestic producers as a whole of the like product" in accordance with Article 4.1 of the Anti-Dumping Agreement.[15] While the Korean Government does not comment generally regarding the particular facts of the USITC' s analysis in this case, it urges the Panel to carefully examine the merits of Japan's claims and the legal and factual support for the USITC's injury finding.

48. We highlight Article 3.4 which requires an analysis of "all relevant economic factors and indices bearing on the state of domestic industry," *i.e.*, the industry as a whole (Article 4.1). Thus, where there are divergent trends in different segments of the industry, an

49. Authority may not unduly emphasize a particular segment of the industry at the expense of the industry as a whole while all relevant conditions of competition are considered. In addition, Article 3.5 states that "{t}he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities". Article 3.6 clarifies that this determination must be made "in relation to the domestic production of the like product" where, as in this case, such data was available.

III. CONCLUSION

50. The Government of the Republic of Korea respectfully requests the Panel's careful consideration of its comments.

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[15] Japan's First Submission at paragraphs 253-255.

ANNEX C

Second Submissions by the Parties

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ANNEX C-1

Second Submission of Japan

(13 September 2000)

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Business Confidential Information

In this Submission, including its Exhibits, Japan has placed Business Confidential Information in brackets ("[]"). The bracketed information is highly confidential. This information is provided solely for the purpose of fully informing the Panel of the factual details of the Hot-Rolled Steel investigations. Japanese respondents would be seriously harmed if this information were used for any other purpose or were made available to anyone outside the Panel, the Secretariat officials assisting the Panel, and the official legal team of the United States and the third parties — especially if this information were made available to any of Japanese respondents' competitors. Japan therefore respectfully requests that this information be protected and that it be omitted from the Panel's report.

INTRODUCTION

1. Japan has demonstrated through its factual and legal presentations in this proceeding that the United States has violated numerous provisions of the Agreement on Implementation of Article VI of GATT 1994 ("the AD Agreement") as well as Article X of GATT 1994. The United States has attempted to deflect Japan's substantive claims with faulty preliminary objections, convenient interpretations of the relevant standards of review, and misconceived allegations that Japan's case relies on conspiracy theories. These devices, however, cannot overcome the strength of Japan's legal claims.

2. This Second Submission focuses on the substance of these claims. We do not repeat here the political context in which the United States made the decisions in this case. We instead merely wish to remind the Panel that the context is important to discerning whether the United States has met its obligations to conduct its investigations in an objective, unbiased, uniform, impartial, and reasonable manner – standards that are critical to any case under the AD Agreement and Article X:3(a) of GATT 1994.

3. This case presents a number of actions and policies undertaken by the US authorities that violate the AD Agreement, as follows:

- Facts Available: USDOC has converted the "facts available" provisions of the AD Agreement from an investigative gap-filling tool into an adversarial weapon to be used against foreign respondents. The general practice of using adverse facts available to punish respondents is inconsistent on its face with both the letter and spirit of Article 6.8 and Annex II of the AD Agreement. Further, the application of the policy in this case demonstrates its abusive nature. KSC was punished for its failure to find a way to force a petitioner to cooperate in the investigation for the benefit of a respondent. NSC and NKK were punished for good faith misunderstandings in their initial questionnaire responses, which were ultimately corrected before the closing of the factual record. The US authorities misapplied Paragraph 7 of Annex II and ignored the obligation of Article 6.13.

- All Others Rate: USDOC interprets Article 9.4 as if it includes the word "entirely," and thus calculates the "all other rate" applicable to companies not investigated based on margins tainted by "facts available." What the United States could not achieve in the negotiations of the Uruguay Round, the United States unilaterally adopts as its interpretation of the treaty text.

- Affiliated Parties: USDOC applies an arbitrary and unfair 99.5 percent test to exclude nearly all low-priced home market sales to affiliates while excluding high-priced sales to affiliates only if they are "aberrationally high." This particular USDOC policy so clearly violates Article 2.4 that not one of the five third parties in this case defends this policy, and four of the five parties specifically condemn the policy. Also, the United States uses downstream prices to calculate normal value, without appropriate adjustment, in direct contravention of the requirements of Article 2.2 to use a respondent's available home market sales or other specified alternatives.

- Critical Circumstances: USDOC rushed to judgment to make an early finding of critical circumstances long before it had sufficient evidence within the meaning of Article 10.6 to do so. USDOC formalized this approach of relying almost exclusively on the petition itself in a new policy bulletin that ensures this problem will repeat itself.

- Captive Production: The statutory provision on captive production impermissibly requires the USITC to focus primarily on one segment, at the expense of the other segment and the

domestic industry as a whole. The statute does not simply add another factor, or allow appropriate consideration of all factors. The statute instead significantly skews the analysis in favour of one segment. This analytic approach thus violates the explicit requirement in Articles 3 and 4 for injury determinations to be based on the domestic industry as a whole.

- Causation: USITC impermissibly manipulated the periods examined to justify its outcome. Rather than objectively determine the facts, USITC simply ignored the logical inconsistency in its finding -- that the domestic industry increased its shipments and improved financial performance even with an increase in imports. Such self selection does not meet the requirement of Article 3.1 for an "objective examination," or Article 3.5 for a determination that subject imports themselves caused the material injury. USITC also inadequately considered alternative causes, and thus violated the Article 3.5 requirement not to attribute other causes to the imports being investigated. Selective discussion of favourable facts and ignorance of unfavourable facts simply does not meet the requirements of Article 3.

4. Beyond these AD Agreement violations, the US authorities also breached their obligations under GATT 1994 Article X:3(a) to administer the anti-dumping law in a "uniform, impartial, and reasonable" manner. These obligations exist independently of the AD Agreement, and the Panel should therefore address these separate and independent claims. They are summarized as follows:

- Notwithstanding USDOC's application of punitive adverse facts available for far less severe actions by respondents, USITC accepted corrected questionnaire responses from domestic companies filed well after the initial deadline but before the closing of the factual record. The United States pretends this asymmetry does not exist, and in doing so has the audacity to claim that the domestic companies made "timely" responses citing the USITC version of the very regulation that USDOC claims did not apply to the foreign companies.

- Notwithstanding an existing and uniformly followed regulation, the authorities conveniently overlooked clerical errors the correction of which would benefit foreign respondents, even though there was no dispute at all over the clerical error or the applicability of the regulation at issue.

- Notwithstanding a longstanding practice of not accelerating cases, particularly complex cases, the authorities pushed this case through in record time. Instead of taking more time to proceed carefully, the United States rushed to finish early.

- Notwithstanding an existing customs policy that would have easily allowed the authorities to collect retroactive duties should they prove necessary later in the case, the authorities instead capitulated to domestic industry demands to craft a new policy. The authorities then rushed to apply the new policy in this case regardless of the state of the factual record.

- Notwithstanding a long history of analyzing three-year trends, USITC chose to focus on only two-years of the investigation period so as to avoid the logical inconsistencies of considering all three years.

Although all of these decisions reflect the degree of political pressure on the US authorities, none of these decisions complies with the obligation for "uniform, impartial, and reasonable" administration of the law.

5. This case is very much about respect for the rule of law, and respect for international obligations. The Panel decision in this case will show whether the obligations reflected in the AD Agreement and in GATT 1994 Article X:3(a) are meaningful or not. If there are any limits on the discretion that

administering authorities enjoy, then this case presents multiple violations of those limits that this Panel should discipline.

I. PRELIMINARY OBJECTIONS

6. The United States made preliminary objections concerning certain evidence submitted by Japan as well as Japan's claim against the US general practice of applying adverse facts available. We address only the former here; the latter is addressed separately in the section concerning facts available.

7. Japan believes that its letter of 10 August 2000 and its answers to Panel Question 3 demonstrate that all the factual information in this case are properly before the Panel. There are three kinds of claims in this proceeding: (a) "as applied" claims under the AD Agreement, (b) "on its face" claims under the AD Agreement, and (c) claims under GATT 1994 Article X:3(a). The issue raised by the United States in its preliminary objections to certain evidence is the extent to which Article 17.5(ii) of the AD Agreement limits the factual evidence that the Panel can consider with respect to these three types of claims.

8. The United States has conceded that "on its face" claims are not limited by Article 17.5(ii) of the AD Agreement.[1] Japan agrees. Indeed, "on its face" claims could not be limited by Article 17.5(ii) because the claims are not based solely upon what an authority did in a specific investigation.

9. The same logic applies to Japan's Article X claims. Article X claims are based on a different set of facts than "as applied" claims under the AD Agreement.[2] Article X is, *inter alia*, a *comparative* task in which the Panel compares the treatment of one party to another party (such as petitioners versus respondents), or the treatment of the respondents in this investigation to the treatment of respondents in other US investigations in terms of the *administration* of a law, regulation, or practice.[3] Therefore, contrary to the US assertion in its response to Panel Question 23, it makes perfect logical sense that a specific decision might not substantively violate the obligations of the AD Agreement, but that the administration of rules leading to that decision violates Article X of GATT 1994. Although a decision in isolation might not look biased for AD Agreement purposes, when the administration leading to that decision is compared to other instances, the partiality often becomes crystal clear.[4]

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[1] US Response to Panel Question 39. The United States later in its response to Panel Question 39 makes a hypocritical statement that should be ignored. After asserting that extra-record evidence can be used to support "on its face" claims, the US encourages the Panel to ignore Japan's expert evidence from a statistician because Japanese exporters should have submitted it to USDOC during the investigation. The Japanese exporters vociferously argued against the 99.5% test in the original investigation. Japan should not now be punished in making its "on its face" claim for the fact that perhaps the exporters did not find it worth the resources to hire an expert statistician for an AD investigation before a biased authority that had used this practice in nearly every prior case. Expert testimony on the "fairness" of a particular methodology, however, is quite appropriate before a WTO panel considering the proper interpretation of the word "fair" under the AD Agreement.

[2] The United States incorrectly suggests that the only contested evidence relevant to Japan's Article X claims is two newspaper articles. All of the newspaper articles that provide background on the case and illustrate the biased and zealous manner in which the domestic industry, Congress and the US AD authority were operating help explain why the US AD authority resorted to non-uniform, partial and unreasonable administrations of its rules. *See* **Exhibits JP–16-23, 25-27, 32(a)–(e), 37, 38**. In addition to these articles, in its Article X claims Japan also references NKK's good-faith behaviour in trying to respond to USDOC's weight conversion factor. *See* Japan's First Submission, para. 317. In this way, Mr. Porter's affidavit is also relevant to Japan's Article X claims. *See* **Exhibit JP–28**.

[3] The difference between Japan's GATT 1994 Article X claims and its claims under the AD Agreement is set forth in greater detail in the section of this submission dealing with Article X.

[4] A perfect example is USDOC's refusal to correct its clerical error that inflated NKK's preliminary margin by 12 percentage points. While the decision not to correct an error before the Final Determination might

10. With respect to the "as applied" claims, this so-called "extra-record" evidence is essential for the Panel to complete its task in this case. Article 17.6(i) requires the Panel to determine whether the authorities properly established facts and undertook an objective and unbiased evaluation of the facts. Fitting together with it, DSU Article 11 requires panels to make an "objective assessment" of the matters before it. The Panel cannot determine whether the facts were properly established and objectively assessed without considering the context of those facts.[5] Therefore, the Panel is obligated under WTO rules to consider all proffered evidence that will shed light on these important issues.

11. Moreover, within the "as applied" claims, Japan makes both legal and factual claims. In this regard, the expert opinion of the statisticians does not present any new or extra-record facts. Rather, it is an expert opinion based on record facts that the USDOC arm's length test is unfair. The affidavits of respondents' counsel, contrary to presenting new factual information, for the most part document margin impact *based on record facts*. There is no basis, therefore, upon which to exclude the statements. The affidavits are explicit in demonstrating step-by-step how the affiants reached their conclusions based on the record information or information improperly expunged from the record by USDOC.

12. Newspaper articles are provided (a) to give the Panel context when it examines whether the US authority properly established facts or assessed facts in an objective and unbiased manner[6] and (b) to summarize information for the Panel.[7] The articles demonstrate the extent of lobbying exerted by the domestic steel industry in this case on Congress which then exerted pressure on USDOC. The articles highlight the zealous nature of the actions taken by the United States in this case. The articles place certain extraordinary decisions made by USDOC in context so that the Panel can determine whether an objective and unbiased authority would have reached these decisions. There was no reason for the Japanese exporters in the underlying investigation to submit these articles. The articles are themselves about the investigation and USDOC's conduct during the investigation.

13. As a result, all of the evidence submitted by Japan is worthy of the Panel's consideration.

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not create a substantive AD Agreement violation, when compared to the fact that USDOC maintains a consistent practice of correcting these significant errors in other cases, the bias and partiality becomes clear.

[5] Article 17.5(ii) does not say the Panel should rely *only* upon evidence before the authority. The provision operates in conjunction with DSU Article 11 which obliges the Panel to make an objective assessment of all of the facts. There is no conflict between Article 17.5(ii) of the AD Agreement and Article 11 of the DSU. The Appellate Body has been very clear that Article 17 of the AD Agreement does not trump the broader rights and obligations of panels and members. *See United States—Anti-Dumping Act of 1916*, 28 Aug. 2000, WT/DS136/AB/R, WT/DS162/AB/R, at para. 74 ("*U.S.—1916 Act*") and *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, adopted 2 Nov. 1998, WT/DS60/AB/R, at para. 65-67 ("*Guatemala—Cement*"). Moreover, the Appellate Body has established that panels have broad authority to look at evidence and determine its probative value, specifically so that panels can discharge their Article 11 obligations. *See United States—Import Prohibition of Certain Shrimp and Shrimp Products,* adopted 6 Nov. 1998, WT/DS58/AB/R, at paras. 104-106 ("*U.S.—Shrimp*"). The Appellate Body stated:

> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements*." (emphasis added in the report)

[6] *See* **Exhibits JP–16-23, 25-27, 32(a)–(e), 37, 38.**

[7] *See* **Exhibits JP–32(a)–(e), 33, 36**. As for **Exhibit JP–34(a)**, if an exporter referred the authority to the article, then it is on the record and Japan can use that Article before the Panel. It does not matter if the exporters provided copies of the Article or not.

II. STANDARD OF REVIEW

A. THE DISPUTE SETTLEMENT UNDERSTANDING ("DSU")

14. The United States misunderstands the operation of the appropriate standards of review in this case. Although the AD Agreement does indeed contain a unique standard of review,[8] Article 11 of DSU does not lose its meaning as we described in Paragraph 10, and *Japan has not brought this case only under the AD Agreement*. Japan has raised simultaneous claims under GATT 1994 regarding the US *administration* of its anti-dumping rules that deserve equal attention and consideration by the Panel. Therefore, Article 11 of the DSU is the applicable standard of review for Japan's Article X claims under GATT 1994.

15. The United States has effectively conceded this fact. Their only argument pertaining to the DSU standard of review is to assert, with absolutely no support, that Article X:3 of GATT 1994 simply *cannot* apply to a Member's anti-dumping actions.[9] By focusing only upon the standard of review under the AD Agreement, the United States has effectively conceded that Article 11 of the DSU controls the Panel's standard and scope of review with respect to Japan's GATT 1994 Article X claim – a claim that is separate and independent of the claims under the AD Agreement. In this way, the Panel should remain mindful of its obligation to consider all facts and evidence under Article 11 of the DSU. The United States cannot hide behind an alleged deferential standard of review contained in the AD Agreement to limit the Panel's review over the *entire* case.

B. THE AD AGREEMENT

1. This case fits squarely within the factual standard of review

16. In theory, the parties are in agreement as to the operation of the standard of review. Japan was explicit in its First Submission that it is not asking the Panel to reweigh the specific facts in this case.[10] Rather, each factual claim is based on either the improper establishment of the facts (including the failure to consider essential facts) or the biased and non-objective evaluation of the facts.

17. Where the parties disagree sharply, however, is the level of deference the Panel is to pay to the factual conclusions of a national authority. Although Japan agrees that the Panel should not reweigh the facts, the first sentence of Article 17.6(i) specifically directs the Panel to examine whether the national authority properly established the facts and evaluated the facts in an objective and unbiased manner. This consideration requires absolutely no deference on the part of the Panel. If the Panel finds instances in which the national authority improperly established facts or failed to evaluate the facts in an objective and unbiased manner, then those determinations fail to meet the basic requirements of the AD Agreement.

18. The United States also misstates the "scope" of the Panel's factual review.[11] First, Japan's challenges in this case are not limited to only the hot-rolled investigation. To the extent, therefore, that Japan has made "on its face" challenges, Article 17.5(ii) is irrelevant. Second, contrary to the US

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[8] Oddly, in footnote 97 in Part A of its First Submission, the United States claims that this unique standard of review also applies to matters pertaining to subsidies and countervailing measures. This claim is false. The United States recently lost this argument before the WTO Appellate Body in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, adopted 7 June 2000, WT/DS138/AB/R, at paras. 50-51.

[9] US First Submission, para. A-88 (emphasis added). The obvious applicability of GATT 1994 Article X to anti-dumping measures is discussed in more detail in the section of this submission covering Japan's actual Article X claims.

[10] Japan's First Submission, para. 49.

[11] Japan's detailed arguments on this topic are presented in Japan's 10 August 2000 Response to US Preliminary Objections.

view, Article 17.5(ii) of the AD Agreement does not limit review to the "administrative record." Importantly, the Panel must take into account facts that are "placed" before an authority, but not placed on the actual record. The US attempt to limit the scope of the Panel's review would, in fact, preclude the Panel's ability to carry out its factual standard of review in which it must examine the US authority's initial establishment of the facts, and consider whether the authority evaluated the facts in an unbiased and objective manner.

2. The United States distorts the legal standard of review

(a) No interpretation should escape the disciplines of the Vienna Convention, even under Article 17.6(ii)

19. In advocating unlimited deference to Member's interpretations of the AD Agreement, the United States would have the Panel allow the United States to interpret the AD Agreement at its own will. Article 17.6(ii) stipulates that panels must interpret the anti-dumping provisions in accordance with "customary rules of interpretation of public international law," a clear reference to the Vienna Convention.[12] Nearly every panel and Appellate Body decision now refers to the Vienna Convention as the primary set of rules that govern treaty interpretation in the WTO context. The deliberate insertion into Article 17.6(ii) of a reference to the customary rules of interpretation requires an interpretation *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* as stipulated in Article 31 of the Vienna Convention.[13] And Article 32 of the Vienna Convention instructs an interpreter as to how to deal with ambiguity, if any, by referring to the treaty's supplementary materials. Faithfully interpreted, Article 17.6(ii) thus bars Members from arbitrarily interpreting the provisions of the AD Agreement in a way that neglects their object and purpose.[14] Accordingly, the attempts of the United States to justify its interpretation by referring to the second sentence of Article 17.6(ii) must fail. When the Vienna Convention and the language of Article 17.6(ii) are read together, in their entirety, they do not give a Member *carte blanche* authority to equate ambiguity with multiple interpretations as the United States attempts here.

20. Even when the Panel finds a provision subject to more than one interpretation, that interpretation must still be "permissible" on the basis of *good faith* interpretation as elaborated above.[15] The Panel does not owe unrestrained deference to a Member's legal interpretation of treaty text. Rather, the Panel must scrutinize the permissibility of that interpretation in light of the Vienna Convention rules of treaty interpretation and a Member's obligation to implement the WTO Agreements *in good faith*.

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[12] See Steven P. Croley and John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l L. 193, 200 (1996).

[13] Vienna Convention on the Law of Treaties, art. 31.1 (emphasis added).

[14] In footnote 105 in Part A of its First Submission, the United States challenges the opinion of two GATT scholars that the anti-dumping standard of review allows for only one permissible interpretation. Far from recognizing the similarities between the standard of review and US law, the scholars point out the significant differences between the two bodies of law. Moreover, they explain the negotiating history of Article 17.6(ii), which evolved from a US proposed standard that recognized the use of multiple interpretations to the current and more limited standard of review that relies first and foremost on the Vienna Convention. *See* Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 193, 209-211 (1996). The United States is simply trying to achieve in dispute settlement what it failed to achieve in negotiations. See Gary N. Horlick and Peggy A. Clarke, "Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO," in 41 *Studies in International Economic Law: International Trade Law and the GATT/WTO Dispute Settlement System* 315, 317-320 (Ernst-Ulrich Petersmann ed. 1997), which analyzes the consistent rejection by WTO Members of US proposals regarding the anti-dumping legal standard of review during the Uruguay Round. (Attached as **Exh. JP-92**).

[15] The Government of Japan endorses the argument made by the Government of Brazil that the concept of "good faith" serves as an important tool of interpretation that should guide the Panel in determining the limits of "permissible." *See* Brazil's Third Party Submission, paras. 5-11.

(b) The United States misstates the doctrine of "subsequent practice"

21. Finally, the United States misleads the Panel as to the appropriate international practice under Article 31(3)(b) of the Vienna Convention governing subsequent practice. In this Article, "subsequent practice" must be those which establish "the agreement of the parties."[16] With no citation whatsoever, the United States whittles down this tool of interpretation to require only that "*a number* of signatories to the Agreement" have adopted the practice.[17]

22. Using this faulty premise, throughout its submission the United States alleges that other Members have interpreted the AD Agreement in a manner identical to the United States. In this submission, however, Japan will point out that many Members *do not* interpret the AD Agreement in the same manner as the United States, thereby nullifying any potential for the establishment of a "subsequent practice" under the accepted Vienna Convention interpretive tool. The concept of "subsequent practice" is about agreement and a concordance of actions; it is not about codifying varied practices or the practices of only a few dominant Members.

III. FACTS AVAILABLE

23. Japan's argument on facts available is that not only the application of relevant provisions of the US Statute in this case, but also USDOC's general practice of applying adverse facts available, violates the AD Agreement. Although the US statute itself may or may not be consistent with the Agreement, the general policies and methodologies with which USDOC consistently applies it are definitely not. Rather than use the facts available provisions of the AD Agreement as an investigative tool to find reliable information to fill gaps in information -- regardless of how those gaps are created -- USDOC uses them as a mechanism to punish respondents. Nowhere does the AD Agreement support such a policy.

24. The extreme nature of USDOC's facts available practice emerges in the arbitrary treatment of KSC, NSC, and NKK in the hot-rolled steel case. Each company cooperated with USDOC's information requests. None of them refused to provide information; none of them refused on-site verification. When they had trouble reporting information, they informed USDOC of their difficulty. The United States itself admits the Japanese companies were "substantially or largely cooperative" in this case.[18] Yet in the face of such facts, the United States now portrays them as the "bad secretary."[19]

25. The facts -- properly established and objectively evaluated -- belie this offensive analogy. KSC faced a situation in which USDOC has in the past applied special circumspection: USDOC required it to supply data from an affiliated US customer whose role as a petitioner in the case placed it odds with KSC's interest in providing USDOC with complete information. USDOC did not even consider KSC's good faith attempts to comply with USDOC's requests notwithstanding this conflict of interest. Rather than look for a reliable alternative, USDOC resorted to facts that would punish KSC.

26. USDOC also punished NSC and NKK. In response to a good faith misunderstanding by NSC about what information it had, and a good faith misunderstanding by NKK about what USDOC

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[16] The Appellate Body has explained that, "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation." *Japan—Taxes on Alcoholic Beverages*, adopted 1 Nov. 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 13 n.24 (citing Sinclair, *The Vienna Convention on the Law of Treaties* 137 (2nd ed., 1984), among others).

[17] US First Submission, para. A-86 (emphasis added). The United States also goes so far to say that a varied subsequent practice among Members demonstrates that there are multiple interpretations of a provision. Varied subsequent practice, rather, demonstrates a lack of agreement and a need for clarity.

[18] US Response to Panel Question 27, para. 16.

[19] US Closing Statement, page 2.

wanted, USDOC overreacted. Rather than accept and then verify the information when it was offered, USDOC instead excluded the information from the record. That the missing information had little impact on the margin underscores the extreme nature of the USDOC policy. Even though the nature of the information and the impact on the margin showed that respondents could not possibly have been trying to manipulate the results, USDOC assumed the worse and lashed out in a punitive way.

27. The US defense of its policy underscores the wrong-headed manner in which USDOC approaches its task. Article 6.8 and Annex II of the AD Agreement do not permit the adversarial nature of USDOC anti-dumping investigations.

A. THE US PRACTICE OF APPLYING ADVERSE FACTS AVAILABLE VIOLATES THE AD AGREEMENT

28. The language of USDOC's policy has a distinctly deterrent and punitive ring to it: "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information. . . ."[20] In other words, the policy says to the respondent "if you don't obey, you will be punished." The AD Agreement does not permit this. As we explained in response to Panel Questions 4, 6, and 7, Article 6.8 and Annex II of the AD Agreement are carefully worded to ensure that authorities focus on obtaining the most necessary and reliable facts, not punishing respondents.

29. Japan has already addressed twice the reasons why its Panel request was sufficiently detailed on this topic in its 10 August 2000 Response to US Preliminary Objections (paragraphs 32-37) and in its 6 September 2000 Answers to Panel Questions (paragraphs 10-12, answering Question 3). We merely reiterate here that the United States concedes it did nothing different in this case from what it does in every case. If this is true, then the US preliminary objection is merely aimed at urging the Panel to limit any remedy it issues on this topic to the facts of this case. We hope that the Panel understands that such a limitation merely invites repetitive litigation on USDOC's wrongful application of adverse facts available. If the Panel accepts that the United States applied a general policy in this case that was inconsistent with the AD Agreement, then the remedy should be aimed at stopping the United States from continued application of such a policy in all future cases.

30. The United States cannot reconcile its practice to the AD Agreement. Its punitive use of adverse facts available ignores the requirement of Paragraph 7 to choose secondary facts with special circumspection. Rather than look for the most reliable information under the circumstances, USDOC searches for the heaviest club it can find to beat the respondent over the head. What the United States fails to understand is that anti-dumping laws, as prescribed by the AD Agreement, are aimed at reaching the truth through the investigative process. Authorities are not permitted to treat respondents as adversaries, like USDOC chooses to treat them. The aim of the authority, at least as far as Article 6.8 and Annex II of the AD Agreement are concerned, is to work with respondents and their data, supplemented with other available information, to obtain facts that are as close to reality as possible.

1. Annex II does not authorize purposeful adverse facts available

(a) Paragraph 7

31. The United States relies most heavily on Paragraph 7 of Annex II to support its punitive use of adverse facts available. The United States claims that the "less favourable" language in the third sentence of this Paragraph authorizes authorities to apply adverse facts available.[21] This interpretation

[20] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24362, 24369 (**Exh. JP-12**).
[21] US First Submission, para. B-66 to B-67.

is misguided as it takes the sentence out of context and ignores the careful choice of words throughout the paragraph.

32. As we explained in our response to Panel Question 4 (paragraphs 14-18), Paragraph 7 of Annex II applies once the decision is made to apply facts available. The entire thrust of the Paragraph is that the authority must take special care in choosing the facts available -- in other words, to find information that most closely approximates reality. This is why Paragraph 7 calls on the authority to use "special circumspection" in choosing the facts available, and to "check the information from other independent sources." This is one place, among many, where Japan finds support for the notion that the whole purpose of the facts available provisions of the AD Agreement is to fill gaps caused by missing information.

33. The final sentence of Paragraph 7 does not change this overriding purpose. The sentence merely contemplates that if a party does not cooperate and withholds information, then a less favourable result might occur than if the party had cooperated and did not withhold information. The language of Paragraph 7 obviously draws a line between the party that withholds and the party that does not. But in all cases, the overriding purpose behind making such inferences is fact-driven: in other words, upon applying special circumspection and checking the information against other information (as required by Paragraph 7), the authority may decide that the most reasonable and logical manner in which to fill the gap caused by the missing information is to use facts which might turn out to be less favourable to the respondent. The purpose is not, as the US practice expressly states, to punish respondents for not providing the information. The following table helps to illustrate the differences between what Paragraph 7 contemplates and the US general practice:

Requirement of AD Agreement (To Find The Most Reliable Facts)	US General Practice (To Induce Respondents to Cooperate, i.e., To Punish)
• The title of Annex II generally calls on authorities to find the "best information available."	• The US does not ask whether the information is "best" under the circumstances.
• Paragraph 7 calls on authorities to use "special circumspection" and "to check the information from other independent sources."	• The US does not apply special circumspection or check its choice of facts available against any other information. In fact, the US claims that it has no reason to do so when the information used belongs to the respondent itself.
• In other words, when information is missing, the authority must be very careful in its choice of facts available. Any choice must be logical and reasonable. To the extent any inferences are made concerning the respondent's cooperation, they too must be logical and reasonable. The purpose is to use facts that most closely resemble reality.	• The US has no intention to find facts that most closely resemble reality. Rather, they specifically seek to punish the respondent for not cooperating when they use facts "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information."
• In some cases, after applying special circumspection, an authority may find that the most logical and reasonable inference is one that turns out to be less favourable to the respondent, including margins alleged in the petition. But, nonetheless, the purpose is to find the most reliable facts.	• The language of the US practice demonstrates the difference in approaches. "The purpose of the adverse facts available rule," according to the U.S., is to force respondents to cooperate, not to find the most reliable facts.

34. Even if the exporter does not or is not able to provide the requested information, the onus remains on the investigating authority to determine whether dumping exists using facts available. On this point, the United States asserts erroneously that the Panel in *U.S.—Atlantic Salmon* did not reject the principle that adverse inferences may be drawn where appropriate.[22] *U.S.—Atlantic Salmon* did not address the specific issue of whether a Member may adopt a practice of purposefully punishing an exporter with adverse facts available. That dispute focused on the impact of the choice of facts available on the non-sample group. Nonetheless, certain principles relevant to this dispute can be extracted from the Panel's analysis in *U.S.—Atlantic Salmon*. In particular, the panel considered *representativeness* to be an important goal when applying facts available. The overall goal of an investigation, therefore, is to calculate the correct margin, or at least a representative margin. The level of participation or non-participation of the exporters does not excuse investigating authorities from seeking that goal.

(b) Other Paragraphs in Annex II

35. In grasping for some basis to support its punitive form of adverse facts available, the United States attempts to read into other provisions of Annex II concepts that are not there. The United States argues that the warning set forth in Paragraph 1 of Annex II only makes sense if adverse facts available are allowed.[23] Yet, the warning that authorities may use facts available when information is not supplied within a reasonable time refers to the *possibility* that the application of facts available

[22] *Id.* paras. B-77 to B-78.
[23] *Id.* para. B-61.

will be less favourable. In some cases, the facts available may be less favourable; and because of this possibility, Paragraph 1 of Annex II requires authorities to warn the parties. In other words, the uncertainty of a less favourable result itself creates the incentive to cooperate. There is no reason to read into Paragraph 1 a warning of a purposefully adverse result.

36. The United States also asserts that because the warning specifically refers to the petition information as the alternative, the use of adverse facts available is permitted. According to the United States, because the petition information will "document the highest degree of dumping," it is clear this Paragraph authorizes the use of adverse facts available.[24] This argument suggests that the AD Agreement permits an authority to establish a practice of initiating investigations based on petition information which "generally is presumed to be adverse." If this is the case, the United States may well be violating in most cases the requirements of Articles 5.2 and 5.3 of the AD Agreement.

37. The United States also argues that if Japan's position were valid, Paragraph 5 of Annex II would not make sense, because there would be no sanction for not acting to the best of one's ability.[25] But the thrust of Paragraph 5 is precisely the opposite -- to oblige the authority to accept information even if it is not ideal, if the party has acted to the best of its ability. Even then there is no mention of facts available, adverse or otherwise. There is no textual basis for the assertion that this provision allows an authority to punish an exporter that does not act to the best of its ability.

38. Finally, with respect to Paragraph 6, the United States says "there would be *no reason* to require investigating authorities to give exporters a 'last chance' to explain before their information was rejected, if that information could be replaced only with a neutral gap-filler."[26] Paragraph 6 merely says that the authority must provide the parties reasons why information is not accepted and the opportunity for those parties to provide further explanations; if the explanations are considered unsatisfactory, the authority's reasons should be given in published determinations. The authority must allow further explanations because it may be unclear exactly what the authority is requesting or it may be that the party may not have been given the opportunity to provide the requested information. This provision therefore does not support adverse facts available. Rather, Paragraph 6 embodies the general requirements of fairness and good faith in that it provides for notice of when and why authorities might use facts available. Paragraph 6 is therefore a due process clause that exists for the benefit of the parties, not the authority.

2. Article 6.8 does not authorize purposeful adverse facts available

39. The United States illogically reads Article 6.8 provision to mean that "because the use of facts available is the solution to the problem posed by non-cooperative respondents," authorities must be able to induce respondents into cooperating by the prospect of a worse result.[27] But, as the United States admits, this interpretation is simply not supported by the text of the article: "Article 6.8 does not *explicitly* provide that the selection of facts available may entail an adverse inference."[28]

40. Article 6.8 provides "{i}n cases in which any interested party refuses access to, or otherwise does not provide, *necessary* information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." (Emphasis added) It says authorities can use facts available only when the

[24] *Id.* para. B-62.
[25] *Id.* para. B-63.
[26] *Id.* para. B-65.
[27] *Id.* para. B-59. The United States claims that the use of facts available is to solve the problems of uncooperative *respondents*. Yet, Article 6.8 clearly applies to all interested parties, not simply to respondents. The limitation by the United States of the alleged problem and solution to respondents simply serves to highlight its misunderstanding of the purpose of the provision and its biased use of the provision against respondents.
[28] *Id*. para. B-59 (emphasis added).

authorities do not have necessary information. Nowhere in Article 6.8 is the word "adverse" used, nor is there any reference to providing the authorities a mechanism to induce respondents to cooperate. Rather, Article 6.8 treats all reasons for missing information in the same manner: by permitting the resort to facts available. Even when a party "refuses access" to information, Article 6.8 merely contemplates the use of "*facts* available," not some adverse version thereof. Because there is no modification of the term facts available, the use of facts available must be as reasonable and as representative as possible.

3. The legal authorities cited by the United States are not analogous or authoritative

41. The United States analogy of a dispute between sovereign states and those between a private party and a government agency is improper. The United States cites *Canada—Civilian Aircraft* and *Argentina—Footwear* to support its conclusion that the WTO has recognized that the use of adverse inferences is a necessary tool for gathering information.[29] These cases, however, involved the use of adverse inferences during the course of the WTO dispute settlement proceeding. WTO disputes are entirely different from an anti-dumping investigation. A dispute within the WTO system involves two countries, one of which is accused of violating an international agreement. The WTO system depends on cooperation among governments and compliance with WTO Agreements. For this reason, *Canada—Civilian Aircraft* spoke about the "viability of the dispute settlement system."[30]

42. An anti-dumping investigation is distinct in that the private parties are not bound by an international agreement. Indeed, the exporter's participation is optional; the AD Agreement is indifferent as to whether an exporter participates. The AD Agreement recognizes that an exporter may lack the resources to participate, the requested information, or the ability to extract the information requested by the deadline requested. The duty of the investigating authority remains the same, regardless of the level of participation of the exporter: to calculate as accurately and reasonably as possible, the dumping margins of a particular exporter.

43. Finally, the US argument that most countries use adverse inferences to induce cooperation as a justification for the US practice is absurd.[31] The various practices of other Members are irrelevant to this inquiry. Panels should not determine WTO-consistency based on how many other Members are also violating a particular WTO agreement.

B. THE APPLICATION OF ADVERSE FACTS AVAILABLE TO KSC VIOLATED THE AD AGREEMENT

44. USDOC's practice of punishing respondents with adverse facts available, as applied in this case, violates the AD Agreement. Indeed, the US rebuttal with respect to its use of facts available for KSC demonstrates that USDOC improperly established the facts, and demonstrates an array of AD Agreement violations.

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[29] *Id.* paras. B-69 to B-71.

[30] Notwithstanding its inapplicability here, the *Canada—Civilian Aircraft* case makes the point that even if adverse inferences are made, such inferences must still be logical or reasonable in light of the circumstances. In other words, they must be related to the facts involved, not merely aimed at punishment. *Canada—Measures Affecting the Export of Civilian Aircraft,* 2 Aug. 1999, WT/DS70/AB/R, at para. 200 ("*Canada—Civilian Aircraft*"). Further, we note that the authority for using adverse inferences in that case was the Agreement on Subsidies and Countervailing Measures, Annex V of which specifically calls for use of adverse inferences when government parties are involved. No such provision exists in the AD Agreement.

[31] US First Submission, para. B-72. Moreover, the United States has misstated the doctrine of "subsequent practice" as a matter of international law, as discussed above.

1. The United States misstates the facts

45. The US rebuttal contains numerous factual mischaracterizations with respect to KSC. In raising these mischaracterizations, Japan does not ask the Panel to substitute its own factual conclusions for those of USDOC; rather, Japan demonstrates how USDOC (as well as the United States Government in its First Submission) improperly established the facts.

- ***"KSC did not allege that CSI was unable to provide the requested information." US First Submission, para. B-18 (emphasis in original).***

46. In fact, KSC repeatedly set forth CSI's *inability* to provide the requested information in a number of submissions to USDOC. In response to a request from KSC, CSI stated that

> CSI is *unable* under its accounting system to provide the information on sales. . . . It is also our belief that *without being able to provide* the important information of sales prices requested, the provision of other data requested by {KSC} would neither be usable nor useful in the investigation of Kawasaki. . . ."[32]

KSC first put that letter on the record on 18 December 1998,[33] and then reiterated CSI's response that CSI's accounting system was *unable* to provide the information.[34] In its continued efforts to show USDOC CSI's inability to provide the requested information, KSC twice submitted to USDOC Mr. Gonçalves' Letter to KSC of 14 December 1998.[35]

- ***"{T}he Shareholders' Agreement is the only objective evidence on the record that shows how CSI operated and was governed internally." US First Submission, para. B-88.***

47. This is a surprising and extreme statement. The purpose of any shareholders' agreement is to define how a company should operate. Such agreements alone do not necessarily reflect how a company is run in practice. KSC submitted several letters from CSI's President and CEO, Mr. Gonçalves, showing how CSI operated in practice – including its participation as a petitioner in an anti-dumping case against both its parent companies' home countries.[36] Much of this evidence demonstrated that the Shareholders' Agreement was regularly ignored by the company and its shareholders. Such evidence is no less objective than the Shareholders' Agreement itself.

- ***"{T}here is no evidence on the record that KSC even invoked [ ]" US First Submission, para. B-93.***

48. The United States conveniently ignores evidence that is clearly set forth in one of its own exhibits. The KSC Sales Verification Report acknowledges that KSC in fact invoked [ ].[37] The report also specifically recognizes CSI's letter refusing the suggested visit from one of KSC's

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[32] *See* Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**) (emphasis added)**.**

[33] *See* KSC Letter to USDOC of 18 Dec. 1998, at Appendix A (proprietary version attached as **Exh. JP-93(a)**).

[34] *See* KSC Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**) (emphasis added).

[35] *See* KSC Verification Exhibit 20 (Mar. 1999) (excerpts attached as **Exh. JP-93(b)**); KSC's Case Brief at 16, Exhibit 2 (12 Apr. 1999) (excerpts attached as **Exh JP-93(c)**).

[36] All of the letters on CSI's letterhead from Mr. Gonçalves, CSI's President and CEO, provide strong *objective* evidence of how CSI operated. *See* Mr. Gonçalves Letter to KSC of 29 Oct. 1998 (**Exh. JP-42(f)**); Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**); Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**). Additional discussion demonstrating how the Shareholders' Agreement was regularly ignored by the company and its shareholders appears at **Exh. JP-93(d)**.

[37] *See* KSC Sales Verification Report, at 21-22 (excerpts in **US/B-21** and **Exh. JP-42(y)**) ("KSC invoked this Article in seeking permission to compile the necessary data, but CSI refused permission.").

attorneys and accounting consultant.[38] The United States also ignores the language of the Shareholders' Agreement, which includes providing [ ]."[39] Without question, the [ ].[40] Thus, as KSC's [ ] KSC's attorneys did in fact [ ] when they asked CSI for access to CSI information to prepare the response.[41]

- ***"There is nothing on the record indicating that KSC would have encountered any opposition from CVRD if KSC had directly requested CVRD's assistance in obtaining the information requested by Commerce . . . ." US First Submission, para. B-96.***

49. KSC informed USDOC that CVRD's parent, CSN was a respondent in the companion investigation of hot-rolled steel products from Brazil, and as such, CVRD was in effect a competitor of KSC in the US market.[42]

- ***"KSC never asked for Commerce's assistance in the investigation in any respect. Specifically, KSC never asked Commerce what steps it should take to obtain the information regarding its sales through CSI" or submit the information in another form. US First Submission, para. B-106.[43]***

50. KSC submitted numerous letters to USDOC outlining the difficulties KSC encountered in attempting to obtain the CSI information. It would be absurd to conclude that such repeated communications to USDOC did not *in any respect* include a request for assistance.

51. Indeed, on 9 November 1998, the day after KSC received Mr. Gonçalves' Letter of 6 November 1998, refusing the KSC visit, KSC's attorneys met with USDOC to apprise the agency of the situation.[44] Following up on the meeting, KSC submitted a letter to USDOC on 10 November 1998.[45] Moreover, in a 3 December 1998 letter to USDOC, KSC reminded USDOC that "we have received *no response* from the Department."[46] That statement was based on the belief that USDOC should have provided KSC advice following its meeting and its letters, and was intended to elicit a response from USDOC. Also in that letter, KSC asked to attend a meeting between USDOC and petitioners' counsel (*i.e.* CSI's counsel), specifically addressing CSI's refusal to provide KSC the necessary information, "so that all involved will have a complete understanding of the issues involved." USDOC refused to allow KSC to attend the meeting.

52. KSC continued its efforts to persuade USDOC to provide guidance. In its letter to USDOC of 18 December 1998, KSC was more specific in its request for assistance. KSC stated that it, as yet, had "received *no information, guidance, or response* from the Department."[47]

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[38] *Id.* at 22 (excerpts in **US/B-21** and **Exh. JP-42(y)**); *see also* Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**).

[39] Shareholders' Agreement Art. [ ] (**Exh. JP-42(aa)**) (emphasis added).

[40] Indeed, even CSI acknowledges that KSC's attorneys and accounting consultant are [ ] under the Shareholders' Agreement. *See* Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**) (noting "even Kawasaki Steel being one of our *shareholders*, we usually apply some restrictions to the *disclosure* of sensitive *data to their representatives*.") (emphasis added).

[41] *See* KSC Letter to Mr. Gonçalves of 5 Nov. 1998 (**Exh. JP-42(g)**) (requesting a four day visit with CSI's accounting staff).

[42] *See* KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

[43] The Court of International Trade opinion by Judge Restani should not be given weight because it too is based on an incorrect factual premise that KSC never asked for guidance. *See Kawasaki Steel Corp. v. United States,* Court No. 99-08-00482, Slip Op. 00-91, at 19-20 (1 Aug. 2000) (**Exh. JP-93(e)**).

[44] *See* KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-42(n)**).

[45] *See* KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

[46] KSC Letter to USDOC of 3 Dec. 1998, at 1 (**Exh. JP-78**) (emphasis added).

[47] KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-42(n)**) (emphasis added).

53. Notwithstanding that the US statement is inaccurate, whether or not KSC asked for guidance is irrelevant. As discussed further below in Section III.B.3, Article 6.13 obliges the investigating authority to provide assistance once the interested party notifies the authority of its difficulties. The AD Agreement does not oblige an interested party to ask for assistance.

- ***"Commerce did request, and KSC refused to report, the transfer prices between KSC and CSI." US First Submission, para. B-123.***

54. The US exhibits demonstrate that this statement is false. KSC provided USDOC with detailed product, quantity, and price information for its sales to CSI,[48] and later referred USDOC to its product-specific transfer price data.[49] Moreover, as the United States admits earlier in its submission, "Commerce examined documents relating to KSC's sales through CSI" at verification. [50]

55. The extent of the US mischaracterizations on all of these factual issues completely compromises the US position.

2. The United States misinterprets the requirements of Paragraph 7 of Annex II

56. The US practice ignores the requirements for choosing facts available under Paragraph 7 of Annex II. For KSC, USDOC failed to comply with three aspects of the provision. First, it chose an adverse facts available margin with the express purpose to punish the company. As discussed above, this is inconsistent with the language of Paragraph 7 of Annex II and the entire concept of facts available. Second, its choice ignored the critical question of whether KSC in fact "withheld" CSI's information, as required by Paragraph 7. Third, it made no effort whatsoever to comply with the same paragraph's requirement to use "special circumspection" in choosing facts available. The first of these violations is addressed in detail above with regard to Japan's general claim. The second and third are addressed below.

(a) The United States misunderstands the plain meaning of the term "withheld"

57. The United States argues that its choice of adverse facts was justified because KSC withheld information from USDOC. Even assuming that the words "less favourable" could justify punitive adverse facts available (which it does not), USDOC still violated the last sentence of Paragraph 7. The plain meaning of "is being withheld" requires that a party have something in its *possession* that it is *actively refusing* to turn over.[51] A party cannot "withhold" something unless it possesses it or at least has the power to exercise control over it so as to keep the item from being turned over. KSC did not possess the information requested by USDOC, nor did it control CSI so as to be able to affirmatively refuse to provide the information to USDOC.[52]

58. USDOC ignored evidence that showed CSI's inability and unwillingness to cooperate with KSC, as well as the competitive market relationship KSC maintained with both CSI and its joint venture

[48] KSC Section A Response at Exhibit 37 (16 Nov. 1998) (excerpts attached as **Exh. JP-93(f)**, with sensitive business confidential information redacted).

[49] KSC Supplemental Section A Response at 6-7 (4 Dec. 1998) (excerpts in **US/B-24**).

[50] US First Submission, para. B-20.

[51] The definition of "withhold" in the *New Shorter Oxford English Dictionary* is: "1. restraint or hold back from action; keep under restraint; 2. keep back (what belongs to, is due to, or is desired by another); refrain from giving, granting or allowing."

[52] The fact that under US law, KSC and CSI are treated as a single entity is not determinative. Rather, it simply illustrates the absurdity of US practice. USDOC collapsed KSC and CSI, despite their conflicting interests and CSI's actual independence from KSC as exhibited through the events that actually transpired *See* 19 U.S.C. § 1677(33) (**Exh. JP-4(i)**); 19 C.F.R. § 351.102(b) (**Exh. JP-5(a)**); 19 C.F.R §351.401(f) (attached as **Exh. JP-90(b)**).

partner, CVRD. USDOC thus failed to properly establish the facts or evaluate them objectively and, in turn, ignored its obligations under the AD Agreement.

(i) *CSI's President and CEO repeatedly made clear he could not and would not help KSC respond to the USDOC*

59. It is an uncontested fact that KSC did not itself possess the information USDOC deemed necessary from CSI. The issue, then, is whether KSC nonetheless controlled whether CSI would release the information. In fact, KSC did not control CSI's ability or willingness to provide the information.

60. In response to an 8 December 1998 request for information from KSC's attorneys,[53] CSI's President and CEO Mr. Gonçalves stated as follows:

> "CSI is *unable* under its accounting system to provide the information on sales requested in question 1. . . . It is also our belief that *without being able to provide* the important information of sales prices requested, the provision of other data requested by {KSC} would neither be usable nor useful in the investigation of Kawasaki. . . ."[54]

So, in addition to not having the information itself, KSC was told that the entity that controlled the information was unable to supply the most important part of it.

61. Furthermore, Mr. Gonçalves repeatedly refused to provide the requested information,[55] citing CSI's role as a petitioner in the investigation:

- "{P}lease remember that *CSI is one of the petitioners*, and eventually we would be in a difficult position to supply some kind of information."[56]
- "Besides the fact, that *CSI is one of the petitioners* . . . some of the data {KSC} would like to have access is confidential CSI data, and even Kawasaki Steel being one of our shareholders, we usually apply some restrictions to the disclosure of sensitive data to their representatives. This behaviour has been adopted here at CSI in order *to protect the company as an American steel company*, regardless of the Brazilian and Japanese ownership."[57]

- "It is also {CSI's} belief that without being able to provide the important information of sales prices requested, the provision of other data requested by {KSC's attorneys} would be neither usable nor useful in the investigation of Kawasaki and therefore would be a waste of resources for both CSI and Kawasaki."[58]

So, beyond CSI's apparent inability to help with respect to some requests, the company also refused to help with others.

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[53] KSC Letter to CSI of 8 Dec. 1998 (**Exh. JP-42(l)**) (emphasis added).

[54] Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**) (emphasis added).

[55] *See* KSC Letter to Mr. Gonçalves of 27 Oct. 1998 (**Exh. JP-42(e)**) (seeking cooperation in responding to USDOC questionnaire, specifically including sales by CSI as reseller or further processor of the subject merchandise originating from KSC); KSC Letter to Mr. Gonçalves of 5 Nov. 1998 (**Exh. JP-42(g)**) (requesting acceptance of a four-day visit with CSI's accounting staff by one of KSC's attorneys and KSC's accounting consultant in order to review the information for the questionnaire response); KSC Letter to CSI of 8 Dec. 1998 (**Exh. JP-42(l)**) (inquiring into its previous requests for information and specifically listing the information requested pertaining to CSI from the Supplemental Questionnaire); KSC Letter to CSI of 7 Jan. 1999 (**Exh. JP-42(t)**) (reminding CSI of its previous requests for information and requesting again all of the information requested by USDOC in its questionnaires).

[56] Mr. Gonçalves Letter to KSC of 29 Oct. 1998 (**Exh. JP-42(f)**) (emphasis added).

[57] Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**) (emphasis added).

[58] Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**).

62. To downplay the actions of Mr. Gonçalves, the United States depicts the President and CEO of any company as a low-level employee.[59] In actuality, the President and CEO of any company is the highest-ranking "employee" and has considerable power to take actions on a daily basis in the best interests of the company.[60]

63. The power of the President and CEO was even more pronounced in the case of CSI. At verification, KSC officials explained that the Shareholders' Agreement between KSC and CVRD did not operate to allow either company any real control of CSI's day-to-day conduct.[61] In fact, the Agreement was structured so that the rights of KSC and CVRD would be in exact balance. Given that neither KSC nor CVRD controlled the day-to-day conduct of CSI, that left only one person in a position to do so: Mr. Gonçalves.

64. Indeed, CSI's decision to become a petitioner in the investigation is a perfect example of the power Mr. Gonçalves had as President and CEO. Contrary to Article [ ] of the Shareholders' Agreement, CSI's decision to become a petitioner was [ ].[62] By the time of the [ ] in December, CSI was already a petitioner.[63] Moreover, CSI did not obtain KSC's approval to become a petitioner.[64] Thus, the ultimate decision to become a petitioner must have been made by the highest ranking officer of CSI, Mr. Gonçalves.[65]

65. Petitioner CSI, therefore, had the power to act on its own, including maintaining possession of the information USDOC wanted and prohibiting KSC – and USDOC – from seeing it. Under such circumstances, KSC could not withhold the information.

(ii) Even though KSC was a part owner, it had no unilateral control of CSI

66. The United States incorrectly concludes that KSC's 50-percent ownership of CSI should have given KSC the requisite power to obtain the information.[66] Yet, because KSC only controls 50 percent of the shareholder votes and directors, KSC was not in a position to *unilaterally* reverse CSI's decision not to cooperate with KSC's requests for information. Instead, KSC needed the support of its joint venture partner, CVRD.

67. Considering Mr. Gonçalves personal ties to both CVRD and CSN, however, KSC had reason to believe that CVRD's position would be the same as that of Mr. Gonçalves. Mr. Gonçalves was nominated by CVRD to be CSI's President and CEO. In addition, prior to becoming President and CEO, Mr. Gonçalves had been an employee of CSN, CVRD's partial owner. As an employee of CSN, Mr. Gonçalves was aware of the close relationship between CSN and CVRD. Moreover, Mr. Gonçalves, as well as KSC, appreciated that CSN was KSC's competitor in the US market and as a competitor of KSC, it would be in CSN's, and CVRD's favor for KSC to obtain a higher margin than CSN.[67]

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[59] US First Submission, para. B-83.

[60] 1 *Corporation* ¶ 1713 (1997) (excerpts attached as **Exh. JP-93(g)**) ({T}he president of a corporation is its business head and has power to do any act that the board of directors could authorize or ratify.").

[61] KSC Sales Verification Report, at 21-22 (excerpts in **US/B-21** and **Exh. JP-42(y)**); Shareholders' Agreement Art. [ ].

[62] *See* Board Meeting Minutes of 28 July 1998 (**US/B-23/BIS**).

[63] *See* Board Meeting Minutes of 10 Dec. 1998 (**US/B-23/BIS**).

[64] KSC Sales Verification Report, at 21 (excerpts in **US/B-21** and **Exh. JP-42(y)**).

[65] This is one among many ways in which the actual operation of CSI failed to comply with the apparent intent of the Shareholders Agreement. **Exhibit JP-93(d)** provides a complete list.

[66] US First Submission, para. B-89.

[67] KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

68. The United States suggests that the [ ] could have easily resolved the dispute.[68] The [ ].[69] With [ ] it is highly unlikely that its convention would resolve in actuality any deadlock.

69. The US arguments supporting its claim that KSC could exert power over CSI are simply not sensitive to the corporate realities of multinational companies that are owned by companies with differing interests in a particular dumping proceeding. Here we have an extreme case where KSC's interests are in conflict with both parties who would be in the best position to provide assistance. CSI's interests are in conflict with KSC's as CSI is a petitioner. KSC's interests are in conflict with CVRD, because CVRD's part owner, CSN, is also a respondent in the investigation and thereby competes with KSC in the US market.

70. The United States focuses on how or whether KSC could have obtained the information, and whether the respondent acted to the best of its ability. The United States therefore implies that a party must take all actions that USDOC thinks necessary, whether in reality they would prove futile or not. But whether or not all such actions are taken, the question remains: did KSC withhold the information?

71. The facts clearly show that KSC did not possess the CSI information, and that as a practical matter, KSC did not have the power to obtain the information. The United States failed to establish that KSC *in fact* could have obtained this information, and, in turn, that it effectively withheld the information. The United States therefore applied facts available in violation of Annex II.

(b) The United States misunderstands the plain meaning of "special circumspection"

72. The United States misconstrues the requirement of "special circumspection in Paragraph 7." [70] The United States claims that it applied circumspection by using the second-highest rather than the highest margin given that the highest margin was not within the mainstream of KSC's sales. Also, the United States argues that in choosing the second highest margin, its use of adverse inferences was "directly proportionate" to the significance of the underlying violation.[71]

73. This argument demonstrates that the United States does not comprehend the true purpose of facts available: to fill in the gaps left when necessary information is unavailable and to do so in such a manner to ensure the information used is reliable so as to produce an accurate margin. This is the whole point of Paragraph 7's requirement to use special circumspection and to corroborate any information it chooses to use. The phrase special circumspection cannot mean punishing a respondent with the second worst results instead of the worst results. Indeed, such an application is far from circumspection -- "a cautious observation of the circumstances" and "taking everything into account." Further, the phrase circumspection is modified by the adjective "special." According to the *New Shorter Oxford English Dictionary,* special means "exceptional in quality or degree; unusual, out of the ordinary." This modification of circumspection emphasizes the exceptional exercise of care

[68] US First Submission, para. B-96.

[69] Shareholders' Agreement Art. [ ] (**Exh. JP-42(aa)**) (emphasis added).

[70] Actually, the primary argument made by the United States is that Paragraph 7 does not even apply. The United States asserts that the special circumspection requirement is irrelevant because USDOC used KSC's own information, and not information from a secondary source -- *i.e.*, a source other than the respondent itself. US First Submission, paras. B-109 to B-110. A secondary source, however, is anything other than the primary source (*i.e.,* the actual information requested). The use of margins from KSC's other sales as a substitute for its CEP sales was therefore a secondary source. This must be the case as there is no reason to apply a different standard for checking the representativeness of data merely because the data used as facts available belongs to the party. In any event, the question of representativeness -- which is required by Annex II, as discussed above in paragraphs 41 through 43 -- still applies notwithstanding the US interpretation of "secondary source." Note also that if the United States is right about "secondary source," then it can no longer rely on "less favourable" to justify adverse facts available.

[71] US First Submission, paras. B-112 to B-113.

authorities must observe in relying on facts available -- they must ensure that the information used is reliable and as close to reality as possible.

74. The United States claims that the use of any other facts would have rewarded KSC for not cooperating.[72] Ignoring for a moment that KSC did, in fact, cooperate, a less punitive facts available margin would have rewarded KSC only if KSC knew that CSI's information would produce a high margin. The facts show that neither of these were possible. First, KSC did not know the actual margin as it did not possess or even have access to CSI's resale information. Second, USDOC did not know the actual margins and, thereby, did not know when it would cross the threshold between punishment and reward. Thus, the US claim is not credible.

75. In a weak attempt to demonstrate that USDOC took everything into account, the United States claims that it was in CSI's best interests to cooperate as an affiliated importer and reseller of KSC hot-rolled steel and that any benefit experienced by CSI from the application of adverse facts available indirectly rewarded KSC as a shareholder of CSI.[73] USDOC cannot possibly decide what is and is not in a company's best interests. CSI *obviously* decided that, on balance, it enjoys the greatest benefit by refusing to cooperate, and encouraging USDOC to apply facts available to KSC.

76. Besides the factual inaccuracies of this argument, the United States relies on circular logic. It is absurd for the United States to excuse the benefit to CSI by arguing that any benefit to CSI would also benefit KSC as a shareholder. If this logic were true, then the United States would have contravened its basic intention of penalizing KSC. The United States cannot try to justify adverse facts available to penalize KSC in one context, and then argue that its application was justified because it indirectly benefited KSC.

77. Lastly, the United States asserts that it exercised special circumspection by using partial facts available instead of total facts available.[74] This is absurd. If the US interpretation were true, any partial facts available would satisfy this requirement, regardless of how illogical or unreasonable the available facts might be.

78. Ultimately, what matters most is that USDOC failed to consider carefully the fact that CSI was a petitioner in this case -- a fact which led USDOC to excuse respondents in previous cases.[75] Above all else, this fact proves that USDOC failed to apply "special circumspection" when choosing which facts available to use when CSI refused to cooperate.

3. Article 6.13 unambiguously requires authorities to take into account any difficulties experienced by interested parties and to provide assistance to those parties

79. The United States attempts to dismiss the mandatory language of Article 6.13, by misreading the actual language of the article, focusing inappropriately on KSC's size, and shifting its obligations onto KSC's attorneys.[76] These arguments ignore the simple fact that Article 6.13 unambiguously establishes obligations upon the *authority*, and not upon the interested party or its lawyers.

80. Article 6.13 states "{t}he authorities *shall* take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and *shall* provide any assistance practicable" (emphasis added). The text of Article 6.13 is unambiguous.

[72] *Id*. para. B-113.
[73] *Id.* para. B-114.
[74] *Id.* para. B-116.
[75] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Taiwan*, 63 Fed. Reg. 40461, 40464 (29 July 1998) (excerpts attached as **Exh. JP-93(h)**) (noting that one of the reasons the respondent was unable to report the information USDOC requested was the affiliate's participation in the proceeding as a petitioner).
[76] US First Submission, paras. B-103 to B-106.

Contrary to US claim, the phrase "in particular small companies" does not limit Article 6.13 exclusively to small companies,[77] and does not absolve the authority of this responsibility when a large company is subject to investigation. Further, Article 6.13 explicitly requires authorities to examine carefully *any* kind of obstacles interested parties faced in supplying the requested information to the authority. Indeed, the use of the words "shall" and "any" demonstrate the broad scope of this obligation. In this case, KSC made clear it had difficulties.

81. The United States attempts to sidestep USDOC's obligation to provide assistance by claiming that KSC should have known how to handle its affiliate and joint venture partner. But, as discussed above, USDOC ignored the competitive realities of the situation. Further, USDOC affirmatively *obstructed* efforts to find a solution, when it scheduled a meeting with CSI to discuss the anti-dumping case and refused KSC's participation.[78] At the very least, attempting to suggest alternatives, and seeing that they were not viable, would have better positioned USDOC to more fully appreciate the difficulties KSC experienced and understand that KSC had in fact acted to the best of its ability. This type of exchange is exactly the type of collaborative effort contemplated by Article 6.13.

82. In the final determination, USDOC identified after-the-fact avenues KSC should have explored to convince the United States that it had acted to the best of its ability. USDOC could have notified KSC of those expectations during the investigation. This would have both provided "practicable assistance" and put KSC on notice that unless it at least attempted these approaches, USDOC would deem KSC as non-cooperative. Instead, USDOC simply waited until the final investigation to identify other avenues it required KSC to explore. This predatory approach reveals that USDOC was not acting as a neutral fact-finder, but instead in a biased manner that ultimately violated its obligations under the AD Agreement.

4. USDOC's failure to calculate a constructed export price for KSC violated Article 2.3 of the AD Agreement

83. Instead of actually calculating an export price for KSC's sales of hot-rolled steel to CSI, USDOC used the second-highest margin from any of KSC's sales for all of those CSI transactions, in violation of Article 2.3 of the AD Agreement. The United States argues that if the authority considers that the export price is unreliable because of an association, it need not test whether in fact the prices are reliable.[79] But this interpretation ignores the rest of the text of Article 2.3.

84. Article 2.3 provides that authorities *calculate* export price on the basis of resale price or "another reasonable basis." When read as a whole, the text of Article 2.3 shows there must be something that brings the unreliability of the prices into question in order for the authority to later be able to judge the reasonableness of its calculation. Association alone cannot serve as the basis for the decision that the prices appear unreliable. Instead, Article 2.3 indicates that the phrase "because of association" is not the justification for an unreliability determination. Rather, the authority must find that the prices are unreliable, and their unreliability must be caused by the association.

85. In its response to Japan's suggestion that USDOC use KSC's own prices to CSI to test the reliability of the data, the United States incorrectly states that KSC refused to report the transfer price between KSC and CSI.[80] As discussed above, however, the record shows that USDOC did in fact have the information that would have allowed it to make a comparison between KSC's sales to CSI and those to its non-affiliated customers.[81] USDOC simply ignored the data. USDOC immediately

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[77] *Id.* para. B-103.

[78] KSC Letter to USDOC of 3 Dec. 1998 (**Exh. JP-78**). Japan wonders why USDOC did not take this opportunity to specifically request the information from CSI directly.

[79] US First Submission, para. B-120.

[80] *Id.* para. B-123.

[81] KSC Section A Response at Exhibit 37 (excerpts attached as **Exh. JP-93(f)**).

jumped to the assumption that because KSC and CSI were affiliates, CSI's resale prices were necessary.[82]

86. Had USDOC actually determined that KSC's transfer prices to CSI were unreliable, the detailed transfer price information still provided USDOC with a "reasonable basis" to calculate a surrogate export price to compare to normal value, rather than immediately applying a margin for sales through CSI.[83] USDOC instead chose to ignore its obligation under Article 2.3 to calculate an export price on a "reasonable basis" once it summarily decided that the KSC-to-CSI price was unreliable. The United States again specifically relies on the factual inaccuracy that KSC did not provide such information to justify disregarding the existence of perfectly acceptable normal values.[84]

87. We recognize that to apply facts available to calculate a surrogate export price, USDOC would have to make certain assumptions about expenses. This is precisely the objective of facts available, and the obligation of the authority: if it cannot obtain the ideal information in its investigation, the authority should resort to secondary sources for information. KSC's sales to CSI were the best source for such information. The fact that the United States quickly jumped to a punitive application of the second highest margin, and did not enlist KSC to help it develop a surrogate export price in the face of CSI's recalcitrance, demonstrates that the United States had no intent of trying to find the "best information available," as the title of Annex II intends.

C. THE APPLICATION OF ADVERSE FACTS AVAILABLE TO NKK AND NSC VIOLATES THE AD AGREEMENT

88. USDOC acted arbitrarily in its treatment of NKK and NSC. An objective authority could not have assessed the facts surrounding NKK's and NSC's errors as deserving such harsh punishment. Moreover, USDOC failed to apply the requisite legal standards of the AD Agreement when it carried out these punishments. Specifically, USDOC actually received the information it needed from NSC and NKK; both provided the information and offered to verify the information. USDOC arbitrarily decided the information had not been provided fast enough. Ignoring the circumstances that led to the inadvertent delays, USDOC punished the companies with adverse facts available.

1. The United States argues for unreasonable standards of timeliness and unreachable standards for cooperation

(b) Article 6.8 and Annex II establish a "reasonableness" standard for timely submission of information

89. The United States equates deadlines with a "reasonable time" or a "timely fashion" under Paragraphs 1 and 3 of Annex II. The issue is not whether the deadlines were reasonable, but rather whether NKK and NSC submitted the information within a reasonable period.[85] *A deadline cannot define what is a reasonable period of time for all information the authority will incorporate into its determination*. Although deadlines may be necessary to obtain the majority of information from

[82] Note that one requirement for applying facts available under Article 6.8 is that the information be "necessary." This discussion proves that USDOC did not even determine whether it was necessary, and thus violated Article 6.8.

[83] The US suggestion that Japan treats the "reasonable basis" language of Article 2.3 as a separate facts available provision is mistaken. The reasonable basis requirement of Article 2.3 only applies to Article 2.3 and does not replace the facts available provisions. For example, in KSC's situation, the reasonable basis requirement would have simply allowed USDOC to devise a reasonable manner in which to calculate the export price after it determined the KSC-to-CSI price was unreliable. The facts available provisions would provide the authority for USDOC to use the secondary information available in order to calculate the export price on a reasonable basis.

[84] US First Submission, para. B-124.

[85] US First Submission, para. B-132.

respondents, it is not reasonable to claim that a deadline should mark the last moment the authority will accept new information in all cases under all circumstances. Flexibility, when circumstances demand it, is the hallmark of reasonableness. For example, to the extent there are small, lingering categories of information that are submitted after a deadline, or collected by the authority during a verification, the authority has received this information within a reasonable period of time to incorporate it into its dumping analysis and calculations.

90. Authorities also must consider the other informational demands on respondents during an investigation; whether the authority's initial request was clear (or whether there was some doubt as to exactly what the authority was requesting); whether the authority assisted the company with follow-up guidance as to the nature of its request and how to comply with it; and whether the information was maintained in the normal course of business (or whether it would have to be developed solely for the investigation). USDOC ignored all of these factors during its fact-finding for NKK and NSC.

(ii) The requirement of Paragraph 1 of Annex II for submission of information within a "reasonable time" must be read in the context of USDOC general practice

91. The United States incorrectly claims that Paragraph 1 of Annex II equates "a reasonable time" with deadlines established by the authority.[86] Paragraph 1 states that "if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." Although "reasonableness" is subjective, it must be interpreted in context of the proceeding itself and the authority's prior practice. In the ordinary legal meaning of the term, reasonable means "suitable under the circumstances."[87] This case does not present a situation where the respondents provided nothing within USDOC's questionnaire deadlines. Respondents provided an extraordinary amount of information in an extremely detailed manner. The weight conversion factors at issue here represented a very minor portion of the large volume of information submitted by NKK and NSC. When these companies discovered that they could correct the record and submit the requested information, they submitted the factors along with a long list of other corrections and supplemental information. All of these corrections were submitted well before verification, and therefore in a reasonable time; USDOC and petitioners had substantial opportunity to review, respond to, and use the information. The fact that USDOC accepted NKK's and NSC's other corrections, and thereby implicitly found that they were submitted in a reasonable period, proves that the conversion factors were timely under the circumstances.

92. USDOC *regularly* accepts information after questionnaire deadlines, as recognized in its regulation that allows parties to submit new factual information up until seven days before verification.[88] The US argument against application of this regulatory deadline to NKK's and NSC's submission of new factual information is entirely inconsistent with USDOC practice.[89] Taken to the

[86] *Id.* paras. B-133 to B-139.

[87] *Black's Law Dictionary* 1265 (6th Ed. 1990).

[88] In this very case, USDOC accepted approximately 200 pages of new factual information submitted by petitioners the same day NKK and NSC submitted their weight conversion factors. Petitioners' 22 February 1999 submission to USDOC provided a number of press articles about KSC, NKK, or NSC; the Japanese steel industry generally; factors affecting demand; and other general information.

[89] The United States is trying to convince the Panel that the regulation does not apply to information requested in a questionnaire. *See* US Response to Japan's Question 9, para. 12. USDOC itself recently took the opposite position. *See Issues and Decision Memorandum for the Investigation of Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877 (30 Mar. 2000), <http://ia.ita.doc.gov/frn/summary/taiwan/00-7925-1.txt> (attached as **Exh. JP-94)** (*"Decision Memorandum"*). In this recent case, USDOC faced a challenge from petitioners to disregard corrections submitted by a respondent just before verification. USDOC first noted that respondent's original questionnaire and supplemental questionnaire responses were all submitted within the time limits established by USDOC. USDOC also noted that respondent's corrections were timely in accordance with 19 C.F.R. § 351.301(b)(1) (the same provision at issue in the hot-rolled steel case). Then, citing the overriding purpose of the US anti-dumping statute, which "is to determine margins as accurately as possible," USDOC

extreme, this interpretation would prevent submission of any corrections or supplemental information before verification. Yet corrections are necessary when a respondent's prior questionnaire responses were either incorrect or incomplete. This is USDOC's standard practice, which it otherwise followed in the hot-rolled steel investigation.

93. The weight conversion information submitted by NKK and NSC was a correction.[90] The companies mistakenly believed that they could not respond to USDOC's request. When it became clear to NKK (without any assistance from USDOC) that what USDOC required was a better estimate of weight, NKK corrected its prior submissions and supplied the information. Similarly, NSC discovered during verification preparation that its production facilities actually retained weight information for the subject sales, a discovery that was not made earlier because the weight information was maintained on a computer system that could not be accessed by the NSC sales personnel responsible for preparing NSC's questionnaire response. NSC then corrected itself and supplied the information. The conversion factors were submitted before the regulatory deadline for new factual information and therefore were submitted within in a reasonable time.

94. Moreover, USDOC accepted a large number of other corrections *after* the applicable questionnaire deadlines.[91] These additional corrections had a much larger impact on USDOC's dumping analysis than the weight conversion factor. The long list of corrections submitted by each company places the weight conversion factor into context, and highlights the arbitrary nature of USDOC's decision. The US emphasis on the fact that NKK and NSC had 87 days in which to submit the conversion factors is unconvincing considering the fact that the information on which many of the other corrections were based was due in exactly the same amount of time.[92]

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stated that it would be "incongruous with the express intent of the statute to rely on data that are clearly inaccurate by a respondent's own admission. Accordingly, it is the Department's general practice to allow respondents to revise their data upon identification of errors when such revisions are done in a timely manner. Timely revisions to respondents' submissions are neither unusual nor inconsistent with the Department's standard practice." *Decision Memorandum*, at cmt. 1 (internal footnotes omitted).

[90] We note that the United States wants the Panel to believe that in good faith, USDOC made a mistake in not correcting the clerical error in NKK's preliminary dumping margin, which was not corrected until the final determination. *See* US Response to Japan's Question 30, para. 44. But, then USDOC was justified in rejecting NKK's and NSC's inadvertent, good faith errors. USDOC's double-standard should not be overlooked.

[91] In the same 22 February 1999, submission that included the weight conversion factor, NKK submitted *seventeen* other corrections along with new transaction-specific sales lists. On the same day, but in a separate submission, NKK submitted *five* other corrections to its cost of production and constructed value databases. Over a week later, on 4 March 1999, NKK submitted *six* more corrections and revised sales lists and cost databases. This is in addition to *one* correction presented on 8 March 1999, *at the beginning of verification*. (See **Exhibit JP-95** for a summary of these corrections.) USDOC accepted and relied upon all of these corrections, even those that affected a large percentage of sales. This is in stark contrast to USDOC's refusal to accept NKK's weight conversion factor, which affected only a small number of sales. This is in addition to *fifteen* corrections NKK submitted in its 25 January 1999, Supplemental Section B Questionnaire Response.

Similarly, on 22 February 1999, NSC submitted *five* corrections and additions to previously submitted information, along with its weight conversion factor. Then, at the beginning of each of USDOC's verifications of NSC and its US affiliate (conducted consecutively from 22 February 1999 through 12 March 1999), NSC presented a total of *eleven* more corrections discovered during verification preparation. Finally, in a 1 March 1999 submission to USDOC, NSC submitted *three* additional corrections. (See **Exhibit JP-96** for a summary of these corrections.) In addition, on 1 March 1999, NSC submitted at USDOC's direction, corrected data, which affected <u>every US and home market sale</u>. In contrast, the conversion factor submitted by NSC on 22 February 1999 affected only a tiny handful of US sales.

[92] For example, USDOC repeatedly asked NKK for transaction-specific movement expenses – in the original Section B questionnaire and in the same supplemental questionnaire that asked NKK to "clearly describe the conversion factor {NKK} used." NKK explained that such information was not available at the time and instead provided estimated movement expenses that approximated actual expenses. NKK corrected its calculation of movement expenses in the 22 February 1999, submission that provided the conversion factor.

(ii) Paragraph 3 of Annex II requires authorities to take everything into account in determining whether facts available are warranted

95. The United States argues that Paragraph 3 of Annex II requires authorities to consider only that information that was "*inter alia* timely."[93] This argument stretches the meaning of timeliness and ignores the other elements of this provision. Paragraph 3 states that:

> All information which is *verifiable*, which is appropriately submitted so that it can be used in the investigation *without undue difficulties*, which is supplied in a *timely fashion*, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. (Emphasis added.)

The United States makes an unjustified leap from "timely fashion" to "submitted within the authority's questionnaire deadlines." With a flourish of Latin, the United States also completely ignores other elements of this paragraph, which provide important rules for what information authorities should take into account.

96. Paragraph 3 references "undue difficulties" to address the manageability of the anti-dumping investigation from both perspectives: placing the burden on respondents to provide useable information and on authorities to take that useable information into account. The facts of this case show that USDOC could have used the conversion factors without undue difficulties. The United States mischaracterizes the impact of using the submitted factors as "entirely new databases."[94] The factors were actually just a couple of numbers that USDOC could have added to one line of its dumping calculation program. The sale-specific raw data did not change. The United States therefore has not demonstrated that it was prejudiced by NKK's and NSC's submission of the conversion factors after questionnaire deadlines. The fact that USDOC easily verified NKK's factor demonstrates this lack of prejudice.

97. The United States also ignores the requirement that authorities should take into account "verifiable" information. Importantly, USDOC actually verified NKK's weight conversion factor. In NSC's case, USDOC was prepared to, but then affirmatively refused to, verify NSC's factor and the evidence NSC had proposed for USDOC's review. NKK and NSC met their burden of providing verifiable information in conformity with Paragraph 3.

98. Although timeliness is an important factor in Paragraph 3, these other considerations must be weighed in determining whether submitted information will be used in the authority's analysis. Perhaps realizing this, the United States argues that the AD Agreement does not compel the authority to accept late-provided information.[95] This is not Japan's position. Japan is simply arguing that reasonableness is by definition contextual. Other provisions demonstrate that the AD Agreement does not contemplate the interpretation of "reasonable time" suggested by the United States:

- The reference in Article 6.13 requires authorities to be mindful of difficulties, and this will impact the notion of "reasonable period."

- The "best of its ability" phrase in Paragraph 5, Annex II warns authorities to not act too rashly in disregarding less than perfect information, requiring a more reasoned analysis of a party's participation.

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[93] US First Submission, para. B-137.

[94] US Response to Japan's Question 9, para. 14. Again, we note that unlike the weight conversion factor voluntarily submitted by NSC, the changes required by USDOC impacted every US and home market sale reported by NSC.

[95] US First Submission, paras. B-159 to B-160.

- The "special circumspection" phrase in Paragraph 7, Annex II further obligates authorities to take care in applying information from other sources.

99. Thus deadlines alone cannot determine whether information is timely. In rejecting NKK's and NSC's conversion factors, USDOC failed to consider the circumstances. The factors were submitted in a timely fashion; therefore, the information "{should have been} taken into account when determinations {were} made."

(c) The United States demanded an inappropriate standard of cooperation under Annex II

100. The United States claims that NKK and NSC failed to cooperate simply because the submitted information was late. The United States impermissibly blurs Paragraphs 5 and 7 of Annex II. Paragraph 5 governs when an authority must accept proffered information instead of resorting to facts available. Paragraph 7 concerns the separate decision of what information an authority can use once it is authorized to use facts available.

(i) The United States ignored the requirements of Paragraph 7 in choosing adverse inferences

101. The United States asserts that Paragraph 7 of Annex II does not require a finding that the party withheld necessary information.[96] Paragraph 7 states, "if an interested party does not cooperate and thus *relevant information is being withheld from authorities*, this situation could lead to a result which is less favourable to the party than if the party did cooperate." (Emphasis added.) Thus, the possibility of "less favourable" results arises only in those "situations" where information "*is being withheld."*

102. There was no withholding here. The moment the companies determined they could provide the requested information to USDOC, they did so. This is far different than if USDOC were to discover, for example, low-priced export sales during a verification that the company had purposefully tried to conceal. Rather, NKK and NSC provided the very information requested by USDOC in sufficient time for verification and incorporation into USDOC's dumping analysis. Information was not withheld and NKK and NSC fully cooperated.

(ii) Paragraph 5 mandates acceptance of NKK's and NSC's corrections

103. Citing Paragraph 5 of Annex II, the United States claims that NKK's and NSC's "reaction" to the preliminary determination demonstrated that the companies could have provided the information at any time, but failed to cooperate to the best of their abilities by not providing the information sooner.[97] This argument demonstrates the unfairness of the US position. The United States is trying to use NKK's and NSC's cooperation against them. That is, according to US logic, NKK and NSC somehow proved their lack of cooperation by cooperating. The United States is also suggesting that any reaction to a preliminary determination, legal or factual, is manipulative. This position undermines the main purpose of notice, which is to give parties a reasonable opportunity to respond.

104. The facts of this case show that NKK and NSC responded fully to USDOC's extensive informational demands and that USDOC's decision to reject the conversion factors violated Paragraph 5. NKK and NSC provided the very information requested by USDOC and therefore the information was "ideal in all respects." NKK and NSC also acted to the best of their abilities. The US position is contingent on the premise that the "best of its ability" equates to meeting questionnaire deadlines, just as "reasonable time" equates to questionnaire deadlines. Rather, "ability" must be

[96] *Id.* para. B-162, n.237.
[97] *Id.* paras. B-150 to B-152.

assessed within the context of a variety of factors, including allowance for mistakes in an accelerated investigation involving large volumes of information.

(iii) In both instances, USDOC ignored NKK's and NSC's additional cooperation during verification

105. As further evidence of their cooperation, NKK and NSC were fully prepared to verify the accuracy of corrections submitted before or during verification, including the conversion factors. NKK and NSC reasonably believed that the conversion factors and all of the other corrections would be verified and then used in USDOC's final dumping calculation. The United States now tries to argue that the verification agenda did not create an expectation that USDOC would verify the weight conversion factors.[98] This argument ignores the fact that USDOC *actually verified* NKK's information and until the last moment continued to assure NSC that it would verify its factor. USDOC's actions at the time do not support the US Government's belated interpretation of its verification agenda. The United States also claims that the agendas show that USDOC intended to verify NKK's and NSC's inability to provide the conversion factor. This places NKK and NSC in an impossible situation: face facts available for submitting the facts or face facts available for not submitting the facts and failing verification. This argument also shows the results-oriented nature of USDOC's decision.

106. The US argument that there is no obligation in the Agreement to verify the conversion factors is similarly unconvincing. The US argument is valid only if it is successful in arguing that it was justified in not accepting the conversion factors. But, if the US argument is true, why did it verify NKK's factor? Verification of NKK's factor demonstrates that USDOC will in fact verify items that are not ultimately part of their findings. USDOC routinely verifies other issues, such as US indirect selling expenses, that are not always used in the dumping calculation.

2. The United States improperly dismisses the duties the AD Agreement places on authorities to conduct a fair investigation

(a) NKK and NSC were entitled to reasonable guidance from USDOC under Article 6.13

107. The United States claims that USDOC's requests for information were clear and in accordance with Article 6.1.[99] The US position would make sense if USDOC had requested information normally maintained by NKK or NSC, or something at least familiar to the companies. It is undisputed that steel companies commonly sell products based on actual weight and theoretical weight. The companies in this investigation, however, do not normally convert one type of weight to the other. Therefore, USDOC's request effectively required the companies to develop a conversion factor that: (1) neither company maintained in the normal course of business, (2) neither company had ever used before, and (3) was entirely foreign to either company. USDOC's lack of clarity in requesting this obscure conversion factor constitutes a failure to establish the facts properly.

108. The United States overlooks that this was, for all practical purposes, the only request for information that was not routinely understood and accommodated by NKK and NSC. The companies provided volumes of other information. When USDOC did not fully understand the information provided or when it needed additional information, it issued supplemental questions to NKK and NSC to clarify their responses. With respect to the conversion factors, USDOC's requests for information from NKK were ambiguous and confusing.

109. This is demonstrated by the difficulties NKK and NSC had in obtaining the information. NSC repeatedly informed USDOC it was impossible under any circumstances to obtain the

[98] *Id.* para. B-170.
[99] *Id.* paras. B-165 to B-169.

conversion factor because the weight data necessary to calculate it did not exist.[100] Without any guidance or assistance from USDOC, NSC itself discovered that actual weights were recorded at the production facility and immediately informed USDOC. Similarly, NKK did not receive sufficient "notice of the information which the authorities require" because USDOC offered vague and even contradictory instructions. The supplemental questionnaire to NKK shows that even USDOC did not entirely understand what it was asking for in its initial questionnaire. The supplemental questionnaire actually presumed that NKK had submitted a factor, when in fact it had not. NKK sought additional guidance and was misled by USDOC officials, who told NKK's US attorney that it should just confirm its statement that a conversion factor was impossible.[101] This cannot be what the AD Agreement contemplates with respect to sufficient guidance that results in a proper establishment of the facts.

110. The United States also questions why there is no record of the conversation between NKK's attorney and USDOC. There are many elements to an investigation that investigators do not routinely memorialize in the written record. In fact, USDOC failed to put a variety of information on the record in this very investigation. This is just another example of USDOC's failure to establish the record properly.

111. The United States also incorrectly limits Article 6.13 to small companies.[102] The United States effectively writes the phrase "in particular" out of the Agreement. This is by no means limiting language, but an acknowledgement that small companies are more likely to experience difficulties in responding the information requests of authorities. Although Article 6.13 emphasizes the needs of small companies, it is not designed to protect small companies exclusively. Rather, Article 6.13 embraces the general notion that the authorities should be sensitive to all forms of difficulties experienced by parties. The fact that NKK and NSC were able to provide all other information without difficulty, but obviously struggled with the conversion factor should have been a clear indication to USDOC that this particular request prompted a difficulty.

112. The United States seems to take the position that large companies should be left to fend for themselves and do not deserve USDOC's assistance. For example, the United States implies that service of KSC's questionnaire responses placed NKK and NSC on notice of how to calculate a weight conversion factor. Armed with this knowledge, NKK and NSC therefore could have submitted the factors within questionnaire deadlines without any assistance from USDOC.[103] This assumption is incorrect both factually and legally. Like NSC, KSC told USDOC that it did not calculate a conversion factor in its normal course of business. Rather, for the purposes of this anti-dumping investigation, KSC calculated a *better estimate* of the weight of its theoretical weight sales.[104] NKK's and NSC's counsel could not predict whether this better estimate would satisfy USDOC. Instead, under Article 6.13 of the AD Agreement, USDOC had the burden of informing NKK and NSC of an acceptable methodology for calculating the factor, which it could have easily done in its supplemental questionnaires.

113. Furthermore, USDOC's vague instructions in the original and supplemental questionnaires do not constitute "practicable" assistance. The contradictory guidance given NKK is the antithesis of assistance. Practicable means assistance that the authority is capable of providing. When it was obvious that NKK misunderstood the request for a conversion factor, particularly in light of

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[100] NSC Section B Questionnaire Response, at B-22 (Dec. 22, 1998) (**Exh. JP-29**); NSC Supplemental Section B Questionnaire Response, at Supp. B-24 (Jan. 26, 1999) (**Exh. JP-29**).

[101] The United States implies that the conversation between NKK's US attorney and the relevant USDOC official may not have occurred. It is interesting that the United States did not submit an affidavit from the officials in charge of denying this.

[102] US First Submission, paras. B-171 to B-172.

[103] US Response to Panel Question 24, para. 6.

[104] *See* KSC Supplemental Questionnaire Response, at 19 (25 Jan. 1999) (**Exh. JP-49(f)**).

USDOC's contradictory and misleading oral guidance to NKK, USDOC was more than capable of clarifying its request. When NSC stated that it was impossible to provide the information requested by the USDOC because the necessary underlying data did not exist, USDOC should have offered "practicable" assistance in the form of suggestions about information that NSC could provide as a substitute for the assertedly unavailable information. Instead, USDOC gave no meaningful assistance to either NKK or NSC with their difficulties in responding to this request. The United States thereby failed to meet its obligations under Article 6.13.

(b) The fair comparison requirements of Article 2.4 continue to apply to the calculation of NKK's and NSC's margins

114. Article 2.4 requires authorities to make a "fair comparison . . . between the export price and the normal value." The United States claims that it complied with Article 2.4 in applying adverse facts available to NKK's and NSC's margins. However, the use of facts available in the AD Agreement presumes that the authority will apply facts available only where necessary. Here, to the extent facts available was necessary, it related to a conversion factor and the recalculation of US price for NSC, or normal value for NKK. The facts available mode does not suddenly excuse authorities of all of their obligations. It simply is a remedy for filling a void in the information needed to calculate margins. USDOC could have used some form of conversion factor to generate surrogate US prices for NSC and normal values for NKK. This would have then allowed USDOC to calculate margins using the remaining information for NKK and NSC. Instead, USDOC made no "comparison" between export price and normal value for the affected NSC sales, but simply applied an unreasonably high margin. For NKK, USDOC chose normal values without regard to how closely those underlying sales related to the overall average normal value for the product categories that included the theoretical weight sales at issue. Such an approach is not a "fair comparison" as contemplated by Article 2.4.

115. The United States wrongly interprets the facts available tool as something that, when used, renders other provisions of the AD Agreement meaningless. The *US —Atlantic Salmon* decision demonstrates this interpretation is not permissible. That Panel admonished the United States for acting inconsistently with Article 2.4 by failing to consider the representativeness of the resulting margin in deciding which facts available to use.[105] Unreasonably inflated margins are not representative of the displaced price comparison if there is no demonstration that the facts available were at all related to the underlying sales. The US First Submission does not respond to Japan's claims that the facts available were not rationally related to the theoretical weight sales and therefore offers no proof that the resulting margins were representative. The United States did not meet its burden of making a fair comparison in accordance with Article 2.4.

116. The United States also asserts that if it is required to only use facts available selectively, this would nullify the authority in Paragraph 7 of Annex II to select facts that are less favourable.[106] Paragraph 7 does not provide an affirmative allowance to use punitive facts available.[107] In addition, to the extent it does, the punitive facts available should be used selectively, and only with respect to those facts not obtained. Here, this meant certain US prices and home market prices for NKK and NSC.

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[105] United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, adopted 27 April 1994, 41S/229 BISD, para. 450 ("U.S.—Atlantic Salmon").

[106] US First Submission, para. B-174.

[107] On a related issue, the United States has argued that it does not select facts available that are certainly adverse, but sufficiently adverse. *See* US Response to Japan Questions 5 and 6, paras. 7-8. Surprisingly, it is the US position that it did not know for sure that the facts available USDOC applied to NKK and NSC were adverse because "it does not have the actual information against which to compare its choice of presumably adverse information." *Id.* This simply is not true. USDOC had the actual weight conversion factor for each company. Therefore, not only did USDOC act improperly by rejecting the factors and resorting to facts available, it knew the facts available it applied were adverse.

IV. ALL-OTHERS RATE

117. Article 9.4 states that the all-others rate shall not be based on margins calculated using facts available. It does not distinguish between margins calculated using partial facts available versus those using total facts available.

118. The United States thinks that this provision contains a word limiting its applicability to margins based entirely on facts available, but no such limiting word exist.[108] As Brazil points out, "the word 'entire' does not appear in Article 9.4."[109] Dumping margins calculated on the basis of partial facts available *are* "margins established under the circumstances referred to in Paragraph 8 of Article 6,"[110] and therefore they are not permitted to be used in calculating the all-others rate.

119. The United States complains that it would be "impossible" for USDOC to calculate an all-others rate if Article 9.4 forbids the use of margins based on partial facts available, because all three individually-investigated respondents were assigned overall margins based on partial facts available.[111] Nothing in Article 9.4, however, prevents USDOC from using a composite of the portions of the investigated companies' margins not based on facts available. In many cases, USDOC will have determined a margin based on the company's information and then add a few distorting adjustments to that margin based on adverse facts available -- indeed, that is precisely what USDOC did to KSC, NSC, and NKK in this case. Having added the distorting adjustments, USDOC could just as easily leave them out, and determine margins based solely on the companies' own information.

120. The United States also makes a series of policy arguments not grounded in the AD Agreement. First, the United States notes that calculating margins is a complicated endeavour, and claims that authorities need discretion with the use of facts available to fill gaps in respondents' information.[112] Japan does not deny that anti-dumping duty calculations are complicated. The issue for purposes of Article 9.4, however, is to whom the facts available are applied when a gap appears in the record. If an authority legitimately determines that a company it is investigating has withheld the necessary information, that is a different issue from applying facts available in the calculation of the all-others margin. The companies that must live with this rate have not even been given the opportunity to provide any information. The AD Agreement is clear that companies not individually investigated should not be affected by the behaviour of investigated companies.

121. Second, the United States claims that the result of using facts-available rates in the calculation of the all-others rate is neutral, because nothing at all is known about the pricing of other companies. The United States implies that companies in the all-others category could be dumping at a *higher* margin than the individually-investigated respondents.[113] Japan believes that the important question under the AD Agreement is the following: why is nothing known about the company? If nothing is known because the company has not cooperated or has been unable to provide the information, then a resort to facts available may be appropriate. But if nothing is known because USDOC decided not to devote any time or resources to investigating that company, as is the case with the companies in the

[108] US First Submission, paras. B-180, B-183, B-189.

[109] Brazil's Third Party Submission, para. II.D.2. The European Communities also appears to share Japan's interpretation of Article 9.4 that margins based even partially on facts available must be excluded from the margin calculation for companies that were not individually investigated. *See* Oral Statement by the European Communities, para. 8.

[110] Article 9.4 of the AD Agreement.

[111] US First Submission, para. B-194.

[112] *See* US First Submission, paras. B-199 to B-200.

[113] *See* US First Submission, para. B-198, n.262.

all-others category, then it is not permissible—indeed, it is not fair—to calculate the all-others rate with margins based on facts available.[114]

V. AFFILIATED SALES IN THE HOME MARKET

A. EXCLUSION OF SALES TO AFFILIATES

1. The 99.5 percent test neither determines whether a sale is in the ordinary course of trade nor results in a fair comparison

122. Article 2.1 requires a determination of the dumping margin based on home-market sales "in the ordinary course of trade," and Article 2.4 requires a "fair comparison" between the home market and export prices. USDOC's 99.5 percent test -- which disregards sales to any affiliated customer unless they are priced 99.5 percent or greater than the average price to unaffiliated customers -- accomplishes neither. This test is too simple and mechanical to resolve whether the sales are within the "ordinary course of trade" or not, and its systematic disregard of only low-priced sales prevents a "fair comparison."[115] When the United States attempts to rationalize the 99.5 percent test on the merits, it simply underscores the inherent unfairness and unreasonableness of the test. Not surprisingly, not a single third party to this proceeding endorses the US practice at issue.

123. The United States asserts that since Article 2.1 of the AD Agreement does not specify how to evaluate whether a sale is in the "ordinary course of trade," then any conceivable test is acceptable.[116] The United States misinterprets the standard of review,[117] and fails to reconcile its interpretation with other provisions of the AD Agreement, such as Article 2.4. The United States has essentially admitted that it applies a double standard when it comes to determining whether sales to affiliates shall be included in the normal value calculation: low-priced sales are excluded if they are as little as 0.5 percent less than prices charged to non-affiliates,[118] but high-priced sales are excluded only if they are "aberrationally high."[119] Nowhere does the United States articulate why home market prices that

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[114] In response to Japan's argument that the calculation of the all-others rate in this particular investigation violated the AD Agreement, the United States notes that SMI did not make exactly the same argument to USDOC that Japan now makes to the Panel. *See* US First Submission, para. B-36, n.91. SMI focused on the use of adverse inferences against KSC and how that inflated the all-others rate. *See* Sumitomo Metal Indus., Ltd. Case Brief, at 4-5 (12 Apr. 1999) **(Exh. JP-48).** SMI's position in this investigation, however, only underscores the flaws in the US statute and in particular its distinction between margins based "entirely" and margins based only "partially" on facts available. SMI's lawyers made a strategic decision to try to work within the US framework and minimize the inflation of the all-others rate by urging USDOC not to punish respondents for a petitioner's refusal to cooperate.

[115] The test also violates the spirit of Article 2.2, which sets forth the circumstances under which home-market sales may be excluded as below cost or in insufficient quantities. Article 2.2.1 illustrates how carefully an authority must determine whether a sale should be excluded as outside the ordinary course of trade. As Korea notes, Article 2.2.1 specifies that below-cost sales "may" be disregarded only under very specific circumstances. The AD Agreement thus places very strict limits on an authority's discretion to disregard even below-cost sales; *a fortiori*, above-cost sales cannot be disregarded in an arbitrary manner. *See* Korea's Third Party Submission, paras. II.E.5-7.

[116] *See* US First Submission, paras. B-214, B-217.

[117] *See* Section II.B.2 above.

[118] The United States glosses over the important difference between the two-percent *de minimis* test for dumping margins and the severe 0.5-percent test for sales to affiliates. *See* US First Submission, para. B-221, n.308. Yet the language cited by the United States makes Japan's point even more compelling. Deciding whether an affiliation affects the pricing "may involve situations where the outcome is close and the exercise of human judgment is unavoidable." *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea,* adopted 19 Mar. 1999, WT/DS99/R, at para. 4.661. That is precisely the point. The hair-trigger test of 0.5 percent makes no sense given the complicated nature of the analysis USDOC purports to undertake.

[119] US First Submission, para. B-228.

are too low show that the relationship affected prices, but that home market prices that are too high would not show the same thing. This double standard reveals that the true purpose of the 99.5 percent test is to inflate the magnitude of the dumping margin, which the United States essentially admits, [120] not to determine whether sales to affiliates are in the ordinary course of trade. This is neither "fair" (Art. 2.4) nor does it indicate whether the sales are indeed "ordinary" (Art. 2.1).

124. Contrary to the US argument,[121] the 99.5 percent test does not focus on the relationship with an affiliated company. As Japan explained at the first meeting with the Panel, assume a parent company is running a loss, but owns a subsidiary whose profits are quite high. Under such circumstances, the parent company would have an incentive to sell to its subsidiary at higher prices than it sells to other customers to reduce the profit of the subsidiary and consequently reduce its taxable income. Since the parent company is running a loss anyway, the parent's additional revenue would not increase its tax burden. In other words, in such a situation the affiliation tends to result in high prices between the companies, not low prices. The prices are distorted by the affiliation; they are therefore not at arm's length. Yet, USDOC's so-called "arm's length test" would not exclude those sales because its test addresses only whether the average price to affiliates is lower than the average price to non-affiliates.

125. When asked by the Panel to comment on this hypothetical situation, the US response only confirmed Japan's concerns. The United States allows only that it "might" disregard such high-priced home-market sales, and only if a respondent affirmatively demonstrates that they are outside the ordinary course of trade.[122] Yet the United States will *always* automatically exclude all home-market sales to affiliates below the rigid 99.5 percent test, and makes no further inquiry. This is precisely what Japan means by a double standard: substantially equivalent or slightly lower prices never make it into the normal value calculation, but high prices -- even up to "aberrationally high" levels -- are presumed to be in the ordinary course of trade. The United States digs an even deeper hole for itself when it tries to portray this policy as *favorable* to respondents. The United States states that in Japan's hypothetical situation, assuming the high-priced sales pass the 99.5 percent test, respondents would be "free" to distort normal value downward by reporting downstream resales that are *below cost*.[123] This point, if true,[124] simply demonstrates that USDOC is not trying to use the 99.5 percent test to eliminate sales "outside the ordinary course of trade" at all. What better example is there of prices being influenced by the fact of affiliation, than the fact that the downstream reseller systematically sells at a loss? Yet the United States insists that such sales would be acceptable to USDOC under the 99.5 percent test.

126. The United States argues the 99.5 percent test results in a "fair comparison" because Article 2.4 is self-contained -- that is, a comparison is inherently "fair" if an attempt is made to adjust the prices for differences such as taxes or the level of trade.[125] The first sentence of Article 2.4, however, stands on its own as an independent requirement. The requirement of a "fair comparison" did not appear at all in the Tokyo Round Anti-Dumping Code, but was specifically added, as a separate sentence, during the Uruguay Round.[126] This addition of new language must serve some purpose. As Japan has demonstrated -- and as the European Communities, Brazil, Chile, and Korea

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[120] *See* US Response to Panel Question 34, paras. 33-35 (focusing on the alleged importance of excluding low-priced sales).

[121] *See* US First Submission, paras. 211-213.

[122] US Response to Panel Question 37, para. 41.

[123] US Response to Panel Question 37, para. 43. Even more absurd is the US claim that respondents should be grateful that USDOC did not apply current US practice to exclude those higher priced sales and use instead even higher priced downstream sales.

[124] Japan frankly questions whether, in a real investigation, USDOC would accept such below-cost downstream resales as "in the ordinary course of trade."

[125] *See* US First Submission, para. B-219.

[126] *Compare* Article 2:6 of the Tokyo Round Anti-Dumping Code *with* Article 2.4 of the Uruguay Round Anti-Dumping Agreement.

also have concluded -- the 99.5 percent test is unfair because it systematically inflates the dumping margin without truly determining whether the sales it eliminates were outside the ordinary course of trade or, conversely, whether the sales it retains were in the ordinary course of trade.

127. The United States argues that Japan is trying to impose its own concept of "unfairness," and that the Panel cannot make such judgments.[127] It is hard to imagine a clearer example of "unfair" than a test that is one-sided: it permits higher prices (and thus higher dumping margins), but precludes lower prices (and thus lower dumping margins). The test simply has no rational relationship to reality, and reflects an outcome-determinative approach.

128. The United States also asserts that the 99.5 percent test "has no predictable or necessary effect on the calculated dumping margin" because individual sales that might be below the 99.5 percent threshold are included in normal value.[128] This argument ignores the systemic unfairness that *all* the sales to this customer are, on average, higher than the sales of similarly-situated customers whose purchases do not pass the 99.5 percent test. If sales to all affiliated parties are "inherently suspect,"[129] what is fair about retaining only high-priced sales?

129. The United States claims that NKK's proposed standard deviation test errs on the side of including affiliated-party transactions that might actually be affected by the relationship.[130] Such a test, by definition, eliminates low-priced sales as well as the "aberrationally high" prices identified in the US submission. Such a test is not one-sided, and is objectively reasonable.[131] Though the United States may be correct that the margin calculation does not rely on standard-deviation analysis,[132] the arm's-length test poses a different question. Dumping margins simply measure differences in price. The arm's-length test is supposed to measure, solely on the basis of price, whether a sale to an affiliate has been influenced by the relationship or is outside the ordinary course of trade -- a more complicated endeavour.

130. Japan does not posit that a standard deviation test is the only way to do this; Japan simply wants the Panel to know that alternatives were presented to USDOC in this investigation, that standard deviation is a more reasonable way to determine whether a sale is in the ordinary course of trade based solely on price, and that USDOC has not shown any interest in seriously considering such inherently fair alternatives.

2. The "everyone else does it" excuse is not only weak, but also wrong

131. Ultimately, we are left with what the United States apparently believes is its best defense of its practice of excluding sales to affiliates: "everyone else does it." According to the United States, other major users of the anti-dumping laws have similar rules for excluding home-market sales to affiliates from the normal-value calculation.[133] This defense does not rise to the level of subsequent practice,[134] and is both irrelevant and wrong. It is irrelevant because the other Members' statutes and practices have never been reviewed for WTO consistency by a panel. It is wrong because the

[127] US First Submission, para. 219.
[128] US Response to Panel Question 36, para. 37.
[129] US Response to Panel Question 34, para. 33.
[130] US First Submission, paras. B-223 to B-224.
[131] Japan refers the Panel to the affidavit submitted from two statisticians, both of whom have held professional positions in the US Government, concerning the inherent bias in the 99.5 percent test. *See* **Exhibit JP-56**.
[132] S*ee* US First Submission, para. B-225.
[133] *See* US First Submission, paras. B-206 to B-207.
[134] *See* Section II.B.2.b above.

language from those statutes quoted by the United States indicates that the other countries have more thoughtful and less mechanical approaches than the 99.5 percent test.[135]

132. The European Communities, Brazil and Korea, whose practices have been cited by the United States, specifically support Japan on this question and agree that USDOC's practice is unreasonably biased and mechanical.[136] There is *no* country other than the United States that rejects sales to affiliates simply because they are sold at average prices less than 99.5 percent of the average price to non-affiliates.

3. Article 2.2 makes clear that any test for finding sales to be outside the ordinary course of trade must be more rigorous than USDOC's 99.5 percent test

133. Article 2.2 sets forth the circumstances in which an authority may rely on something other than a producer's own sales in the home market to calculate normal value when there are no sales in the ordinary course of trade. The only outside-the-ordinary-course-of-trade sales identified in this provision are the below-cost sales discussed in Article 2.2.1. This provision makes clear that choosing to exclude sales as outside the ordinary course of trade is a rigorous undertaking. Even below-cost sales cannot be deemed outside the ordinary course of trade unless they are made (a) within an extended period of time, (b) in substantial quantities, and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time. The fact that the sales are below cost is alone not sufficient to justify their exclusion. Rather, each one of the specified conditions must be met.

134. Similar rigor must apply if an authority is to exclude sales to affiliates. It is not sufficient that the relationship between the companies can be as low as a five percent shareholding and that the average price between the companies is merely 0.5 percent lower than the average price charged to unaffiliated companies.[137] It strains common sense that such an easy test could be permitted given the rigor with which authorities must analyze below-cost sales.

B. REPLACEMENT WITH DOWNSTREAM RESALES

135. Even assuming the sales to affiliates are deemed outside the ordinary course of trade, the AD Agreement does not permit USDOC to replace sales to affiliates with downstream resales, as the United States does in "most" cases.[138] USDOC may use other home-market sales, or, if there are no home-market sales in the ordinary course of trade, Article 2.2 specifies that it must use only third-country sales or constructed value. Other than a desire to increase the burden on respondents, the United States has not identified any rationale for its policy.

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[135] The EC excludes sales to affiliates unless it determines that the prices are "unaffected by the relationship." US First Submission, para. B-206, n.266. So do Australia, New Zealand, Argentina and Korea, in similar language. *Id*. para. B-206, nn.268-70. Brazil's statute includes the precatory "may," and hinges exclusion on a determination of whether "related prices and costs are comparable to those of operations among parties that are not so related." *Id*. para. B-206, n.267.

[136] *See* Brazil's Third Party Submission, Part III.C; Brazil's Response to the Questions to the Third Parties, Question 48; Oral Statement by the European Communities, paras. 20-21; European Communities' Response to the Questions to the Third Parties, Question 48; Korea's Third Party Submission, Part II.E, F; Korea's Response to the Questions to the Third Parties, Question 48; *see also* Chile's Third Party Submission, 8-9.

[137] This applies with equal force to tests that do not even consider relative price levels. The United States claims in response to Panel Question 34 that USDOC "could reasonably have disregarded all … sales {to affiliates} in the home market, regardless of price levels to affiliates, as Canada and Mexico do, and relied solely on arm's length sales to unaffiliated parties." US Response to Panel Question 34, para. 33. Japan disagrees. The 99.5 percent test is unfair not merely because it excludes low-priced sales to affiliates, but also because it assumes that such prices are low because of affiliation, regardless of the level of affiliation and even when the affiliation is as low as five percent.

[138] US Response to Panel Question 35, para. 36.

1. Article 2.1 does not justify use of downstream sales in the home market

136. The United States claims that downstream sales "clearly come within" home market sales under Article 2.1. In doing so, however, the United States makes no effort to explain why.

137. The US position on this issue is indefensible. Article 2.1 merely defines dumping. Nowhere does this provision discuss using downstream sales. The United States is reading into the AD Agreement concepts that are not there. The expansive reading the United States has adopted would permit all sorts of alternatives to using a respondent's sales, as long as they are in the ordinary course of trade and destined for consumption in the exporting country. Such an expansive reading, however, ignores clear preferences in the AD Agreement, such as determining dumping margins for individual exporters and/or producers (Article 6.10). This preference explains why constructed value is calculated based on production costs (Article 2.2), not the costs of a reseller. There is simply no reason to interpret Article 2.1 to permit the US practice.

138. Article 2.3 specifically allows the use of downstream prices in the export context, but not in the context of home-market sales.[139] Article 2.3 exists because there is no alternative for export price to a specific market other than some price at which sales are made in that specific export market. Therefore, Article 2.3 creates a mechanism for constructing an export price for that market. There is no such need for this policy on the home market side, because there are other alternatives, including other home market sales and, based on Article 2.2, constructed value or third country sales (if the remaining sales are too few). Nothing in the AD Agreement permits the use of resales in the home market.[140]

2. If there are no home-market sales in the ordinary course of trade, then Article 2.2 requires use of third-country sales or constructed value.

139. If USDOC does not believe sales to affiliates are in the ordinary course of trade, then it has three choices. The first choice is to use the respondent's other home-market sales.[141] When there are *no* sales in the ordinary course of trade in the home market, or when such sales do not permit a proper comparison then the second and third choices present themselves: third-country sales or constructed value. Where downstream home-market sales in the ordinary course of trade exist, however, the United States thinks USDOC may not reasonably use other non-home market based alternatives.[142] In this sense, the United States claims that the particular provisions of Article 2.2 and 2.3, if read to prohibit replacement of sales to affiliates with the downstream resales, lead to an "absurd result." Japan disagrees. When USDOC rejects home-market sales to an affiliate on the basis of the 99.5 percent test, USDOC is declaring that these sales are not in the ordinary course or do not permit a proper comparison. Assuming that judgment is correct -- a point Japan contests -- the question

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[139] *See* Japan's First Submission, paras. 162 to 164.

[140] The United States responds to Japan's analysis with an attack on the viability of the maxim "expressio unius est exclusio alterius." That is, the language must be viewed in context, and the United States thinks it is inappropriate to infer any substantive meaning from the specification of some concepts and the omission of others. *See* US First Submission, paras. B-232, B-234 to B-235. Attributing meaning to text is the essence of treaty interpretation. The textual approach of Article 31 of the Vienna Convention rests on certain "logical presumptions," including specifically the presumption that "express mention excludes other items (expressio unius est exclusio alterius)." In fact, the United States and the US steel industry recently embraced "expressio unius" as a tool for interpreting the Uruguay Round Agreements in the Panel proceedings in *U.S.—Leaded Bar.* *See* US First Submission, para. 154, Attachment 2.1 to the Panel Report, WT/DS138R (23 Dec. 1999) & Exhibit USA-25 (excerpts attached as **Exh. JP-98**).

[141] The United States does not even acknowledge that the other home-market sales should be the primary recourse, but identifies only the downstream resales as the "ordinary course" sales available for the normal-value calculation. *See* US Response to Panel Question 33, paras. 29-30.

[142] *See* US First Submission, para. B-234.

becomes what alternative prices USDOC may use. By specifying the alternatives, Article 2.2 does not permit USDOC to use downstream resales.

140. The United States also suggests that Japan's interpretation of the AD Agreement would allow respondents to manipulate the normal-value calculation by structuring *all* home-market sales through affiliated resellers, apparently with the expectation that USDOC would be left with no home-market sales in the ordinary course of trade.[143] First, Japan does not accept the premise that all sales to affiliates will always be outside the ordinary course of trade. Even if such a decision is made, then indeed Article 2.2 requires the authorities to calculate normal value only on the basis of third-country sales or constructed value. In fact, in its official internal "Antidumping Manual," USDOC instructs its staff to do exactly what the United States now claims is "absurd": use third-country sales or constructed value where there are no home-market sales in the ordinary course of trade.[144]

3. The use of downstream resales also violates Article 2.4's "fair comparison" requirement

141. USDOC's use of downstream resales also violates the "fair comparison" requirement because it results in an "apples to oranges" comparison.[145] The United States insists this is not so, because USDOC makes level of trade adjustments -- something the Japanese mills allegedly never requested and Japan allegedly does not even acknowledge in its brief.[146] The United States is mistaken on two points.

142. First, USDOC's level of trade adjustments, which focus on different selling functions, do not address differences in price comparability due to the resellers' costs and profit. Without accounting for such differences, USDOC does not reduce price to the ex-factory level – a task USDOC goes to great lengths to accomplish on the export side when calculating constructed export price.[147] Because USDOC ensures that all constructed export prices are ex-factory prices, any use of downstream sales in the home market that does not incorporate deductions to reach an equivalent ex-factory price will result in an "apples-to-oranges" comparison.[148]

143. Second, USDOC received a specific request for a level of trade adjustment to the downstream resales USDOC used as a surrogate for NKK's home market price.[149] NKK noted the different selling functions it performed for its direct customers as opposed to the customers of its affiliated reseller.[150] USDOC did not grant the level of trade adjustment requested by NKK.[151] So, USDOC did not even apply its limited level of trade adjustment, thus making the "apples-to-oranges" comparison more severe.

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[143] *See* US First Submission, para. B-235.

[144] *Compare* Antidumping Manual, ch. 8, at 2-4, 56 (Dep't Commerce 22 Jan. 1998) (excerpts attached as **Exh. JP-99)** *with* US First Submission, para. B-235.

[145] *See* Japan's First Submission, para. 170.

[146] US First Submission, para. B-236.

[147] When the United States calculates constructed export price, it makes adjustments to the affiliate's resale prices to reduce it to an ex-factory equivalent. 19 U.S.C. § 1677a(c)-(d) (excerpts attached as **Exh. JP-90(c)**). Specifically, subsection (d)(1) reduces the export price to reflect all reseller costs, and subsection (d)(3) reduces the export price to reflect the profit attributable to the reseller. No such adjustment is made by the United States on the home market side when using downstream sales, unless the respondent successfully meets the high US standard for a level of trade adjustment. 19 U.S.C. § 1677b(a)(7) (excerpts attached as **Exh. JP-90(d)**). Even then, however, the adjustment does not reduce the price to an ex-factory level. Rather than deducting all "expenses" as specified in Section 1677a(d)(1), Section 1677b(a)(7)(A) focuses on different "selling activities" that are "demonstrated to affect price comparability." Moreover, Section 1677b(a)(7)(A) makes no provision for deductions for profit, nor does US practice.

[148] *See* Korea's Third Party Submission, paras. II.E.3, II.F.1-4.

[149] *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24339 (**Exh. JP-12**).

[150] *Id*. at 24339-40 **(Exh. JP-12)**.

[151] *Id*. at 24340 **(Exh. JP-12)**.

VI. CRITICAL CIRCUMSTANCES

144. The United States made early decisions on critical circumstances to chase Japanese imports from the market, and thus to placate domestic political pressures. Indeed, the new US policy was sold to domestic constituencies based precisely on this chilling effect. Given the normal operation of US customs law, there was absolutely no need to rush anything to preserve the option to collect retroactive duties, should they ultimately become necessary.[152] The rush to judgment, long before the authorities have any time to collect or analyze "sufficient evidence" to support such actions, violates Article 10 of the AD Agreement.

145. Moreover, the new US policy that has made this rush to judgment a regular feature of US anti-dumping cases must be addressed by this Panel. The decisions at the end of an investigation should not shield from review those violations of WTO obligations that occur earlier in the investigation, particularly those violations that are likely to be repeated in future cases if not disciplined.

A. THE AUTHORITIES CANNOT PREDICATE A FINDING OF CRITICAL CIRCUMSTANCES ON "THREAT OF INJURY"

146. The United States misreads Article 10.6 to allow "threat" of injury to substitute for current injury. But the language of Article 10.6, the context of Article 10 more generally, and the overall purpose of retroactive duties all contradict this US interpretation.

147. Article 10.6 means what its says: "injury," and not threat of injury. The United States uses Footnote 9 of Article 3 to claim that an affirmative finding of threat of injury *is* an affirmative finding of injury pursuant to which retroactive duties may be assessed.[153] As Japan explained in its First Submission[154] and in response to Panel Question 14, Footnote 9 cannot apply to "injury" as that term is used in Article 10.6. Footnote 9 sets a general rule "unless otherwise specified." The language and context of Article 10 generally and Article 10.6 specifically represent such an "otherwise specified."

148. Consider for a moment the illogic if Footnote 9 were deemed to apply to Article 10.6. The US reading of Article 10.6 would permit imposition of critical circumstances based on a finding a threat of injury. Yet this reading directly contradicts Article 10.4's requirement that in cases of threat, duties can only be prospective. In context, it makes no sense for Article 10.6 to authorize what Article 10.4 does not permit.

149. Although the United States might turn to Article 10.2 as an exception to Article 10.4 allowing some retroactive duties in cases of threat, this argument overlooks the situation of material retardation -- which is also listed in Footnote 9. The United States cannot use Footnote 9 to add "threat of injury" to Article 10.6 without also adding "material retardation" to Article 10.6. Yet under Article 10.4, a finding of material retardation may ***never*** justify retroactive duties -- not duties during the period of provisional measures, and certainly not duties that go back 90 days prior to the start of provisional measures. The problem persists: it makes no sense for Article 10.6 to be read as authorizing what Article 10.4 does not permit. Rather than this bizarre interpretation, the far more natural reading is that Article 10.6 means what it says -- "injury" means current injury, not threat of injury and not material retardation.[155]

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[152] *See* Japan's Response to Panel Question 16, para. 56.

[153] *See* US First Submission, para. B-256.

[154] Japan's First Submission, paras. 191-194.

[155] Nor can the United States argue distinctions between preliminary and final determinations of critical circumstances. The language of Article 10.6 does not mean different things at the preliminary and final stage -- the word "injury" does not change with the passage of few months. The requirements of Article 10.6 apply

150. The United States also argues the phrase "would cause injury" indicates that present injury is not a requirement.[156] As Japan explained in response to Panel Question 14, the US interpretation is incorrect as a matter of language as well as logic. As a matter of language, "would" is of course the *past* tense of will and does not indicate future events.[157] The US interpretation of "would cause injury" to connote future events also would be inconsistent with the context of Article 10, with its overall retrospective purpose. Article 10.6(i) simply cannot be read to describe future events, such as the causation of injury, in light of the use of the present tense in virtually all other verbs in Article 10 relevant to the factual predicate for what the United States terms "critical circumstances."[158]

151. Japan read the US response to Panel Question 30 with interest, since Japan also was curious why USDOC felt the need for more information if USITC's threat-of-injury determination was sufficient to establish "injury" under Article 10.6(i). The only reason the United States identifies, however, is a concern that the injury "may be less apparent to the importers" in light of USITC's finding that there was not even a reasonable indication of present material injury.[159] Japan certainly shares this concern, but this US response does not answer the Panel's question. Indeed, the US response reinforces Japan's point that USITC's *threat-of-injury* finding undermines the basis for concluding that importers, in the "here and now," should have known about dumping and injury.

B. USDOC'S EARLY PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES IN THIS INVESTIGATION VIOLATED THE AD AGREEMENT

152. Articles 10.6 and 10.7 establish important limits on the ability of a WTO Member to determine, in US nomenclature, that "critical circumstances" exist and retroactive duties may be imposed. The United States has disregarded these limits, and rushed to judgment before it had sufficient evidence to justify such an extreme action. None of the elements of Article 10.6 was established to the degree required by Article 10.7; any one of these legal errors would be sufficient for the Panel to find a violation of the AD Agreement. There was no finding that imports were "dumped." There was insufficient evidence that importers knew or should have known of dumping and injury, only vague newspaper articles. There was no finding at all that imports were "likely to seriously undermine the remedial effect" of the duties. The evidence was not sufficient to support a finding of "massive imports4," since imports from Japan actually declined after the petition was filed. Most troubling, the premature timing of the decision, mandated by USDOC's new policy bulletin, guaranteed that sufficient evidence of the elements of Articles 10.6 would not exist.

153. As explained in Japan's Answers to Panel Questions 11 and 15, and in Japan's First Submission, the basic problem is that USDOC simply accepted everything in the petition as the truth. The United States now attempts to distance itself from this fact, but USDOC's contemporaneous documentation proves Japan's point. The preliminary determination of critical circumstances was, in the words of the internal USDOC decisional memo, "{b}ased on allegations contained in the petitions," and on nothing more.[160]

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consistently at both stages. The only difference is the degree of evidence one has of those requirements at each stage.

[156] *See* US First Submission, para. B-274.

[157] *See generally New Shorter Oxford English Dictionary* at 3687-88, 3725; William Strunk, Jr. & E.B. White, *The Elements of Style* 64-65 (3d ed. 1979) (attached as **Exh. JP-100**).

[158] *See* Japan's First Submission, paras. 190-196.

[159] See US Response to Panel Question 30, para. 22.

[160] Memorandum From Roland L. MacDonald and Edward C. Yang to Joseph A. Spetrini Regarding Antidumping Duty Investigations of Certain Hot-Rolled Carbon Steel Flat Products from Japan and the Russian Federation—Determination of Critical Circumstances, 23 Nov. 1998, at 1 **(Exh. US/B-42)** (hereinafter "Spetrini Memo").

1. There was no finding that imports were dumped

154. As a threshold matter, Article 10.6(ii), and the chapeau of Article 10.6,[161] require that the imports in question be "dumped" before the authority can make a finding of critical circumstances. There was no such finding at the time USDOC made its preliminary determination of critical circumstances, and the United States does not even address this specific violation in its written submission.

155. The preliminary determination of dumping was not made until three months later. There was not even any independent evidence of dumping -- apart from the self-serving allegations in the petition -- when USDOC made its preliminary critical circumstances determination. Evidence of dumping might exist if there were an independent assessment, but on this point USDOC's critical circumstances analysis simply summarized the allegations in the petition.[162] "Alleged dumping" is not sufficient to establish that the product was "dumped" for purposes of Article 10.6,[163] as the United States appears to acknowledge when arguing in the context of facts available that petitions are always adverse.[164]

2. There was insufficient evidence of importer knowledge of dumping

156. There was insufficient evidence that importers should have been aware of dumping, a requirement of Article 10.6(i). USDOC's total reliance on the petition is legally insufficient. USDOC specifically found "The most reasonable source of information concerning knowledge of dumping is the petition itself."[165] The United States is conspicuously silent as to this rather remarkable conclusion. Why would an allegation in a lawsuit be the "*most reasonable* source of information" about what other parties knew or should have known? How could any adjudication system conclude that an allegation by one side, standing alone, is the "most reasonable" indicator of the truth?[166]

157. Even the United States recognizes that the information in the petition at best tells only one side of the story.[167] The US attempt to rationalize this assertion in response to Panel Question 32 fails. The United States notes that USDOC calculated a higher dumping margin for KSC than the margins alleged in the petition. *But the petition did not even calculate a margin for KSC*, only for NKK and NSC. Moreover, USDOC's final determination for KSC was distorted by the use of facts available.

158. Under its "25 percent test," USDOC concluded that importers should have been aware that they were dealing in dumped merchandise -- during a period several months before the petition was even filed -- solely because the petitioners subsequently *alleged* that dumping margins for NKK and NSC exceeded 25 percent.[168] As explained in Japan's answer to Panel Question 11, this alone cannot

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[161] On this point, Japan concurs with the reasoning in Brazil's Third Party Submission, para. IV.3.

[162] *See* Spetrini Memo, at 2 (**Exh. US/B-42**).

[163] *Compare* Article 5 ("Initiation and Subsequent Investigation") *with* Article 10.6. As Japan explained in response to Question 11 from the Panel, the evidentiary standard for initiating an investigation does not approach the evidentiary standard for substantive determinations.

[164] US First Submission, para. B-72.

[165] *USDOC Preliminary Critical Circumstances Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**. *See* Spetrini Memo at 2 ("the Department has relied on margin information provided by petitioners in the petition to impute knowledge of sales of subject merchandise at less than fair value") (**Exh. US/B-42**).

[166] *See United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, adopted 23 May 1997, WT/DS33/AB/R, at 14 ("{W}e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.").

[167] *See* US First Submission, para. B-72.

[168] *See* US First Submission, para. B-269.

constitute sufficient evidence, because petitioners' alleged dumping margins are self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities.[169] This deficiency in petitioners' data is underscored by the ultimate dumping determination with respect to NKK and NSC once their information was placed on the record and evaluated by USDOC. Ironically, USDOC then concluded that NKK and NSC -- the two companies whose estimated margins formed the basis of the "25 percent test" -- specifically did *not* dump by margins exceeding 25 percent.[170] The United States has emphasized the quantity of petitioners' allegations and newspaper articles, as if *more* inconclusive newspaper articles or *longer* allegations at some point become proof.[171] They do not, as the USDOC analysis eventually showed.[172]

159. As Brazil notes in its third party submission, even an affirmative finding of dumping above 25 percent would not be sufficient evidence that importers knew or should have known that fact, because importers rarely if ever know the price at which their foreign suppliers sell in their home market (or whether such sales are above the cost of production).[173] The only response the United States can muster is that the 25 percent test is a "permissible interpretation" of Article 10, because the Agreement does not specify how authorities should determine importer knowledge of dumping.[174] This begs the question; however the United States might interpret the Agreement, it may not do so in a manner that eviscerates the Article 10.7 requirement of "sufficient evidence."

3. There was insufficient evidence that imports had injured the domestic industry

160. As discussed above, critical circumstances may not be applied when only a threat of material injury exists. In this case, USITC preliminarily found only a threat of material injury. USDOC, therefore, had insufficient evidence on which to base a finding of material injury, as required by Articles 10.6(ii).

4. There was insufficient evidence of importer knowledge of injury

161. There also was insufficient evidence of importer knowledge that their purchases of the dumped product would "cause injury" to the US industry as required by Article 10.6(i). The United States has attempted to bolster USDOC's finding on this point with a detailed discussion of the facts and the law, but the United States is wrong on both.

162. On the facts, the United States insists importers knew or should have known of injury based on the allegations in the petition, including the vague newspaper articles submitted by petitioners. As discussed in Japan's Answer to Panel Question 15, this argument is meritless based on the substance and chronology of those articles. Other "evidence" of importer knowledge of present material injury included (1) the finding that there were "massive imports" during the earlier, arbitrary period allegedly established by the newspaper articles, (2) the magnitude of the estimated dumping margins alleged in the petition, and (3) "information regarding injury to the domestic industry in the petition itself."[175] In other words, the decision was based on *nothing at all* other than the petition and the contrary conclusion by USITC that there was only a reasonable indication of threat of injury. This basis is inherently insufficient.

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[169] Japan notes that USDOC's initiation checklist simply summarized the allegations in the petition, *see Initiation Checklist,* at 62-63 (**Exh. US/B-18**), as did its internal "analysis" of the critical circumstances allegation, *see* Spetrini Memo, at 2 (**Exh. US/B-42**).

[170] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24370 **(Exh. JP-12)**.

[171] *See, e.g.*, US First Submission, para. B-268 ("the approximately 700 pages of exhibits submitted with the petition and the amendments thereto are not mere allegations -- they are evidence").

[172] *See* Japan's Response to Panel Question 15, para. 54.

[173] *See* Brazil's Third Party Submission, para. IV.6.

[174] *See* US First Submission, para. B-271.

[175] Spetrini Memo, at 3 (**Exh. US/B-42**).

163. Note that Article 10.6(i) is quite specific that dumping *by the exporter* must be causing injury. Vague stories about troubles being experienced by the domestic industry, or vague references to imports in general does not provide a legally sufficient basis to find that importers should have known specific exporters or specific countries were the cause of alleged injury.[176]

164. Moreover, the United States admits that petitioner needed to wait for "sufficient evidence" even to make an allegation.[177] Yet the United States still argues that months before the petition the importers should have known about the injury. If petitioners, carefully studying the market to file a case could not even credibly allege injury in early 1998, how could importers have been aware that alleged dumping would cause injury?

5. There was no finding that imports were likely to seriously undermine the remedial effect of any duty

165. Contrary to Article 10.6(ii), USDOC did not address at all whether the imports were "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." The United States does not even attempt to justify this failure apart from a conclusory assertion, without any citation to the record in this investigation, that USDOC "plainly" considered this factor as an "integral part" of its analysis.[178] USDOC did not do so, quite simply because it is not required to do so by the US statute or policy bulletin, as explained in subpart C below addressing how US law is inconsistent on its face with the Agreement.[179] By comparison, factors USITC typically considers in determining whether the imports were "likely to seriously undermine the remedial effect" include subject import volumes before and after the filing of the petition, trends in subject import pricing data, and inventory levels.[180] USDOC, however, considered none of these factors.[181]

166. The magnitude of this oversight emerges from the illogic of the USDOC position. USDOC identified a surge in imports from a much *earlier* period of time to avoid the inconvenient fact that imports at the time of the petition were falling. USDOC then implicitly jumps to a *future* period to

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[176] Once one looks carefully behind the US allegations that hundreds of pages of evidence supported the USDOC conclusions, it becomes apparent the US argument is an extreme exaggeration. USDOC identified 24 media reports that ostensibly supported its preliminary finding of critical circumstances. Spetrini Memo, at 7-9 (**Exh. US/B42**). Of these 24, however, only 6 mention Japan at all; as the Spetrini Memo itself acknowledges the remainder are either general comments about imports, or articles that discuss other import sources. Of these 6 articles mentioning Japan, only 3 articles appear to mention hot-rolled steel. One of these three, however, is inaccurately described in the Spetrini Memo as having to do with hot-rolled steel -- the interview of Hank Barnette on CNN did not mention hot-rolled steel at all, and discussed only general steel developments. Transcript #98073003FN-L02, of CNNFN: *Before Hours* (30 July 1998) (attached as **Exh. JP-91**). Moreover, of these 6 articles mentioning Japan, 2 of them came in late September just as the petition was about to be filed. The entire US case of "sufficient evidence" with respect to Japan thus collapses to two isolated reports -- one from a British consulting firm CRU International, and another from an obscure publication called the Tex Report, published in Japan in English. In each case, the reference to hot-rolled steel from Japan occupies one or two sentences in a multi-page report covering a variety of other topics. The US argument is that a stray sentence or two in publications, no matter how obscure, represents sufficient evidence that importers should have been aware that alleged dumping of hot-rolled steel was injuring the US industry. This claim is absurd.

[177] US First Submission, para. B-278.

[178] *Id.* para. B-280.

[179] *See also* Spetrini Memo, at 1 (summarizing statutory factors USDOC was considering, and omitting this one) (**Exh. US/B-42**).

[180] *See, e.g., USITC Final Injury Determination*, USITC Pub. 3202, at 21-23 (**Exh. JP-14**).

[181] *See* Spetrini Memo, at 2-4 (**Exh. US/B-42**). The Memo did cite "falling domestic prices resulting from rising imports," but this was based on the selected newspaper articles rather than USITC's pricing data, and it was during "early to mid-1998," not during a period in which imports could have seriously undermined the effect of an eventual order.

allege without any analysis that imports will undermine the remedial effect of the order. The USDOC cannot have it both ways.

6. Inappropriate measurement period for "massive imports"

167. The final factual predicate for a finding of critical circumstances is "massive imports of the subject merchandise over a relatively short period,"[182] which is how the US statute paraphrases Article 10.6(ii). Given the fact that imports from Japan actually declined after the petition was filed and after initiation, which were the periods USDOC always examined until this investigation,[183] there was no sufficient evidence of this point.

168. The United States mischaracterizes Japan's argument by claiming Japan does not actually question the sufficiency of the evidence, but rather why the period was different from usual.[184] There should be no misunderstandings: the use of an arbitrary measurement period undermines the sufficiency of the evidence. USDOC's selection of a measurement period that would best support its preordained conclusion (i.e., that imports were massive in a short period of time) on the basis of nothing but petitioners' allegations and vague newspaper articles is an example of bias and unreasonableness in the collection and evaluation of evidence. The United States attempts to justify the use of this earlier period by claiming that the petitioners' decision to wait until they had sufficient evidence before filing the petition should not deprive them of their remedy against a massive surge of dumped imports.[185] But there must be a neutral, transparent period within which USDOC objectively measures the growth in imports. It cannot be whichever period best supports the petitioners' case, as USDOC did here.

169. The United States also overlooks the illogic of its position. The purpose of the 90-day period is to catch sudden surges triggered by the petition. It makes no sense to look months before the petition to find a surge, overlook a post petition decline, and then assert the need to invoke provisional measures retroactively by 90 days to place duties on those already declining imports.

7. The timing of the decision guaranteed that sufficient evidence would not exist

170. As explained in Japan's answers to Panel Questions, the major flaw in USDOC's preliminary determination of critical circumstances in this case is that the determination was made too early. USDOC traditionally waits until the preliminary determination of dumping to make its preliminary critical circumstances determinations, but changed its practice during the investigation of hot-rolled steel from Japan to provide that critical circumstances determinations should be made "as soon as possible after initiation."[186] By requiring the decision to be made "as soon as possible," USDOC systematically prevented its determination from being made on the basis of "sufficient evidence" as required by Articles 10.6 and 10.7 of the AD Agreement.

171. The United States has attempted to justify its new policy requiring premature findings by noting that Article 10.7 does not require USDOC to wait for the preliminary determination of dumping.[187] True; but that was never precisely Japan's argument. The AD Agreement requires USDOC to make its determination of critical circumstances only on the basis of "sufficient evidence," and USDOC lacked the evidence in this investigation when it rendered its determination so soon after initiation. There may be instances in which USDOC *could* make the decision early, but not without

[182] Section 733(e)(1)(B), 19 U.S.C. § 1673b(e)(1)(B) **(Exh. JP-4(b))**.
[183] *See* Japan's First Submission, para. 204.
[184] *See* US First Submission, para. B-275.
[185] *See* US First Submission, para. B-278.
[186] USDOC Critical Circumstances Policy Bulletin, 63 Fed. Reg. at 55364 **(Exh. JP-3).**
[187] US First Submission, para. B-244.

establishing, on the basis of sufficient evidence, all the elements required by Article 10.6. The petition alone is never "sufficient evidence."

172. The United States also makes the baffling claim that USDOC simply cannot wait to make its preliminary critical circumstances finding until there is any evidence other than the petition because the delay would jeopardize the remedial purpose.[188] As Japan explained in response to Panel Question 16, the US Customs Service does not finalize duty liability until approximately 314 days after entry.[189] There will be plenty of time — over ten months — to determine the final duty liability of the affected entries without any risk that those entries will escape the liability. But rather than recognizing the ordinary operation of US customs law, the United States rushed to judgment. If the facts truly justified critical circumstance there would be plenty of time, but the United States could not be bothered to wait for sufficient evidence.

C. THE US LAW, ON ITS FACE, VIOLATES THE AD AGREEMENT

1. The US distinction between "mandatory" and "discretionary" laws is contrived

173. Several of the problems with the specific application of "critical" circumstances in this case reflect underlying defects in the US statute and how it has been interpreted by USDOC. The United States tries to avoid this problem by invoking the mandatory/discretionary distinctions explored by the GATT Panel in *U.S.—Tobacco*.[190] According to the United States, "{a} law is not, on its face, inconsistent with a WTO Agreement unless it mandates actions that are inconsistent with that Agreement."[191] The United States has invoked *U.S.—Tobacco* repeatedly in other WTO Panel proceedings, and this attempt to misuse that decision must fail just as surely as the others did.

174. First and foremost, the US law and practice governing preliminary determinations of critical circumstances is indeed mandatory. Under Article 10, the United States must not find critical circumstances unless the elements established in that Article are met. In Section 733(e),[192] however, USDOC is directed to determine preliminarily ("shall promptly . . . determine") whether critical circumstances exist under a much lower evidentiary standard and without finding certain essential elements of Article 10. In addition, the Policy Bulletin squarely states, "Commerce should issue its preliminary finding on critical circumstances before the preliminary determination, and also as soon as possible after initiation."[193] The United States has confirmed to the Panel that the Policy Bulletin establishes a practice "for all ongoing and future cases."[194] This is a mandatory practice subject to a *prima facie* challenge under the AD Agreement.[195]

175. Second, the GATT Panel in *U.S.—Tobacco* dealt with very different facts from those before this Panel. The text of the law in question in the *U.S.—Tobacco* case was ambiguous, and it had not yet even been applied. These circumstances led the Panel to give the United States the benefit of the doubt.[196] In contrast, the US statute and USDOC Policy Bulletin pertaining to preliminary

[188] *See* US First Submission, para. B-266; *see also* US Response to Panel Question 32, para. 27.

[189] *See* Memo from Director, Office of Trade Compliance, File ENT-1 FO:TC:C:E AD (26 May 1997), available at www.cebb.customs.treas.gov/public (**Exh. JP-80**).

[190] *See* US First Submission, paras. B-283 to B-284 (citing generally *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 Oct. 1994, BISD 41S/131) ("*U.S.—Tobacco*").

[191] US First Submission, para. B-283.

[192] Codified at 19 U.S.C. § 1673b(e) **(Exh. JP-4(b))**.

[193] USDOC Critical Circumstances Policy Bulletin, 63 Fed. Reg. at 55364 (**Exh. JP-3**).

[194] US Response to Panel Question 26, para. 14.

[195] Cf. United States—Sections 301-310 of the Trade Act of 1974, adopted 27 Jan. 2000, WT/DS152/R, at para. 7.97 ("U.S.—Section 301").

[196] *U.S.—Tobacco*, para. 123.

determinations of critical circumstances have been applied repeatedly, including in this investigation.[197]

176. These features bring this case closer to *U.S.—Section 301* and *U.S.— 1916 Act*,[198] two recent Panel decisions that squarely rejected US attempts to analogize *U.S.—Tobacco*. The Panel in *U.S.—Section 301* persuasively explained why statutes must be read in light of their interpretation by agencies:

> Frequently the Legislator itself does not seek to control, through statute, all covered conduct. Instead it delegates to pre-existing or specially created administrative agencies or other public authorities, regulatory and supervisory tasks which are to be administered according to certain criteria and within discretionary limits set out by the Legislator . . . . The elements of this type of national law are . . . often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations. For example, *even though the statutory language granting specific powers to a government agency may be prima facie consistent with WTO rules, the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation . . .*[199]

Therefore, the Policy Bulletin must form an essential part of the Panel's review of Japan's *prima facie* challenge to the US practice. Japan need only demonstrate the practice that has developed, and how it is inconsistent with the Agreement, for the Panel to review the US practice for conformity with the Agreement.[200]

177. Finally, the pre-Uruguay Round Panel reports, such as *U.S.—Tobacco,* have limited relevance in disputes concerning the conformity of a Member's laws with GATT 1994 and the Uruguay Round Agreements. Article XVI:4 of the Agreement Establishing the World Trade Organization provides: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." "Legislation may thus breach WTO obligations."[201] Whether a particular piece of legislation is "mandatory" or "discretionary" is not the principal issue in evaluating whether on its face it is consistent with the WTO Agreements. Instead, the approach is to "examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination."[202]

2. The US law does not meet the requirements of Article 10

178. The deficiencies of Section 733(e) of the Tariff Act of 1930[203] fall into two categories: (a) elements of Article 10 that are totally absent, and (b) elements of Article 10 that are substantially weakened in the US statute. These defects are reinforced by the Policy Bulletin, which ensures that preliminary determinations of critical circumstances will never be made on the basis of the requirements of Articles 10.6 and 10.7.

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[197] *See* US Response to Panel Question 26, paras. 14-15.

[198] *United States—Anti-Dumping Act of 1916 (Complaint by the European Communities)*, Report of the Panel, 31 Mar. 2000, WT/DS136/R, at para. 6.86-6.88, *aff'd*, Report of the Appellate Body, 28 Aug. 2000, WT/DS136/AB/R & WT/DS162/AB/R, at para. 93 ("*U.S.—1916 Act*").

[199] *U.S.—Section 301*, paras. 7.25-7.27 (emphasis added).

[200] *U.S.—1916 Act*, para. 6.88.

[201] U.S.—Section 301, para. 7.42.

[202] *U.S.—Section 301*, para. 7.53.

[203] Codified at 19 U.S.C. § 1673b(e) **(Exh. JP-4(b))**.

(b) Absent findings

179. Article 10.6 requires a determination "for the dumped product in question" that "the injury {if any} is caused by massive dumped imports." Section 733(e)(1)(B), in contrast, requires only that "there have been massive imports" and there is no requirement anywhere in the statute that the imports be "dumped." This prong of the US statute thus looks only to an increase in the volume of imports. Unlike the corresponding section of the AD Agreement, the US statute does not require that the massive imports be determined to have been dumped or to have caused injury. This defect is reinforced by the Policy Bulletin, which directs USDOC to make its "preliminary finding on critical circumstances *before* the preliminary determination {of dumping}."[204]

180. Moreover, at the preliminary stage, US law provides for no finding at all that the massive dumped imports are "likely to seriously undermine the remedial effect." Article 10.6 requires authorities to "determine for the dumped product in question that . . . the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." There is no corresponding requirement at all in Section 733(e). At the preliminary stages, the US statute does not even require a "reasonable basis to believe or suspect" this element. Only in the statute governing final determinations is there a requirement that an authority make the determination whether the imports "are likely to undermine seriously the remedial effect" of the duties.[205] (This statute requires such determination to be made by the USITC, not USDOC.)

181. Notwithstanding the total absence of any finding that the "massive imports" were "dumped" or that they are "likely to seriously undermine the remedial effect" of the duty, the United States claims such findings are implicit in USDOC's ultimate finding that critical circumstances exist.[206] The United States does not respond at all to the point about the absence of any finding that the "massive imports" were dumped, apart from claiming that its "25 percent test" demonstrates that the imports were dumped.[207] But this test asks a different question—whether the importers should have known about dumping, rather than whether the massive imports injuring the US industry during the short period were dumped. More importantly, as illustrated by the investigation of hot-rolled steel from Japan, USDOC apparently considers mere allegations of dumping in excess of 25 percent to be "evidence" of dumping; as demonstrated above and in Japan's First Submission,[208] mere allegations are not sufficient evidence of dumping.

182. As to the point about undermining the remedial effect, the United States claims that element exists because that phrase appears once in a policy bulletin and because USDOC "specifically looks to the timing and volume of the *dumped* imports to determine whether critical circumstances exist."[209] The United States is being glib: the US statute does not require USDOC to determine that the imports were dumped for purposes of the preliminary determination of critical circumstances, and merely examining the timing and volume of the imports does not address whether the remedy is being undermined *seriously* by the dumped imports. For example, if the US industry was not in fact injured by the imports during the measurement period, then a simple growth in imports would not undermine seriously the duty. Yet that growth alone is all the US statute requires.

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[204] *USDOC Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (**Exh. JP-3**) (emphasis added).

[205] Section 735(b)(4)(A) (19 U.S.C. § 1673d(b)(4)(A)) **(Exh. JP-4(c))**.

[206] *See* US First Submission, paras. B-281, B-287.

[207] *See* US First Submission, para. B-285.

[208] *See* Japan's First Submission, paras. 197-207.

[209] *See* US First Submission, para. B-281 (emphasis added).

(c) Insufficient findings

183. US law also contains an impermissibly weak standard of evidence. Article 10.7 requires "sufficient evidence" of the elements of Article 10.6. The United States makes the astonishing argument that its statute — requiring only a "reasonable basis to believe or suspect" — is *equivalent* to Article 10.7's requirement of sufficient evidence.[210] The principal basis for this assertion is the use of the phrase "sufficient evidence" in proximity to "reasonable basis to believe or suspect" in USDOC critical circumstances determinations in just two anti-dumping investigations.[211] It is clear, however, that USDOC is asking itself a different question than Article 10.7 contemplates. It is one thing to have "sufficient evidence" that an element of Article 10.6 truly exists; it is quite another to have "sufficient evidence" of only a "reasonable basis to believe or suspect" that an element of Article 10.6 exists. This distinction appears to be totally lost on the United States, which has laden its response to Panel Question 31 with quotations (from US court cases and countervailing-duty determinations) discussing this second, lower standard.[212]

184. The differences are real, as illustrated by the ordinary meanings of the words used. *New Shorter Oxford English Dictionary* first defines "sufficient" as "legally satisfactory," citing its origin in law. "Evidence," in that dictionary, is broken into two categories: "general" and "legal." The general definition includes "{f}acts or testimony in support of a conclusion, statement, or belief. . . . Something serving as proof." The legal definition of the word "evidence" is "{i}nformation . . . tending or used to establish facts in a legal investigation." In contrast, Section 733(e) requires only a "reasonable basis to believe or suspect" certain elements. "Reasonable" is defined in the *New Shorter Oxford English Dictionary* as "{w}ithin the limits of reason; not greatly less or more than might be thought likely or appropriate, moderate." To "believe" is defined as to "{h}ave confidence or faith in," to "*trust*," and to "*hold an opinion, think*." (Emphasis added.) The verb to "suspect" means to "{i}magine something evil, wrong, or undesirable in (a person or thing) *on little or no evidence*; believe to be guilty *with insufficient proof or knowledge*." (Emphasis added.)

185. Thus what is "reasonable" is not "sufficient." "Sufficient" is a standard: whatever is enough to satisfy a legal test. "Reasonable" is a range, which can be "less or more than might be thought likely or appropriate." And what one "believes or suspects" is not necessarily "evidence." "Evidence" is proof. "Believe or suspect" describes a range much less than proof. "Suspect" is in fact flatly incompatible with evidence; it is instructive that the definition of "suspect" includes "{i}magine something evil, wrong, or undesirable . . . on little or no evidence; believe to be guilty with insufficient proof or knowledge." "Believe" is mere trust or confidence. That does not reflect the factual inquiry required to establish "proof." USDOC is essentially directed by the statute to decide that critical circumstances exist on mere suspicion or belief, without any real evidence.

VII. CAPTIVE PRODUCTION

186. The United States attempts to rewrite the captive production provision, but ultimately cannot paper over the fundamental violations of the AD Agreement engendered by both the provision on its face and its application in this case. When applicable, the statute on its face compels the USITC to focus its analysis primarily on market share and financial performance in the merchant market segment without relating its findings to the domestic industry as a whole. Articles 3 and 4, as interpreted by numerous panel reports, permits authorities to conduct a segmented analysis only when

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[210] *See* US First Submission , paras. B-288 to B-290. Indeed, the United States goes so far as to claim that the two standards can be correctly used "interchangeably." US Response to Panel Question 31, para. 23.

[211] *See* US First Submission, para. B-290, **US/B-46 & US/B-47**; US Response to Panel Question 31, para. 24 n.6.

[212] This lower standard is not acceptable simply because it applies to preliminary determinations. As the United States acknowledges in Paragraph 18 of its Response to Panel Question 28, the "sufficient evidence" standard applies equally to preliminary and final critical-circumstances determinations.

it is explicitly related back to the industry as a whole. The captive production provision requires no such relating back, and in fact encourages USITC impermissibly to accentuate merchant market data in its determinations. The United States cannot finesse this issue by referencing additional statutory provisions or emphasizing that the captive production provision does not force USITC to exclude captive production entirely.

187. Moreover, the USITC's application of the captive production provision in this case violated the AD Agreement by forcing it to ignore the shielding effect of captive production. USITC not only omitted this key finding from its analysis of conditions of competition – upon which the 1993 hot-rolled steel case hinged -- but also highlighted merchant market conditions throughout its determination, without relating its relevance to the industry as a whole.

A. THE CAPTIVE PRODUCTION PROVISION VIOLATES THE AD AGREEMENT ON ITS FACE

3. The plain text of the captive production provision impermissibly focuses USITC's analysis on an industry segment

188. The United States asserts that Japan "fundamentally misinterprets" the "plain meaning" of the captive production provision,[213] but spends much of its "plain meaning" argument by running away from the provision's explicit text and underlying logic. The logical fallacy of the US interpretation can be seen in Paragraph C-5 of the US First Submission. To say that imports might be having an impact in the merchant market certainly justifies considering the merchant market. The United States then takes the completely unjustified step of saying the merchant market "should be a focus of the injury analysis," to allow "a more complete picture of the competitive impact of imports." This US claim has two fundamental flaws.

189. First, the United States understates the effect of the captive production provision. The provision does not require that USITC merely consider the merchant market, or make the merchant market merely a part of the analysis. Rather, the provision requires the USITC to "focus primarily" on the merchant market. Not surprisingly, the United States tries to hide from this inconvenient language with several rhetorical devices:

- The statute does not require an ***exclusive*** focus on the merchant market. The United States uses this device repeatedly,[214] but Japan has never made this argument. The statute need not require an exclusive focus on the merchant market to violate the AD Agreement. If the statute skews the analysis, and precludes a balanced assessment of the impact of imports on the domestic industry as a whole, it violates Articles 3 and 4.

- The statute only requires ***consideration or examination*** of the merchant market. Although the United States might wish the statute used this phrase, it does not. Repeating this phrase in the US First Submission[215] cannot change the actual wording of the statute. Perhaps the most egregious use of this concept occurs in the US Answer to Panel Question 45. The United States innocently explains that certain factors "are considered as they relate to the merchant market as well as to the industry as whole."[216] This statement reflects the extent to which the USITC tries to hide from the explicit statutory requirement to "focus primarily" on one segment, necessarily at the expense of the other segment and the domestic industry as a whole.

[213] US First Submission, paras. C-8, C-20.
[214] *Id*. paras. C-6, C-13 to C-15, C-31, C-38.
[215] *Id.* paras. C-22 to C-24, C-31, C-38.
[216] US Response to Panel Question 45, para. 56.

- Japan would require the USITC to ***ignore*** the merchant market. This repeated statement[217] distorts the Japanese position. Japan has never argued that the authorities cannot consider the merchant market at all. Rather, Japan has argued that any such consideration must be balanced. The merchant segment and the captive segment must both be considered, and that consideration must then be related back to an analysis of the industry as a whole.

190. Second, the United States forgets that ultimately the task is to assess the impact of subject imports on the domestic industry as a whole. The purpose is not to study the "competitive impact of imports" in isolation, or on one segment of the domestic industry, but to consider the impact of imports on the domestic industry *as a whole*. To focus primarily on that part of the domestic industry where imports compete most directly, and then to downplay the market share and financial performance of the domestic industry as a whole, fundamentally skews the analysis.

(a) The captive production provision does not add another factor to USITC's analysis of the domestic industry as a whole

191. Seeking to moderate the captive production provision, the United States highlights an entirely different provision of the anti-dumping statute that enumerates factors USITC must consider — including market share and financial performance — with respect to the domestic industry as a whole.[218] According to the United States, the captive production provision merely adds an additional factor to this list, without detracting from the required overall industry analysis.

192. The captive production provision cannot be understood merely to bring an additional relevant factor to USITC's attention. Indeed, such a revision would have been unnecessary, because USITC already long considered merchant market performance to be a relevant economic factor, sometimes at the urging of petitioners.[219] For example, USITC considered merchant market data in the *1993 Flat-Rolled Steel Case* as a relevant economic factor, but refused to predicate its determination on the merchant market segment, as argued by petitioners.[220]

193. Rather, the provision *privileges* merchant market data over overall industry data when applicable. It is an accepted canon of statutory construction that if two provisions are in conflict, the more specific and more recent provision takes precedent over the more general and older provision.[221] When applicable, the captive production provision's primary focus on the merchant market segment unquestionably conflicts with the 19 U.S.C. §1677(7)(C) requirement to focus on the domestic industry as a whole. As between subsection (iii) and subsection (iv) of Section 1677(7)(C), the

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[217] US First Submission, paras. C-6 to C-7, C- 9, C-33.

[218] *Id.* paras. C-19, C-22.

[219] *1993 Flat-Rolled Steel Case,* USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**) ("{W}e have in previous cases recognized that imports may not affect the merchant market production and captive market production in the same way. In such instances, we have given separate consideration to the effect of subject imports on the merchant market segment of the industry as part of our analysis in determination whether the imports are materially injuring the total domestic industry, including captive production.") (citing *Industrial Phosphoric Acid from Belgium and Israel*, USITC Pub. 2000; *Titanium Sponge from Japan and the United Kingdom*, Invs. Nos. 731-TA-161 and 162 (Final), USITC Pub. 1600 (Nov. 1984); *Electrolytic Manganese Dioxide from Greece and Japan,* Inv. Nos. 731-TA-406 and 408 (Final), USITC Pub. 2177 (April 1989)).

[220] *Id.* (**Exh. JP-59**) ("We followed this approach in the preliminary investigations of these industries, and adopt this analysis, when appropriate, in these final determinations.").

[221] *See* 2B Sutherland Stat Constr § 51.02 (5th Ed. 1992) ("{T}he more recent enactment prevails"); *Watt v. Alaska*, 451 US 259, 266, 68 L. Ed. 80, 88 (1981) (acknowledging the general rule that "the more recent of two irreconcilably conflicting statutes governs"); *see also* Sutherland Stat Constr § 51.05 ("{I}f there is any conflict, the {more specific provision} will prevail."); *Busic v. United States*, 446 US 398, 406, 65 L. Ed. 2d 381, 389 (1980) (stating that a "more specific statute will be given precedence over a general one . . ."). Excerpts are attached as **Exh. JP-101**.

captive production provision in subsection (iv) is the more specific provision. Therefore, the captive production provision supersedes Section 1677(7)(C)(iii), and when applicable, USITC is to "focus primarily" on the merchant market segment in its analysis of market share and financial performance, and de-emphasize its consideration of these same factors for the domestic industry as a whole under Section 1677(7)(C).

194. The flaw in the US argument is that the USITC cannot fairly consider the market share and financial performance of the domestic industry as a whole under subsection (iii) while at the same time "focusing primarily" on the market share and financial performance of the merchant market only under subsection (iv). To emphasize one necessarily means to de-emphasize the other. Articles 3 and 4 require that the evaluation of the market share and financial performance be more than just an afterthought or a loose end to wrap up after focusing primarily on one segment at the expense of the other segments.

195. In what may be the single most surprising statement in this dispute, the United States brazenly claims that the captive production provision "does not in any way place emphasis on the merchant market segment over the entire industry."[222] This statement simply cannot be reconciled with the explicit command of the statute to "focus primarily" on the merchant market for market share and financial performance. It is hard to imagine how anyone could construe "focus primarily" as not placing "emphasis" on the merchant market segment.

196. The United States seems to think that 19 U.S.C. § 1677(7)(E)(ii) somehow offsets the distorting effects of the captive production provision.[223] This provision, clarifying that no single factor can "necessarily give decisive guidance," however, speaks to a different issue. Japan has never argued that the captive production provision results in giving merchant market data decisive guidance. Rather, Japan has argued that the captive production provision improperly focuses on the merchant market segment at the expense of a proper analysis of the captive segment and, in turn, the industry as a whole. The residual left after focusing primarily on one segment at the expense of the other segment simply does not meet the standards of the AD Agreement.

(b) The captive production provision leaves USITC with no discretion to weigh overall industry data as it sees fit

197. Considering the language of the captive production provision itself, the United States also contends that the words "primarily focus" imply more than one focus, and that nothing in the captive production provision precludes USITC from focusing on any and all evidence, giving weight to factors as it sees fit.[224] Boiled down to its essentials, the United States argues that because the captive production provision does not require USITC to focus *exclusively* on the merchant market, but only *primarily*, it is consistent with the Agreement.[225]

198. The US interpretation of "primarily" simply repeats the error of the US argument about "exclusive." The United States seems to believe because the word primarily does not affirmatively exclude all consideration of the captive segment, that the analytic approach is consistent with the AD Agreement.[226] But the United States never addresses Japan's real argument: that "primarily" modifies "focus," and that the phrase "primarily focus" read together so narrows the authority's discretion that this analytic approach violates the requirement of Articles 3 and 4 to consider the

[222] US Response to Japan's Question 22, para. 30.
[223] *Id.* at Question 23, para. 32.
[224] US First Submission, para. C-22.
[225] *Id.* paras. C-6, C-21 to C-22, C-32.
[226] *Id.* para. C-13.

domestic industry as a whole. The United States seems to believe that whatever limited consideration is left over after primarily focusing on the merchant market is enough.[227] It is not.

199. Moreover, the US interpretation of the word "primarily" (that USITC is free to weigh merchant market data and overall industry data as it sees fit) would completely nullify the captive production provision, given that USITC possessed, and indeed used, such discretion prior to the captive production provision's enactment. It is an accepted canon of statutory construction that statutes are to be read so as to give meaning to their provisions.[228] Accordingly, the captive production provision cannot be read as simply restating the discretion USITC already possessed to weigh market share and financial performance data as it deems appropriate.[229] When the captive production provision applies, USITC cannot choose to accord the market share and financial performance of the domestic industry as a whole decisive weight or even balanced weight in its analysis and still "focus primarily" on the merchant market for these factors.[230] The captive production provision makes market share in the merchant market and financial performance more than just additional relevant economic factors — they become the *dominant* economic factors.

200. If USITC were genuinely to exercise its discretion to weigh market segment data and overall industry data as it sees fit, it would probably not choose to "focus primarily" on merchant market data, given past practice. In the *1993 Flat-Rolled Steel Case*, petitioners argued that USITC should limit its analysis to the merchant market, excluding captive production as "work in progress."[231] USITC rejected the petitioners' argument, finding "the practical effect would be to skew our analysis," but did separately consider the effect of imports on the merchant market segment, as it had in previous cases.[232] The low weight USITC chose to ascribe to this particular factor is evident from the fact that merchant market segment data is mentioned nowhere in the determination.[233] By contrast, USITC highlighted merchant market data throughout its determination in this case, when the captive production provision applied.[234] The captive production provision overrides USITC's discretion, compelling it to emphasize factors that accentuate injury by reason of subject imports, and preventing it from performing the "objective analysis" required by Article 3.1 of the AD Agreement.[235]

(c) The purported logic behind the captive production provision only underscores its inconsistency with the AD Agreement

201. Additional arguments proffered by the United States concerning the logic behind the captive production provision only underscore the impermissible distortions it wreaks on USITC's analysis. The United States asserts that because the captive production provision only applies when an industry sells significant production into the merchant market, the impact of imports on the merchant market is likely also to impact the industry as a whole when the captive production provision is applicable.[236] Yet USITC's determination that merchant market sales are "significant" in no way guarantees that

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[227] US Response to Japan's Question 22, para. 31.

[228] 2A Sutherland Stat Constr § 46.06 (6th Ed. 2000) (excerpts attached as **Exh. JP-101**) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence, of a statute.").

[229] *See 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**).

[230] If the USITC were to ignore the statute and make a balanced judgment for the domestic industry as a whole, and find no injury, the disgruntled domestic petitioner would have an excellent legal basis under US law to challenge that USITC determination.

[231] *1993 Flat-Rolled Steel Case,* USITC Pub. 2664, at 15 (excerpts in **Exh. JP-59**).

[232] *Id.* at 17 (excerpts in **Exh. JP-59**).

[233] *Id.* at 44-54 (excerpts in **Exh. JP-59**) (excluding pricing product data, which is necessarily from the merchant market).

[234] *USITC Final Injury Determination*, USITC Pub. 3202 at 10-21 (**Exh. JP-14**).

[235] Article 3.1 provides, in relevant part: "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination. . . ."

[236] US First Submission, para. C-11.

material injury in the merchant market segment has in fact resulted in material injury to the industry as a whole. Such a conclusion can only be reached through a careful and balanced examination of overall industry data.[237]

202. The United States further argues that the captive production provision properly recognizes that the ill-effect of imports are most evident in the merchant market, and that by limiting its analysis to overall industry data, USITC risks obscuring the impact of flagging merchant market segment performance on the domestic industry as a whole.[238] Japan thoroughly agrees with both observations, but these observations miss the point. The captive production provision violates the AD Agreement precisely because it *prevents* the robust performance of the domestic industry as a whole from minimizing material injury in the merchant market segment. In the *1993 Flat-Rolled Steel case*, USITC found that "any impact {LTFV imports} may have had on {the merchant market segment} is not significant when evaluated in terms of their effect on the domestic industry as a whole."[239] If the merchant market segment is materially injured by reason of imports but the domestic industry as a whole are not, the AD Agreement permits only one result: a negative determination. Under the same circumstances, the captive production provision practically guarantees an affirmative determination.

203. Consider this simple example. In the merchant market segment, the domestic industry earns an operating profit only of 0.5 percent. Yet in the captive segment, the domestic industry is earning a much stronger operating profit of 3.5 percent. Because the captive segment is larger, overall the domestic industry as a whole is earning an operating profit of 2.5 percent.[240] The authorities might well decide that an operating margin of 2.5 percent does not reflect material injury, particularly if that operating margin is higher than earlier years in the period being investigated. Yet the captive production provision forces the authorities to "focus primarily" on the 0.5 percent, to ignore the 3.5 percent operating margin in the captive-only segment, and to give only residual consideration to the 2.5 percent operating margin in the domestic market overall. Such an analytic approach does not allow for a balanced assessment. Instead, the approach focuses on the most adverse segment, and then elevates that segment at the expense of other segments and the industry as a whole.

(d) The US Congress' rejection of a more draconian captive production provision does not imply that the steel industry did not get what it wanted

204. The United States speculates that the US Congress intended USITC to examine the impact of dumped imports on the merchant market segment, and assess how that competition impacts the domestic industry as a whole, in the manner contemplated by the panel report in *Mexico—High Fructose Corn Syrup*.[241]

205. The legislative history of the captive production provision contradicts this benign interpretation. Japan agrees that Congress may not have intended to exclude captive production entirely, but this is irrelevant. After losing the 1993 hot-rolled steel case, the domestic steel industry lobbied hard for a new statute to force USITC to concentrate on the merchant market segment, where import competition is most pronounced.[242] The draconian language of early drafts of the captive production provision only illuminates the intentions of the industry advocates. Although the captive production provision as enacted was moderated in expectation of a WTO challenge, it is animated by the same spirit. When the captive production provision applies, and USITC must focus primarily on

[237] In particular, the Article 4.1 definition of domestic industry, which is cited throughout Article 3, provides: "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of he like products."

[238] US First Submission, para. C-23.

[239] *1993 Flat-Rolled Steel Case,* USITC Pub. 2664, at 53 (excerpts in **Exh. JP-59**).

[240] Note these stylised facts are actually quite close to the facts of this case.

[241] US First Submission, para. C-6, C-24.

[242] Japan's First Submission, para. 219.

merchant market data, import penetration is exaggerated and financial performance is understated, making an affirmative determination more likely. The industry received most of what it wanted.

206. Nor does the text of the captive production provision support the US contention that Congress somehow intended USITC to relate its merchant market segment findings back to the domestic industry as a whole.[243] Such an intention appears nowhere in the statute or the Statement of Administrative Action; indeed, and no such analysis was conducted in the hot-rolled steel case by those Commissioners applying the captive production provision.[244]

4. The captive production provision on its face violates Article 3 of the AD Agreement

(a) Article 3.2

207. The United States argues that the captive production provision does not alter the requirement that USITC examine a host of factors with respect to domestic industry as a whole, including market share, in keeping with Article 3.2.[245] This argument forgets that the captive production provision -- subsection (iv) -- supersedes subsection (iii), as the more recent and specific provision. When the captive production provision applies, USITC must "focus primarily" on merchant market import penetration, which will by definition always be higher than overall import penetration.[246] This primary focus precludes USITC from granting overall import penetration the balanced weight Article 3.2 demands. One cannot primarily focus on the merchant market without necessarily downplaying and according much less attention to the domestic industry as a whole.

(b) Article 3.4

208. Article 3.4 explicitly stipulates that all relevant economic factors are to be considered with respect to the *domestic industry*, defined by Article 4.1 as domestic producers as a whole.[247] The US argument that nothing in Article 3.4 prevents USITC from considering merchant market data as a relevant economic factor either primarily or secondarily is misplaced.[248] The captive production provision was not enacted because USITC was overlooking the merchant market segment as a relevant economic factor; USITC had long recognized it as such.[249] Rather, the captive production provision, when applicable, emphasizes market share and financial performance for the merchant market over that for the domestic industry as a whole — the merchant market becomes USITC's "primary focus" for these factors.

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[243] US First Submission, para. C-24.

[244] *See USITC Final Injury Determination*, USITC Pub. 3202, at 12-13, 18 (**Exh. JP-14**) (noting merchant market data is followed by industry as a whole data, but making no attempt to relate the former to the latter).

[245] US First Submission, para. C-22 (citing 19 U.S.C. § 1677(7)(C)).

[246] *See* Japan's First Submission, para. 230.

[247] Article 3.4 provides, in relevant part: "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry . . . ." Article 4.1 defines domestic industry as "domestic producers as a whole."

[248] US First Submission, para. C-22. The United States asserts that Article 3.4's enumeration of "sales" as a relevant factor sanctions an authority to focus primarily on the merchant market segment, because sales only occur in the merchant market. *See* Oral Statement of the United States, para. 36. The captive production provision, however, does not mention sales. When applicable, the provision compels USITC to focus primarily on merchant market import penetration and financial performance. Article 3.4 does not enumerate merchant market import penetration and financial performance as relevant economic factors, but directs authorities to evaluate both factors with respect to the domestic industry as a whole.

[249] *See 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**); Japan's First Submission, paras. 219, 237.

209. The United States conveniently overlooks the historical context of the captive production provision. Congress did not change the law as a technical correction to fix an oversight. Rather, Congress sought to change the way the USITC had been making its decisions. Congress succeeded, as the contrast between the 1993 decision on hot-rolled steel and the 1999 decision in this case makes clear.

210. In *Mexico—High Fructose Corn Syrup*, the Panel clarified that this requirement is undiminished by an authority's decision also to examine industry segment data. Specifically, when an authority examines data for an industry segment, it must specifically relate its findings back to the domestic industry as a whole, and predicate its determination on a consideration of the domestic industry as a whole.[250] The captive production provision does not require USITC to relate its merchant market findings to the domestic industry as a whole, but instead invites USITC to ground affirmative determinations in the higher import penetration and lower profits inevitably displayed by an industry's merchant market segment.

(c) Article 3.5

211. The United States argues that the captive production provision is consistent with Article 3.5 because it does not prevent USITC from recognizing the shielding effect of captive production, and because merchant market data is relevant to USITC's consideration of causation.[251] Article 3.5 and Footnote 9 unquestionably require USITC to demonstrate that subject imports are causing injury to the domestic industry as a whole, not just the merchant market segment.[252] By privileging injury in the merchant market over injury to the domestic industry as a whole, the captive production provision allows USITC to violate Article 3.5 by establishing causation with respect to injury to an industry segment, in whole or in large part.

212. More importantly, the captive production provision *does* prevent USITC from recognizing the shielding effect of captive production. It would be logically inconsistent for USITC both to find that captive production shields a significant portion of domestic production from import competition while at the same time "primarily focusing" on merchant market data that amplifies import penetration. Recognizing this inconsistency, USITC omitted any mention of the shielding effect of captive production in this case,[253] which is otherwise a time-honoured fixture of its anti-dumping determinations.[254] By contrast, Commissioner Askey, who did not apply the captive production provision and dissented on the issue of current injury, expressly noted that substantial captive production attenuated subject import competition.[255] USITC also recognized the shielding effect of

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[250] *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States,* adopted 24 Feb. 2000, WT/DS132/R, at para. 7.155 n.625 (authorities must relate a segmented analysis to producers as a whole), at para. 7.160 (conduct of a segmented analysis does not excuse authorities from rendering a determination based on producers as a whole) ("*Mexico—High Fructose Corn Syrup*").

[251] US First Submission, paras. C-32 to C-33.

[252] Article 3.5 provides, in relevant part: "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." Footnote 9 defines injury as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry."

[253] *USITC Final Injury Determination*, USITC Pub. 3202, at 9-21 (**Exh. JP-14**).

[254] *See, e.g., 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 22 (excerpts in **Exh. JP-59**); *Fresh Garlic From the People's Republic of China,* Inv. No. 731-TA-683 (Final), USITC Pub. 2825, at I-14 n. 67 (Nov. 1994) (excerpts in **Exh. JP-62**); *Stainless Steel Wire Rod From Brazil and France,* Inv. Nos. 731-TA-636 and 637 (Final), USITC Pub. 2721, at I-10 to I-11 (Jan. 1994) (excerpts in **Exh. JP-62)**; *Stainless Steel Wire Rod From India,* Inv. No. 731-TA-338 (Final), USITC Pub. 2704, at I-10 to I-11 (Nov. 1993) (excerpts in **Exh. JP-62)**; *DRAMs of One Megabyte and Above From the Republic of Korea,* Inv. No. 731-TA-472 (Final), USITC Pub. 2629, at 29-30 n.109 (Jun. 1991) (excerpts in **Exh. JP-62)**; *Silicon Metal From the People's Republic of China,* Inv. No. 731-TA-556 (Final), USITC Pub. 2385, at 10-11 (May 1993) (excerpts in **Exh. JP-62**).

[255] USITC Final Injury Determination, at 51 (**Exh. JP-14**).

captive production in its contemporaneous cold-rolled steel determination, in which it found a similar degree of captive production, but did not apply the captive production provision.[256] The 1993 hot-rolled steel case hinged on the degree to which substantial captive production mitigated causation between subject imports and the domestic industry's widening financial losses. By precluding such a finding, the captive production provision prevents USITC from complying with Article 3.5.

213. The United States deceptively argues that Japan's insistence that captive production mitigates import competition is no less of a segmented approach than that required by the captive production provision, because it privileges the captive segment — reflected only in output — over the merchant market segment — reflected only in sales.[257] Japan argues nothing of the sort. The AD Agreement unambiguously favours *overall* industry data over *segmented* industry data, through the Article 4.1 definition of the industry as "domestic producers as a whole." To analyze the industry as a whole, USITC must examine the impact of subject imports on both the merchant market and captive segments. In this regard, USITC cannot examine captive production without recognizing that it shields domestic producers from import competition. It therefore does not reflect an impermissible segmented approach, but is integral to USITC's analysis of the domestic industry as a whole. To find that imports have more effect on the merchant segment requires the recognition that imports have less effect on the captive segment. By suppressing this powerful insight, the captive production provision sabotages a balanced analysis of causation in violation of Article 3.5.

214. This US argument thus ignores the relationship of the merchant market to the industry as a whole. As aforementioned, the panel in *Mexico—High Fructose Corn Syrup* held that a segmented analysis must be related to an industry as a whole for a determination to be predicated on an industry as a whole.[258] Yet the USITC cannot relate its analysis of the merchant market segment to the industry as a whole without also analyzing the captive segment; the whole cannot be understood without an understanding of both parts. The USITC could not possibly shed any light on the condition of an industry as a whole through an analysis of the segment most impacted by imports alone, without also performing and relating a separate analysis of the captive segment, which is shielded from import competition.

215. Nor does Japan's argument that USITC inadequately analyzed mini-mills as an alternative cause of injury represent a segmented approach analogous to the segmented approach required by the captive production provision.[259] Japan does not argue that USITC should primarily focus its analysis and base its determination on the market share and financial performance of the mini-mill segment, without analyzing the segment's impact on the domestic industry as a whole, which would clearly violate the AD Agreement.[260] Rather, Japan only maintains that USITC abrogated its responsibility under Article 3.5 by failing to isolate the injury caused by alternative factors — including mini-mills — and implicitly attributing this injury to subject imports.[261] USITC does not adopt impermissibly a segmented approach to causation by merely analyzing the impact of a new, low cost industry segment on the domestic industry as a whole.[262] On the other hand, USITC does impermissibly base its determination on an industry segment when the captive production provision applies, and it must focus its consideration of market share and financial performance primarily on the merchant market segment, without having to relate its findings back to the domestic industry as a whole.

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[256] *Cold-Rolled Steel Case*, USITC Pub. 3283, at 19 (excerpts in **Exh. JP-86**) ("{T}he extent of competition between domestic production and subject imports is somewhat limited, given the domestic producers' large volume of internal transfers and contractual sales.").

[257] US First Submission, paras. C-29 to C-30.

[258] *Mexico—High Fructose Corn Syrup*, para. 7.155, n.625.

[259] US First Submission, para. C-26.

[260] *See* Japan First Submission, paras. 271-275.

[261] *Id.* para. 271.

[262] Significantly, the United States does not argue that Japan's arguments concerning the General Motors strike or non-subject imports represent segmented approaches.

216. In fact, this aspect of the captive production provision — a segmented analysis that need not be related back to the domestic industry as a whole — distinguishes it from the type of segmented analysis traditionally conducted by USITC. For example, in *Disposable Lighters From Thailand*, USITC found that the disposable lighter market was divided into two distinct segments: high end and low end.[263] Because domestic production was concentrated in the high end, and subject imports in the low end, USITC determined that the volume and price impact of subject imports on the domestic industry as a whole was limited, with subject imports increasing primarily at the expense of non-subject imports.[264] Hence, USITC analyzed the high and low end industry segments in a balanced way, but then extended its findings to the domestic industry as a whole. The captive production provision requires no such analysis. The provision does not allow the USITC to give balanced consideration to the captive segment.

(d) Article 3.6

217. The United States disingenuously argues that the captive production provision is consistent with Article 3.6, by asserting that import effects on output and sales — only evident in the merchant market — are equally important measures of import effects on "production."[265] First and foremost, the word "production" unambiguously refers to output, and cannot be understood to mean sales, which excludes "production" for internal consumption. Article 3.6 mentions sales only as a means of identifying production.[266]

218. Second, the United States draws a false distinction between production and sales. Captive production is transformed into downstream products that are ultimately sold at a higher profit than the upstream product. Firms choose to consume merchandise captively, rather than sell it on the merchant market, precisely because it is more profitable to do so. It is not accidental that Article 3.6 stipulates that authorities analyze the effects of imports on production, and not sales. Production as a whole yields a far more complete picture of an industry's performance than sales, because it reflects the economic benefits from both merchant market sales and transfers for downstream sales. Consequently, Article 3.6 does not treat output and sales equally, but privileges output. The captive production provision violates Article 3.6 insofar as it directs USITC to focus primarily on sales to the detriment of output.

5. Panel reports do not support the captive production provision

219. The United States seeks to justify the captive production provision by claiming that the Panel report in *Mexico—High Fructose Corn Syrup* only holds that the exclusion of an entire industry segment violates the AD Agreement, while the analysis of industry segments is both permissible and useful.[267] The difference between Mexico's practice in *Mexico—High Fructose Corn Syrup* and the captive production provision, however, is not a matter of kind but of degree. The Panel held that a segmented analysis is consistent with the AD Agreement so long as an authority's ultimate determination is based on its analysis of the domestic industry as a whole:

> {W}hile an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from

[263] *Disposable Lighters From Thailand*, Inv. No. 731-TA-701 (Final), USITC Pub. 2876, at I-9 (Apr. 1995), at I-9 (excerpts attached as **Exh. JP-102(a)**).

[264] *Id.* at I-15 (excerpts attached as **Exh. JP-102(a)**) (volume), I-16 (price), I-19 (non-subject imports).

[265] US First Submission, paras. C-30, C-34 to C-35.

[266] Article 3.6 provides, in relevant part: "The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production. . . ."

[267] US First Submission, paras. C-36 to C-38.

> making the determination required by that Agreement — whether dumped imports injure of threaten injury to the domestic industry as a whole.[268]

220. Although the captive production provision does not force USITC to exclude captive production from its analysis, as the Mexican authority excluded the household industry segment, the provision does force USITC to emphasize merchant market data in its analysis of market share and financial performance, necessarily marginalizing its consideration of overall industry data. USITC cannot render a determination "based on its analysis of the domestic industry as a whole" after the captive production provision has focused a vital portion of its analysis on the merchant market segment, and ignored any separate consideration of the captive segment.

221. In its analysis of *Mexico—High Fructose Corn Syrup*, the United States conveniently sidesteps *Korea—Dairy* and *Argentina—Footwear,* both of which are impossible to reconcile with the captive production provision. The *Mexico—High Fructose Corn Syrup* Panel itself commented on the applicability of these panel reports to the anti-dumping context: "Both Panels concluded that the failure of the investigating authorities to either consider all sectors, *or to relate their conclusions concerning specific sectors to the industry as a whole,* resulted in injury determinations that were not based on injury to the industry 'as a whole', inconsistent with the requirements of the Safeguards Agreement."[269] The captive production provision is inconsistent with these panel reports in directing USITC to focus primarily on the merchant market segment for certain factors without requiring USITC to relate its conclusions back to the industry as a whole in its determination.

222. Nowhere does the statute require or even allow the relating back of both industry segments to the industry as a whole. USITC considers the industry as a whole for some facts, but under the captive production provision USITC elevates the importance of the market share and financial performance of one segment. USITC does not relate the merchant market segment to the captive segment. Moreover, USITC never relates its findings in *either* segment to the domestic industry as a whole. The USITC seems to think that by merely mentioning the results of the domestic industry as a whole, it can make up for the fact that the statute required primary focus on one segment at the expense of the other segment.

223. In addition, the captive production provision is inconsistent on its face with the recent panel report in *U.S.—Wheat Gluten*. That panel held that in the safeguards context, authorities must subtract injury caused by alternative factors to ensure that the injury caused by subject imports alone rises to the level of serious injury.[270] By extension, authorities must also subtract injury caused by alternative factors in the anti-dumping context to determine whether injury caused by subject imports alone rises to the level of "material injury." The captive production provision seriously distorts this analysis by amplifying the injury caused by subject imports in the merchant market segment, as revealed in market share and financial performance data. When the captive production provision applies, USITC cannot simply conclude that injury caused by subject imports to the domestic industry as a whole is immaterial without focusing primarily on injury caused by subject imports to the merchant market segment, which is far more likely to be material.

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[268] *Mexico—High Fructose Corn Syrup*, para. 7.160.

[269] *Id.* para. 7.155, n.625 (emphasis added).

[270] *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, unadopted 31 July 2000, WT/DS166/R, at para 8.138 ("There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement.") ("*U.S.—Wheat Gluten*").

6. Canadian and European Communities' practices do not support the Agreement-consistency of the captive production provision

224. The United States justifies the captive production provision by arguing that both Canada and the European Communities ("EC") take similar approaches to anti-dumping investigations; Canada has analyzed the merchant market separately in at least three recent cases and EC appears to exclude captive production from its analysis entirely.[271] Although the practice of other Members may be useful for interpreting ambiguous provisions of the WTO agreement, it is not particularly relevant to the Panel's consideration of the US captive production provision's adherence to the AD Agreement's unambiguous definition of domestic industry. Moreover, neither practice cited by the United States suggests that the captive production provision complies with the Agreement. Indeed, Canada's practice is different in one critical respect: the Canadian International Trade Tribunal merely exercises its discretion to analyze merchant market data, as USITC did prior to the captive production provision's enactment, and is not compelled by any statutory mandate to accentuate merchant market data under any circumstances.[272]

D. THE CAPTIVE PRODUCTION PROVISION VIOLATES THE AD AGREEMENT AS APPLIED IN THIS CASE

1. USITC might have reached a different conclusion had the captive production provision not been applied

225. The United States disingenuously asserts that Japan's as-applied challenge must fail because the three Commissioners not applying the captive production provision voted in the affirmative, meaning that the Commission would have reached an affirmative determination regardless of the captive production provision's application.[273] Two vital facts are ignored. First, Commissioner Askey's dissenting opinion demonstrates that an affirmative material injury determination is by no means assured without the application of the captive production provision.[274] Accordingly, the three Commissioners writing the majority opinion might not have voted affirmative on material injury had their analysis not been tainted by the captive production provision. Second, because Chairman Bragg joined the majority opinion, though she did not apply the captive production provision, her analysis is no less tainted and her affirmative material injury finding no less subject to revision.[275] These four votes could conceivably have been different in the absence of the distortions wrought by the captive production provision's application, making Japan's as-applied challenge far from academic.

226. The United States further argues that Chairman Bragg's vote would have remained affirmative in the absence of the captive production provision's application because she did not apply the captive production provision and yet agreed with the majority's reasoning in its entirety.[276] In other words, these four Commissioners shared the exact same views. But it is precisely for this reason that Chairman Bragg's views could change. By passively endorsing the majority's views, Chairman Bragg adopted findings and conclusions distorted by the application of the captive production

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[271] US First Submission, paras. C-44 to C-47. As the EC points out in its answers to Panel Questions, its law is not subject to this proceeding. The EC therefore declined to clarify the US misstatements about its practice. European Communities' Response to the Questions to the Third Parties, at Question 51.

[272] Canada's Third Party Submission, at 5 n.5 ("While an analogous provision does not exist in Canada's anti-dumping legislation. . .this practice has been developed by the Canadian International Trade Tribunal").

[273] US First Submission, para. C-72.

[274] *See* Japan's First Submission, paras. 251-252.

[275] *USITC Final Injury Determination*, USITC Pub. 3202, at 29-30 n.24 (**Exh. JP-14**) ("Much of the Commission's views focuses first on merchant market data and secondly on total market data. Although this order of discussion does not reflect the sequence of Chairman Bragg's analysis, she joins in the discussion of volume, price, and impact, except as otherwise noted.")

[276] US First Submission, para. C-83.

provision. In particular, Chairman Bragg adopted the majority's failure to relate its analysis of the merchant market segment to the domestic industry as a whole, as required under Articles 3 and 4.[277] There is simply no telling how Chairman Bragg's views would have changed had the majority not focused primarily on the merchant market in analyzing market share and financial performance.

227. The United States uses the affirmative determinations of Commissioners Crawford and Askey to argue that the majority might have reached an affirmative determination even if it had recognized the shielding effect of captive production.[278] Besides admitting that the majority did not consider the shielding effect of captive production, the United States mischaracterizes these two votes. The question is only whether the three Commissioners who applied the captive production provision, and the one who adopted their reasoning without applying the captive production provision, might have changed their affirmative material injury votes in the absence of the captive production provision's distortions. Commissioner Askey's dissenting views, and negative material injury determination, suggests that these votes might indeed have been different had the captive production provision not been applied. It is immaterial whether these four votes would have become negative determinations or affirmative threat determinations. The very fact that these Commissioners might have voted differently is sufficient to warrant reconsideration.[279]

228. The Panel should also understand that Commissioner Crawford's idiosyncratic mode of anti-dumping analysis differs from that of all other Commissioners, and consequently is a poor predictor of how other Commissioners might have voted had they not applied the captive production provision. Under her unique approach, Commissioner Crawford first gauges the substitutability of subject imports for the domestic like product, and then assesses whether subject imports caused material injury by considering the extent to which domestic producers could have increased their sales volume and profits had subject imports not been sold at dumped or subsidized prices.[280] By contrast, every other Commissioner methodically analyzes the statutory factors of import volume, price effects, and impact on industry performance.[281] As the more mechanical approach, Commissioner Crawford's analysis tends to de-emphasize conditions of competition such as captive production. For example, in her concurring views, she finds that captive production reduced the substitutability between subject imports and the domestic like product, rather than shielding domestic producers from import competition.[282] Thus, Commissioner Crawford's analysis affords little guidance whatsoever on how other Commissioners might have voted had they not applied the captive production provision, and recognized the shielding effect of captive production.

2. USITC did not properly recognize the shielding effect of captive production

229. Reaching the merits, the United States disingenuously argues that Japan is wrong on the facts, asserting that USITC *did* consider that the hot-rolled steel industry captively consumes over 60 percent of its production and that this production is relatively shielded from import competition.[283] The United States is manipulating the record. In actuality, USITC only noted the 60 percent figure in conjunction with its captive production provision analysis, and not with respect to its analysis of

[277] *See Mexico—High Fructose Corn Syrup*, para. 7.155, n.625 (providing that authorities must relate a segmented analysis to producers as a whole), para. 7.160 (conducting a segmented analysis does not excuse authorities from rendering a determination based on producers as a whole).

[278] US First Submission, paras. C-85 to C-86.

[279] Nor is the distinction between current injury and threat of future injury merely academic. Under US law and the AD Agreement, duties may only be assessed prospectively in cases of threat of injury. The US determination to subject imports after the USDOC preliminary determination to duties would be legally void if USITC switched its decision from current injury to threat of injury. The distinction matters a great deal.

[280] *USITC Final Injury Determination*, USITC Pub. 3202, at 40-41 (**Exh. JP-14**).

[281] *Compare id.* at 12-21 (**Exh. JP-14**).

[282] *Id.* at 44 (**Exh. JP-14**).

[283] US First Submission, para. C-57.

conditions of competition, causation, or injury.[284] Nor does USITC recognize that the hot-rolled steel industry's substantial captive production is sheltered from import competition. The United States refers to a passage in which USITC only notes that mini-mills face more import competition than integrated mills due to their greater dependence on the merchant market.[285] USITC made this observation to dismiss mini-mills as an alternative cause of injury, not to recognize the shielding effect of captive production.

230. The glaring omission of this key condition of competition from USITC's hot-rolled steel determination in this case stands in stark contrast with its subsequent cold-rolled steel determination, in which the captive production provision was *not* applied. There, USITC expressly found that the high level of captive production attenuated import competition, though the percentage of captive production was no higher than in this case.[286] In every case in which the captive production provision has not applied, and there has been substantial captive production, USITC has recognized that captive production attenuates import competition. The omission of this finding from this case is not a fluke, but confirmation that this finding is logically incompatible with the captive production provision's directive to "primarily focus" on the merchant market segment.

231. The United States further argues that the three Commissioners applying the captive production provision fulfilled their obligation to render a determination based upon the domestic industry as a whole by following merchant market segment data with corresponding overall industry data throughout their views.[287] Though USITC may mention both merchant market data and overall industry data, this in no way diminishes USITC's impermissible emphasis on merchant market data, reflected by pervasive citations. USITC would not have addressed merchant market data prior to overall industry data throughout its determination had merchant market segment performance been merely another relevant factor among many going into a determination otherwise predicated on the domestic industry as a whole.[288] Without these constant citations to the much higher import penetration and much lower profitability of the merchant market segment, USITC would have been hard pressed to justify an affirmative material injury determination, as demonstrated by Commissioner Askey's dissent. Merely citing overall industry data is not enough. Articles 3 and 4 explicitly require USITC to base its determination on the domestic industry as a whole.

232. Under a balanced analysis, USITC would have considered *both* the merchant and captive segments. This would be the only way USITC could relate its segmented approach to an industry as a whole, as required. Yet one searches in vain for any discussion in USITC determination of the captive segment alone. Rather, USITC discusses the merchant market and the overall market separately, with no explanation of how the two relate to each other.

233. This analytic oversight is particularly acute when considering financial performance. To note that overall domestic industry operating profits in 1998 were only 2.6 percent of sales masks the fact that captive segment profits were 3.6 percent of sales.[289] The USITC dutifully followed the captive production provision and stressed the merchant market segment performance of only 0.6 percent, but ignored the counterpart performance of 3.6 percent. Such analysis simply fails the test of objectivity.

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[284] *USITC Final Injury Determination*, USITC Pub. 3202, at 9 (**Exh. JP-14**).

[285] *Id.* at 11, 19 (**Exh. JP-14**).

[286] *Id.* at 10 (**Exh. JP-14**) (56.0 percent of hot-rolled steel production was captively consumed in 1998); *Cold-Rolled Steel Case*, USITC Pub. 3283, at 19 (excerpts in **Exh. JP-86**) ("{T}he majority of all domestic production of certain cold-rolled steel is destined for further downstream processing by the producers.").

[287] US First Submission, paras. C-74 to C-82.

[288] *USITC Final Injury Determination,* USITC Pub. 3202, at 10 (**Exh. JP-14**) (merchant market apparent consumption is mentioned after overall apparent consumption), 12 (market share, shipments), 18 (operating income), 19 (mini-mill operating income, sales), and 20 (apparent consumption).

[289] *See id.* at VI-2, IV-6 (**Exh. JP-14)**). (Total profit - $560.5 million - minus merchant market profit - $43.3 million - divided by captive segment revenue - $14.4 billion - equals 3.6 percent).

3. The negative determination in the 1993 hot-rolled steel case resulted directly from the shielding effect of captive consumption and demonstrates the decisive impact of the captive production provision in this case

234. The United States argues that USITC's negative determination in the 1993 hot-rolled steel case had nothing to do with captive production, asserting that it is mentioned only as an afterthought, but instead was predicated on slab sales, mixed underselling, low subject import market share, and the recession.[290] The United States is simply wrong on the facts — captive production was central to USITC's determination in the 1993 case.

235. USITC begins its 1993 determination with a four-page section devoted to considering and rejecting the petitioners' request that captive production be excluded from the Commission's analysis.[291] The conditions of competition section contains an entire Paragraph devoted to the *shielding* effect of captive production, observing that "petitioners themselves strongly argued that competition between captive production. . .and merchant market supply is virtually non-existent" and "two-third of the production in this industry is shielded to a large extent from any potential adverse effects of subsidized and LTFV imports."[292] These findings are all made well in advance of USITC's discussion of causation.

236. In the heart of its discussion of causation, namely the "impact" section, USITC again devotes an entire Paragraph to the shielding effect of captive production.[293] Specifically, USITC found that the negative impact of subject imports on the merchant market segment was "not significant when evaluated in terms of their effect on the domestic industry as a whole."[294] USITC did not consider captive production as an afterthought, as the United States contends, and it is by no means clear that USITC would have rendered a negative determination in the absence of these key findings.

237. The United States further argues that the greater injury suffered by the domestic industry in 1993 than 1998 is immaterial because USITC's negative determination in 1993 was based on the lack of causation, while its affirmative determination in 1998 was based on its finding that import volume and underselling prevented the domestic industry from benefiting from record hot-rolled steel demand.[295] While certain causation factors might have been weaker on an overall industry basis in the 1993 case, petitioners then clearly believed that these same factors supported an affirmative determination if viewed on a merchant market only basis. Petitioners argued vociferously for USITC to focus on the merchant market, [296] and USITC acknowledged that petitioners' causation case was stronger in the merchant market, though still insufficient when viewed against the industry as a whole.[297] Had USITC been compelled by the captive production provision to focus primarily on the merchant market in the 1993 case — as petitioners' urged — it might have reached a different result, especially given the much greater injury suffered by the hot-rolled steel industry in the 1993 case, as compared to the 1999 case.

VII. CAUSATION DETERMINATION

238. The USITC's consideration of causation in the hot-rolled steel case ignored the requirement in Article 3.1 to make an "objective examination." The USITC's use of a two year period of investigation to analyze the impact of subject imports on the domestic industry is unprecedented, and US assertions to the contrary are clearly calculated to bolster its affirmative determination. The

[290] US First Submission, para. C-90.
[291] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 15-18 (excerpts in **Exh. JP-59**).
[292] *Id.* at 21 (excerpts in **Exh. JP-59**).
[293] *Id.* at 53 (excerpts in **Exh. JP-59**).
[294] *Id.* (excerpts in **Exh. JP-59**).
[295] US First Submission, para. C-97.
[296] *1993 Flat-Rolled Steel Case,* USITC Pub. 2664, at 15 (excerpts in **Exh. JP-59**).
[297] *Id.* at 53 (excerpts in **Exh. JP-59**).

USITC's selective and nebulous analysis of alternative causes of injury would not have permitted it to determine whether injury caused by subject imports alone was "material," as the AD Agreement requires. Though the United States reviews the USITC's analysis of alternative causes in detail, it is what this analysis omits that constitutes a violation of the AD Agreement.

A. USITC FAILED TO RENDER AN OBJECTIVE DETERMINATION BY MANIPULATING ITS PERIOD OF INVESTIGATION TO JUSTIFY AN AFFIRMATIVE DETERMINATION

2. USITC selectively considered different periods to rationalize an outcome

239. The United States denies that USITC impermissibly limited its analysis to 1997 and 1998, arguing that in fact, USITC examined a wide range of factors over the entire three-year period investigated, including subject import volume, market share, and price trends.[298] Conspicuously absent from this expansive list of factors USITC considered over the three-year period, however, are shipments and financial performance, both of which *improved* between 1996 and 1998. *Nowhere in its discussion of impact does USITC even mention that shipments and profits increased between 1996 and 1998.*[299] USITC examined certain factors over three years, and others over two years, depending on which trends best supported an affirmative material injury determination. It is immaterial that the omitted data appears in an appendix to the determination, as USITC declined to factor them into its analysis or even mention them.

240. Moreover, USITC's selective use of two-year trends for some factors and three-year trends for others only undermines its own rationalization for the two-year approach. If 1997 and 1998 were genuinely the most appropriate years for analysis, then USITC should have analyzed *all* trends over these two years. Just because certain factors declined between 1996 and 1998, does not meant that they did not improve between 1997 and 1998, yet USITC did not even contemplate this possibility in its determination, confining its two-year analysis to shipments and profits.[300]

241. The United States claims that even if 1997 had been a peak year, it would not have distorted USITC's analysis, because USITC expressly found that declining costs and increasing demand should have made 1998 an even better one.[301] USITC's logic, however, ignores the 12 million tons of new mini-mill capacity commissioned in 1996 and 1997, but only fully ramped up in 1998.[302] Although increasing demand and declining costs — due to the new low-cost mini-mills — might suggest that 1998 shipments and profits should have surpassed 1997, mini-mills expanded effective capacity, and depressed prices, in 1998.[303] To have objectively distinguished the impact of mini-mills from the

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[298] US First Submission, paras. C-101 to C-102. The United States notes that Table C-1, in the appendix to USITC's staff report, reports all relevant data over the entire period investigated. *Id.* at para. C-99.

[299] *USITC Final Injury Determination,* USITC Pub. 3202, at 16-21 (**Exh. JP-14**). USITC determinations typically discuss volume, price, and impact. The Section on "impact" is where the USITC relates the volume and price trends to the alleged adverse effect on the domestic industry, particularly the domestic industry financial performance.

[300] *Id.* (**Exh. JP-14**).

[301] US First Submission, para. C-105.

[302] USITC did not agree with respondents that mini-mill capacity commissioned in 1996 and 1997 was not fully ramped up until 1998, instead arguing that the new mini-mill capacity commissioned by 1997 could not have materially contributed to injury occurring in 1998. This finding, however, could not excuse USITC from analyzing the relative impact of mini-mills and subject imports over the entire three-year period of investigation. *Compare USITC Final Injury Determination*, USITC Pub. 3202, at 19 (**Exh. JP-14**); *with* Respondents' USITC Prehearing Brief (29 Apr. 1999) at 81 (additional excerpts attached as **Exh. JP-103**) (12 million tons of new mini-mill hot-rolled steel capacity between 1996 and 1998), and 96-97 (excerpts in **Exh. JP-30**) (new mini-mills take two years to fully ramp up and produce at full rated capacity).

[303] *See* Respondents' USITC Prehearing Brief, at 89-91 (29 Apr. 1999) (additional excerpts attached as **Exh. JP-103**) (new mini-mills used lower costs to increasingly undersell integrated mills); Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, at 10-11 (additional excerpts attached as **Exh. JP-104**) (mini-mills undersold integrated mills on an average unit value and pricing product basis).

impact of subject imports in 1998, USITC would have had to examine industry performance trends over the three-year period, which it did not. Thus, USITC's very justification for using 1997 in fact highlights its failure to consider the interplay of alternative causes of injury, shipments, and financial performance over the three-year period, compounding its violation of Article 3.5.[304]

242. The US assertion that Japan is impermissibly attacking USITC's discretion to weigh trends as it deems fit under Article 3.4 is similarly unfounded.[305] USITC could not have objectively assessed the industry's increased shipments and profitability over the three-year period when it did not even mention these trends in its consideration of impact. In *Mexico—High Fructose Corn Syrup*, the Panel held that an authority must consider each Article 3.4 factor, and make its consideration apparent in the final determination, even if a factor is held to be not probative.[306] In *Argentina—Footwear*, the Panel held that trends only can be discerned if viewed over the entire period investigated, and not simply two years.[307] If USITC genuinely made a conscious decision to discount certain trends over the three-year period, in favor of other trends between 1997 and 1998, it had an affirmative obligation under the AD Agreement to discuss both the excluded trends and its reasoning. It did neither.

243. The United States directly admits that USITC made no effort to reconcile the conflicting trends between 1996 and 1998, and 1997 and 1998, but maintains that it "only had an obligation to consider all relevant economic factors bearing on the state of the industry."[308] Its assertion that "the USITC considered the operating profits for the 1996 to 1998 period for the merchant market and the entire industry"[309] is completely groundless -- the two footnotes cited concern only the cost of goods sold and the decline in operating profit between 1997 and 1998, not operating profits between 1996 and 1998.[310] The United States is left to speculate as to why USITC might have deemed the increase in operating profits between 1996 and 1998 irrelevant: "It is possible (although USITC made no findings to this fact) that USITC would have found the domestic industry performing poorly in 1996 *and* 1998."[311] This post hoc rationalization cannot substitute for USITC's obligation under Article 3.4 to consider "all relevant economic factors and indices having a bearing on the industry" including "sales" and "profits," and explain why it might consider otherwise relevant factors to not be probative.[312] Profit and sales trends over the three year period of investigation are clearly relevant economic factors, and the USITC violated Article 3.4 by omitting them from its analysis of impact.

3. USITC has always considered the entire investigation period in analyzing causation

244. The United States claims that USITC has often focused on the year or years of the investigation period it deems most probative, as when there is a dramatic change in industry trends, citing four cases in which USITC focused on either the beginning or the end of a investigation period.[313] Yet, the United States mischaracterizes prior USITC decisions, and selectively identifies trends to justify its conclusion rather than assessing all trends to make an "objective examination" as required by Article 3.1.

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[304] Article 3.5 provides, in relevant part: "The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities."

[305] US First Submission, para. C-106.

[306] *Mexico—High Fructose Corn Syrup*, at 7.128.

[307] *Argentina—Safeguard Measures on Imports of Footwear*, adopted 12 Jan. 2000, WT/DS121/R, at para. 8.230 ("Argentina—Footwear").

[308] US Response to Japan's Questions, para. 36.

[309] *Id.*

[310] *Id.* para. 36 n.7 (citing *Final Injury Determination*, USITC Pub. 3202, at 16, n.88, 18, n.99).

[311] *Id.* para. 38 (emphasis in original).

[312] *Mexico—High Fructose Corn Syrup*, at 7.128.

[313] US First Submission, paras. C-107 to C-108.

245. Although USITC may sometimes consider the end of a period most probative, especially for assessing present material injury, it has never before ignored the first year of the period in assessing shipment or financial performance trends. In fact, USITC at least *considered* these factors over the entire period in each of the cases cited by the United States, despite its particular emphasis on certain years.[314] Thus, USITC tacitly recognizes in these cases that trends can only be assessed when viewed over at least three years. Indeed, *Fresh Atlantic Salmon from Chile* undermines the US contention that USITC regularly ignores the early years of an investigation period. There, USITC actually had to resort to an even longer, four-year period "to obtain a more precise understanding of the growth in demand. . .and the manner in which subject imports are competing within the market."[315]

246. As for dramatic changes in the market warranting USITC's focus on 1997 and 1998, dramatic trends occurred throughout the period, from the commissioning of new mini-mills between 1996 and 1997, to the doubling of subject import volume between 1996 and 1997, and again between 1997 and 1998.[316] To have accurately assessed the causation between mini-mills or subject imports and industry performance, however, USITC would had to have analyzed industry performance over the entire period. An objective examination requires considering all changes, not just those changes that justify a particular conclusion.

4. USITC has expressly refused to predicate past determinations on a two-year analysis

247. The United States also grossly mischaracterizes the three past cases in which USITC refused to draw any conclusions based on comparisons with an anomalous peak year — a convention ignored in this case, when 1997 was used as a baseline despite being a peak year. The United States claims that these three cases "do not have any bearing on the issue at hand,"[317] but in fact they demonstrate that USITC had to have recognized that an emphasis on 1997 and 1998 would distort its analysis.

248. With respect to *Elastic Rubber Tape From India*, the United States claims that USITC only ignored the last two years of the investigation period because it was distorted by an "anomalous event," and not because 1997 was a peak year.[318] In actuality, the same "anomalous event" took place in both the rubber tape and the hot-rolled steel cases: unusually strong demand in 1997 distorting industry trends between 1997 and 1998.[319] USITC's response to this anomaly, however, could not have been more different in the two cases. In *Elastic Rubber Tape From India*, USITC expressly discounted 1997-1998 trends as uninformative, stating: "{u}nder the circumstances, we find the more informative comparison to be that of the overall period of investigation from 1996 to 1998."[320] By contrast, in the hot-rolled steel case, USITC focused exclusively on 1997-1998 trends for key factors, ignoring trends over the full three-year investigation period.

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[314] *Fresh Atlantic Salmon From Chile*, Inv. No. 731-TA-768 (Final), USITC Pub. 3116, at 22 (Jul. 1998); *Fresh Garlic From the People's Republic of China*, Inv. No. 731-TA-683 (Final), USITC Pub. 2825, at I-21-22 (Nov. 1994); *Certain Emulsion Styrene-Butadiene Rubber From Brazil, Korea, and Mexico*, Inv. Nos. 731-TA-794 through 796 (Final), USITC Pub. 3190, at 19, n. 144, n. 145, 20, n. 147 (May 1999); *Nitrocellulose From France*, Inv. No. 701-TA-190 (Preliminary), USITC Pub. 1304, at 5-6 (Oct. 1982). Excerpts from these determinations are attached as **Exh. JP-102**.

[315] *Fresh Atlantic Salmon From Chile*, USITC Pub. 3116, at 14 (excerpts attached as **Exh. JP-102(b)**).

[316] *USITC Final Injury Determination*, USITC Pub. 3202, at 11 (**Exh. JP-14**) (mini-mills), 12 (subject imports doubled every two years over the period investigated).

[317] US First Submission, para. C-109.

[318] *Id.*

[319] *Elastic Rubber Tape From India*, Inv. No. 731-TA-805 (Final), USITC Pub. 3200, at 14 (June 1999) (excerpts attached as **Exh. JP-102(f)**) ("the record indicates that the upward spike in apparent consumption in 1997 was an anomaly caused by an unanticipated high volume of orders at the end of 1997 and a corresponding drop in 1998").

[320] *Id.* at 14 (excerpts attached as **Exh. JP-102(f)**).

249. With respect to *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*, the United States contends that USITC actually did focus on 1997 and 1998, voting negative because industry performance improved between those two years.[321] The United States has the facts wrong. USITC found that industry performance *declined* between 1997 and 1998, including production, shipments, and profits, [322] but that these same measures improved between 1996 and 1998.[323] USITC made a negative determination because "this fairly steady level of performance occurred at the same time that subject imports increased 34 percent and their average values decreased by 16.8 percent."[324] In this case, USITC ignored similar trends over the investigation period — industry performance improved between 1996 and 1998 as imports increased — and focused on 1997 and 1998 to justify an affirmative determination.

250. With respect to *Certain Carbon Steel Plate From China, Russia, South Africa, and Ukraine*, the United States cryptically notes that USITC rendered a negative determination not because of trends in the latter part of its investigation period, but because it found that the adverse impact was not of sufficient magnitude.[325] The United States is correct that USITC declined to predicate its determination on the industry's declining performance between 1995 and 1996, but obfuscates its reasoning. In explaining its negative material injury determination, USITC placed particular emphasis on the fact that "many important indicators of the industry's condition improved overall" from 1994 to 1996, though some declined between 1995 and 1996.[326] It concluded that the decline between 1995 and 1996 was not of sufficient magnitude to outweigh the improvement between 1994 and 1996.[327] In this case, USITC did not even bother to compare the industry's improved performance between 1996 and 1998 with its performance declines between 1997 and 1998, preferring to accentuate the latter to justify its affirmative determination.

B. USITC INADEQUATELY ANALYZED ALTERNATIVE CAUSES OF INJURY

251. The United States claims that USITC's cursory treatment of alternative causes of injury complies with the AD Agreement because Article 3.5 only requires an authority to demonstrate a causal link between subject imports and injury, not a demonstration concerning other known factors.[328] The United States depends upon an outdated, strictly advisory GATT panel report,[329] that

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[321] US First Submission, para. C-109.

[322] *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan,* Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194, at 16 (May 1999) (excerpts attached as **Exh. JP-102(g)**) (Between 1997 and 1998, production declined from 163 million pounds to 159 million pounds, shipments declined from 155 million pounds to 152 million pounds, and operating income declined from $12 million, or 3.4 percent of sales, to $8.3 million, or 2.4 percent of sales.).

[323] *Id.* at 16 (excerpts attached as **Exh. JP-102(g)**) (Between 1996 and 1998, production increased from 153 million pounds to 159 million pounds, and shipments increased from 148 million pounds to 152 million pounds.), 17 (Gross profits increased between 1996 and 1998.).

[324] *Id.* at 17 (excerpts attached as **Exh. JP-102(g)**).

[325] US First Submission, para. C-109.

[326] *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. No. 731-TA-753-756 (Final), USITC Pub. 3076, at 22 (Dec. 1997) (excerpts attached as **Exh. JP-102(h)**) ("Many important indicators of the domestic industry's condition improved overall during the first three years of the investigative period....However, several important financial indicators. . .began to decline in 1996 from 1995 levels.").

[327] *Id.* (excerpts attached as **Exh. JP-102(h)**) ("Taking all factors into account, we do not believe that the adverse impact of the subject imports on the domestic industry is sufficient in magnitude to conclude that the domestic industry is currently materially injured by reason of subject imports. As noted, the deterioration in the domestic industry's condition is reflected primarily in the interim 1997 data.").

[328] US First Submission, para. C-112, C-114.

[329] Addressing *U.S.—Atlantic Salmon*, the panel in *U.S.—Wheat Gluten* agreed generally with its finding that "{a} Member is not necessarily required to quantify, on an individual basis, the precise extent of 'injury' caused by each other possible factor" but adds that "a Member must conduct an examination that ensures that any injury caused by such other factors is not attributed to increased imports." *U.S.—Wheat Gluten,* para. 8.142. The Panel Report goes on to suggest that a certain degree of quantification is required, however

has been superceded by more recent panel reports interpreting the post-Uruguay Round Safeguards Agreement: *U.S.—Wheat Gluten* and *Argentina—Footwear*. Both panel reports (*Argentina—Footwear* upheld by the Appellate Body) hold that authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury caused by imports rises to the level of "serious injury."

1. Recent panel reports make clear that authorities must isolate the injury caused by alternative factors so as to not attribute this injury to subject imports

252. The panel in *U.S.—Wheat Gluten* considered whether USITC's consideration of each alternative cause of injury satisfied Article 4.2(b), which, like Article 3.5 of the Agreement, "prohibits the attribution to increased imports of injury caused by other factors."[330] It found that USITC "weighed each other factor individually against imports to determine whether such factor was 'a more important cause of injury,' and then excluded such other factor as a 'cause of injury' when it did not."[331] After dismissing all other alternative causes, USITC only presumed that the injury caused by imports alone remained "serious."[332] The Panel held this approach to be inconsistent with the Safeguards Agreement:

> In our view, under USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause "*serious* injury" to the domestic industry. We consider that USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.[333]

In other words, authorities must ensure that when injury caused by other factors is subtracted, the remaining injury caused by subject imports rises to the level of "serious injury." This echoes and elaborates upon the Panel Report in *Argentina—Footwear*, which holds that authorities must perform an analysis separating the effects of alternative causes of injury from the effects of subject imports.[334]

253. By extension, the anti-dumping authority must ensure that when injury caused by alternative factors is subtracted, the remaining injury rises to the level of "material injury." But to the extent USITC considered alternative causes of injury at all, it held that each only "partly explained" the industry's declining performance in 1998, concluding that subject imports "materially contributed" to the industry's declining performance.[335] A finding that subject imports "materially contributed" to injury, however, is not the same as a finding that the injury ***caused*** by subject imports is "material." As it had in *U.S.—Wheat Gluten* with respect to the serious injury standard, USITC only found subject imports to be a more important cause of injury than any other, without considering whether the injury caused by subject imports alone was material, as required by Article 3.5.

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imprecise: "We consider that the USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause serious injury to the domestic industry once injury caused by other factors is not attributed to imports." *Id.* para. 8.152.

[330] *Id.* para. 8.151.

[331] *Id.* para. 8.146.

[332] *Id.* para. 8.151.

[333] *Id.* para. 8.152.

[334] *Argentina—Footwear*, para. 8.267 ("{A} sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any such injury caused by such factors can be identified and properly attributed.").

[335] *USITC Final Injury Determination,* USITC Pub. 3202, at 20-21 (**Exh. JP-14**) ("Having taken these {other economic factors} into account, however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's declining performance….").

254. The Panel should reject the US argument that *US —Wheat Gluten* is irrelevant for interpreting the AD Agreement.[336] First, panels regularly interpret the AD Agreement by utilizing panel reports interpreting similar provisions of the Safeguards Agreement. For example, the panel in *Mexico—High Fructose Corn Syrup* cites two Safeguards panel reports in analyzing the permissibility of a segmented analysis under the AD Agreement, noting that the applicable standards are "almost identical."[337] Second, the United States argues that Article 3.5 of the AD Agreement mirrors Article 3:4 of the Tokyo Round Code (interpreted in *U.S.—Atlantic Salmon*) "virtually verbatim,"[338] but ignores the fact that Article 3.5 mirrors Article 4.2(b) of the Safeguards Agreement just as closely.[339] Finally, the United States selectively quotes from the *U.S.—Wheat Gluten* panel report to imply that the panel found *US —Atlantic Salmon* irrelevant to its analysis, as not concerning the Safeguards Agreement.[340] In actuality, the panel expressly held that "to the extent it is relevant to our examination in this dispute, we believe that. . .the *United States—Salmon* panel report provides guidance," and devoted an entire Paragraph to explaining its relevance.[341] The *U.S.—Wheat Gluten* panel report is no less relevant to this Panel's examination of Article 3.5 of the AD Agreement.

255. The United States seems to forget the that Uruguay Round negotiations changed the Tokyo Round legal texts. It makes no sense to analogize to GATT panel decisions interpreting old language rather than WTO panel decisions interpreting the new language and context of the WTO Agreements. Japan explained in its First Submission how Article 3.5 of the AD Agreement changed and strengthened the old Tokyo Round Code language.[342] The addition of the phrase "authorities shall also *examine*" (emphasis added) changed the old Tokyo Round language. Yet the key phrase "must not be attributed" in Article 3.5 of the AD Agreement almost perfectly mirrors the phrase "shall not be attributed" of Article 4.2(b) of the Safeguards Agreement.

256. Moreover, the *U.S.—Atlantic Salmon* decision explicitly rested on what Article 3:4 of the Tokyo Round Anti-Dumping Code did *not* require: an examination of the causes of injury other than subject imports.[343] Article 3.5 of the Uruguay Round AD Agreement now explicitly requires authorities to "examine" these other known factors. This significant substantive change in the underlying treaty text renders *U.S.—Atlantic Salmon* totally inapposite. Indeed, the new word "examine" arguably seeks to address precisely what the *U.S.—Atlantic Salmon* panel found to be missing in the old Article 3:4 from the Tokyo Round Code. In light of this background, we believe the *U.S.—Wheat Gluten* panel more persuasively interprets the word and concept "attribute" in the WTO context than the *U.S.—Atlantic Salmon* panel.

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[336] US Response to Panel Question 46, paras. 58 to 69.

[337] *Mexico—High Fructose Corn Syrup*, at para. 7.155, n.625 ("Article 4.1(c) of the Safeguards Agreement defines the domestic industry in terms almost identical to those of the AD Agreement. . .). The United States itself cites *Argentina—Footwear* to bolster an argument in its First Submission. US First Submission, para. 102, n.218 (Arguing that "{t}he USITC may reasonably find that the overall picture shows material injury even when some of the indicators are not declining.").

[338] US Response to Panel Question 46, para. 66.

[339] *See* Japan Response to Panel Question 46, para. 105, n.59.

[340] US Response to Panel Question 46, para. 60.

[341] *U.S.—Wheat Gluten*, para. 8.142.

[342] Japan's First Submission, para. 260, n. 242.

[343] *See U.S.—Atlantic Salmon,* paras. 549 ("The basic question of interpretation before the Panel was whether … the investigating authorities were required to carry out a thorough examination of all possible causes of injury and 'isolate' or 'exclude' injury caused by such other factors from the effects of the imports subject to investigation."), para. 552 (holding that "the text of Article 3:4 did not support the view that this provision required a thorough examination of all possible causes of injury"); *see also id.* para. 546 (summarizing US arguments, including the following: "Nor did this provision {i.e., Article 3:4} require investigating authorities to carry out a thorough examination of all possible causes of injury in order to exclude injury caused by factors other than imports under investigation").

2. USITC's examination of each alternative cause of injury was inadequate

257. The United States attempts to explain away USITC's perfunctory treatment of each alternative cause of injury, without performing the in depth analysis the panels in *U.S.—Wheat Gluten* and *Argentina—Footwear* found necessary. Yet, USITC's omission of both key alternative causes of injury, and key facts concerning the alternative causes of injury it did address, cannot comply with the Article 3.5 requirement that all such factors be thoroughly considered, and any injury therefrom not attributed to subject imports. The manner is which the USITC addressed the facts before it show the absence of the "objective examination" required by Article 3.1.

(a) Mini-mills

258. Although the United States asserts that USITC extensively analyzed the contribution of mini-mills to injury, and concluded that they were only partly responsible for the injury suffered by hot-rolled steel producers,[344] in actuality, USITC's analysis of mini-mills could charitably be called selective. Consider the following summary of what the USITC said compared to what it ignored:

[344] US First Submission, paras. C-121 to C-127.

USITC Finding (Exh. JP-14)	**Record Facts Ignored**
Minimills might have lower costs and higher productivity, but both minimill and integrated mill prices declined over the period, including those of established minimill Nucor. Therefore, factors other than increased domestic competition had to have contributed to price declines towards the end of the period.[345]	Fierce discounting by new minimills to attract wary customers hurt the profits of minimills and integrated mills alike, including established minimills like Nucor.[346] Seven months after the case had forced subject imports from the market, hot-rolled steel prices remained depressed.[347]
Most minimill capacity was commissioned between 1996 and 1997, yet the domestic industry performed well in 1997.[348]	New minimills take two years to fully ramp up, and produce at rated capacity. Minimills commissioned in 1996 would not have fully impacted the market until 1998.[349]
Minimills actually fared worse than integrated mills between 1997 and 1998, suffering a steeper drop in operating profits. This reflects their greater dependence on the merchant market, where imports are concentrated.[350]	Minimills suffered no less than integrated mills from the new minimills' steep discounting. New minimills commissioned by Northstar BHP, Beta Steel, and IPSCO suffered from costly start-up problems, inflating start-up costs, and hammering profitability.[351]
Even the established minimill leader Nucor showed declining results in line with other minimills between 1997 and 1998.[352]	Similarly well established minimill Steel Dynamics Inc. was highly profitable in 1998.[353]

259. The United States asserts that respondents claimed mini-mill shipments peaked in 1998, when they in fact declined.[354] Respondents made no such claim in any of their submissions. Rather,

[345] *Final Injury Determination*, USITC Pub. 3202, at 15.

[346] Respondents' USITC Prehearing Brief, at 89 (additional excerpts attached as **Exh. JP-103**) (citing Charles Bradford, "U.S.: Strong Dollar, Capacity Main Issues," *AMMOnline* (29 May 1997) (Charles Bradford of Smith Barney observed, "We have never seen a situation where a large amount of new capacity has entered the market without an offer of reduced prices to bet new product out the door, at least initially."); George Cheverley, "A year of reckoning for sheet?" *AMMOnline* (29 May 1997) (Predicts discounting from new minimills will depress hot-rolled steel prices); Scott Robertson, "Caronb Steel Flying High into New Year," *American Metal Market* (8 Jan. 1998) (service centers report steep discounts from new minimills "to get their foot in the door".)).

[347] Respondents' USITC Posthearing Brief, at 28 (additional excerpts attached as **Exh. JP-104**) (citing Hearing Transcript at 195 (Testimony of Stephen A. Szymanski, manager of sales, US Steel Group, that he expected only half of the recently announced $40 hot-rolled steel price hike to stick.)).

[348] *Final Injury Determination*, USITC Pub. 3202, at 19.

[349] Respondents' USITC Prehearing Brief, at 96-97 (excerpts in **Exh. JP-30**) (citing Bradford, *supra.*; Kenneth Iverson, Chairman, Nucor Corp., prepared remarks presented 18 June 1996 at Steel Survival Strategies XI).

[350] *Final Injury Determination*, USITC Pub. 3202, at 19.

[351] Respondent's USITC Prehearing Brief, at 97, 105 (excerpts in **Exh. JP-30**) (citing "Co-Steel Earns $2.7 Million," *New Steel* (29 Apr. 1997); SBC Warburg, Steel Industry Report, TFN Investext 1893253 (4 Apr. 1997)); Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, at 32-33 (additional excerpts attached as **Exh. JP-104**).

[352] *Final Injury Determination*, USITC Pub. 3202, at 19, n. 107.

[353] Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, 31 (additional excerpts attached as **Exh. JP-104**). Petitioner SDI's questionnaire response is summarized in Table VI-6, on page VI-7 of the Staff Report, and is confidential. SDI's 1999 Annual Report, however, reveals that its operating profits increased from $65.154 million in 1997 to $65.171 million in 1998. SDI's 1999 Annual Report, at 2.

[354] US First Submission, para. C-126.

respondents argued that mini-mill market share increased substantially between 1996 and 1998.[355] This observation was confirmed in USITC's own staff report:

> If BOF and EAF-based shipments are separated. . .a striking difference becomes apparent. As BOF mill's total US shipments have declined in each year and by 3.2 percent during the period of investigation, EAF mills have increased their shipments by 31.5 percent from 1996 to 1998 . . . .[356]

Despite this overwhelming evidence, USITC makes no mention of increasing mini-mill market share and widening underselling between 1996 and 1998 in its analysis of impact, instead minimizing these trends by focusing on 1997 and 1998. It made no effort to isolate the injury caused by mini-mills, and not attribute it to subject imports, other than by noting that "we recognize increased competition within the domestic industry has contributed to the domestic industry's poorer performance in 1998."[357] Hence, USITC's analysis of mini-mills violated Article 3.5.

260. One of the most reliable signs of an objective analysis is the willingness to acknowledge and address contrary facts. Yet in this case, USITC conveniently ignored contrary facts rather than confront them. This approach does not constitute an "objective examination" within the meaning of Article 3.1.

(b) The General Motors strike

261. The United States maintains that USITC's analysis of the General Motors strike complied with the AD Agreement, because its assessment that the strike caused some but not all of the industry's declining performance was supported by the fact that the strike impacted only 685,000 tons of flat-rolled steel compared with the 75 million ton hot-rolled steel market.[358] Japan could not have better highlighted the two facets of USITC's analysis that run afoul of Article 3.5. First, USITC's finding that the General Motors strike is "at most, a partial explanation for the industry's declining performance in 1998" makes no attempt to identify this contribution and not attribute it to subject imports.[359] USITC had sufficient information on the record, including the quantity of hot-rolled steel production foregone by the strike, and hot-rolled steel prices during the strike, to have conducted such an analysis. USITC ignored the facts that:

- Integrated steel mills sold hot-rolled steel on the merchant market that would otherwise have been processed into cold-rolled and galvanized steel for General Motors, as demand for hot-rolled steel was least effected by the strike, and stopping and restarting steelmaking operations would have been prohibitively expensive.[360]

- Orphaned hot-rolled steel unloaded on the merchant market had to meet or beat extremely competitive minimill pricing.[361]

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[355] *See* Respondents' USITC Prehearing Brief, at 90-91 (additional excerpts attached as **Exh. JP-103**); Respondents' USITC Posthearing Brief, at 21 (additional excerpts attached as **Exh. JP-104**); Respondents USITC Posthearing Brief, Answers to Questions From Commissioners, at 7-8 (additional excerpts attached as **Exh. JP-104**).

[356] *USITC Final Injury Determination*, USITC Pub. 3202, at III-5 (**Exh. JP-14**).

[357] *Id.* at 19 (**Exh. JP-14**).

[358] US First Submission, paras. C-117 to C-120.

[359] *USITC Final Injury Determination*, USITC Pub. 3202, at 16 (**Exh. JP-14**).

[360] Respondents' USITC Prehearing Brief, at 122 (additional excerpts attached as **Exh. JP-103**). The argument itself can be seen clearly in the public version, although the underlying documentation cites confidential information.

[361] *Id*. at 124 (additional excerpts attached as **Exh. JP-103**) (citing discussion of lower minimill pricing.).

- At least ten purchaser questionnaire responses confirmed that the General Motors strike had depressed hot-rolled steel prices, as did public pronouncements of John Correnti, President of Nucor.[362]

- Though the strike ended on July 28, General Motors's production did not return to normal until two weeks after the strike had ended.[363] Steelmakers did not resume normal production and delivery schedules until the fourth quarter.[364]

262. Second, USITC minimizes the importance of the General Motors strike by placing it in the wrong context. The 685,000 tons of flat-rolled steel orphaned by the strike should not be compared to total apparent consumption, but to merchant market consumption during the strike. In this context, the tonnage displaced by the General Motors strike represented fully 13.7 percent of the total domestic merchant market hot-rolled steel supply during the strike, which record evidence indicates had been aggressively sold off.[365] Such a sudden spike in supply would clearly have had a dramatic impact on hot-rolled steel prices, and industry performance, and USITC completely ignored extensive purchaser confirmation of the General Motors strike's price depressing effect in the second half of 1998.[366] Hence, USITC failed to meet its obligation under Article 3.5 to identify the extent of the injury caused by the General Motors strike, and not attribute it to subject imports.

(c) Non-subject imports and the pipe and tube recession

263. It is instructive that the thorough US exposition of the hot-rolled steel determination summarizes USITC's analysis of mini-mills and the General Motors strike, but entirely omits USITC's analysis of non-subject imports and the pipe and tube recession.[367] The United States cannot summarize what does not exist.

264. Concerning non-subject imports, the United States only argues that USITC found their market share stable over the period investigated, and that subject import volume injured the domestic industry as much as underselling.[368] In other words, the United States admits that USITC failed to analyze non-subject import *price* effects, but argues that such an analysis was unnecessary. Yet, USITC made no effort to analyze non-subject import prices in the aggregate, much less on a disaggregated basis, which might have revealed surging volume from the lowest cost sources. Accordingly, USITC's analysis of non-subject imports was inadequate, and an insufficient basis for ensuring that injury caused by non-subject imports was not attributed to subject imports, as required by Article 3.5.

265. The United States argues that USITC was not obligated to analyze the price effects of non-subject imports because if non-subject imports showed price effects, "it would be expected" that their volume and market share would have increased.[369] This post hoc rationalization, however, appears nowhere in USITC's final injury determination. It is also incorrect: non-subject imports can maintain a constant market share and still injure domestic producers through declining prices alone. Lower-priced non-subject imports can gain market share at the expense of higher-priced non-subject imports, leaving overall non-subject import penetration unchanged. In other words, non-subject import price

[362] *Id*. at 121-123 (additional excerpts attached as **Exh. JP-103**) (These responses are summarized in ten bullet points, though the specifics are confidential).

[363] *Id*. at 118 (additional excerpts attached as **Exh. JP-103**) (citing *AMMOnline*, Industry News (13 Aug. 1998)).

[364] *Id*. at 119 (additional excerpts attached as **Exh. JP-103**) (citing *AMMOnline*, Industry News (13 Aug. 1998)).

[365] *Id*. at 120-123 (additional excerpts attached as **Exh. JP-103**).

[366] *Id.* at 120-122 (additional excerpts attached as **Exh. JP-103**) (providing ten bullet point summaries of purchaser questionnaire responses detailing impact of General Motors strike on hot-rolled steel prices).

[367] US First Submission, paras. C-67 to C-71.

[368] *Id.* paras. C-128 to C-131.

[369] US Response to Japan's Questions, para. 42.

effects are a factual matter.[370] Article 3.5 expressly enumerates "the volume *and prices* of imports not sold at dumped prices (emphasis added)" as a factor which "may be relevant" to an authority's analysis of alternative causes of injury thus recognizing the importance of both volume and price to an analysis of non-subject imports. USITC recognized non-subject imports to be a relevant factor, yet performed only half of the analysis envisaged by Article 3.5. Consequently, it could not have ensured that injury caused by non-subject imports was not attributed to subject imports.

266. Japan is not asking the Panel to reweigh evidence, but the Panel must evaluate whether USITC objectively, completely, and reasonably evaluated all the economic factors. A self-serving recitation of selected facts, with no explanation of why contrary facts are being ignored, does not satisfy the obligations in the AD Agreement. Moreover, a complete failure to collect data on or analysis on economic factors explicitly enumerated in Article 3.5 -- the price of non-subject imports -- also represents a clear violation of the AD Agreement.

267. The United States has a harder time explaining USITC's complete omission of the pipe and tube recession. It speculates that USITC dismissed this alternative cause of injury as immaterial because overall apparent consumption increased over the period investigated to a record high in 1998[371], but this explanation is nowhere found in the determination itself. Moreover, even though overall apparent consumption increased between 1997 and 1998, the pipe and tube recession would have disproportionately depressed the profits of firms most exposed to the pipe and tube market, such as Lone Star Steel and Newport Steel,[372] causing injury unrelated to subject imports. As USITC made no attempt whatsoever to identity such injury, it had to have been attributed to subject imports, in violation of Article 3.5.

VIII. ARTICLE X CLAIM

A. THE US ADMINISTRATION OF ITS ANTI-DUMPING LAWS, RULES, REGULATIONS, AND PRACTICES WAS NOT "UNIFORM, IMPARTIAL, AND REASONABLE"

268. The United States misunderstands Japan's claim with respect to GATT 1994 Article X:3. Japan has not brought this claim in the alternative. Rather, Japan has brought its Article X:3 claim *in conjunction* with its claims under the AD Agreement. Both sets of claims deserve equal consideration by the Panel. The United States violated both agreements in distinct manners.

B. THERE IS NO DOUBT THAT ARTICLE X APPLIES TO A MEMBER'S ANTI-DUMPING ACTIONS

269. The principles embodied in Article X represent a cornerstone of the WTO system that cannot be set aside in the anti-dumping context. In its First Submission, the United States does not question the overarching importance of the Article X protections, nor their embodiment of the obligation of good faith. Rather, the United States questions only the application of these protections to anti-dumping measures.

270. The Appellate Body has recognized the importance and overriding application of Article X to *all* "laws, regulations, judicial decisions and administrative rulings." In *U.S.—Shrimp*, the Appellate Body stated:

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[370] The United States disingenuously implies that USITC cannot easily analyze non-subject import price effect on a disaggregated basis; the Department of Commerce, Bureau of Census, maintains the requisite statistics. US Response to Japan's Questions, para. 43.

[371] US First Submission, paras. C-132 to C-135.

[372] *See* <<www.newportsteel.com/about.html>> ("NS Group, Inc. is a leading producer of tubular products serving the energy industry."); <<www.lonestarsteel.com>> ("Lone Star Steel Company is a manufacturer and distributor of quality tubular products for energy, industrial, and automotive applications throughout the world.") The information from these web pages are attached as **Exh. JP-105**.

> Inasmuch as there are due process requirements generally for measures *that are otherwise imposed in compliance with WTO obligations*, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* treaty rights of other Members.[373]

It is clear that Article X protections apply to all measures, even those that "are otherwise in compliance with WTO obligations."

271. In its unsuccessful effort to negate the application of this essential WTO provision to anti-dumping measures, the United States claims there is a conflict between Article X and Article 1 of the AD Agreement. Article 1, however, simply ensures that Members' anti-dumping actions conform to both sets of rules governing anti-dumping set forth in the WTO Agreement – the AD Agreement *and* Article VI of GATT 1994. Article 1 does not limit the application of other general WTO provisions. Indeed, Article 1 of the AD Agreement recognizes that anti-dumping measures cannot escape the disciplines of Article VI of the GATT 1994.

272. Underlying the US claim of conflict is an assumption that since the AD Agreement establishes a quasi-judicial system encompassing such procedural requirements as notice and the opportunity to be heard, no other due process concerns are recognizable. This assertion threatens the foundation of fairness and due process upon which the WTO system is built. Article X:3(a) goes beyond the structural elements of due process established in the AD Agreement, to examine the *administration* of those structures. Article X:3(a) is a *comparative provision* that, *inter alia*, seeks to ensure that certain parties are not afforded less due process opportunities than others.[374] When parties are treated differently in different cases or within one investigation, based simply upon differences in *administration* of anti-dumping rules (rules that may or may not be consistent with the AD Agreement), these fundamental principles are violated.

C. THE UNITED STATES VIOLATED ARTICLE X:3(A) IN ITS INVESTIGATION OF HOT-ROLLED STEEL FROM JAPAN

273. In this case, even if the Panel were to decide that the United States did not violate any provisions of the AD Agreement (which is not the case), the Panel should still decide that the United States administered its rules in a manner so as to violate Article X:3(a) of GATT 1994:

- The United States consistently penalized foreign exporters at every opportunity with adverse facts available, but then chose not to penalize domestic petitioners for arguably worse behaviour. USDOC cannot administer these punishments in such an impartial or disproportionate manner.
- The United States adopted a regulatory practice of correcting significant ministerial errors, applied it consistently in other cases, but then refused to apply it for a Japanese respondent in this case, claiming oversight.

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[373] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 Nov. 1998, WT/DS58/AB/R, at para. 182 ("*U.S.—Shrimp*") (emphasis added). Anti-dumping measures result in the suspension of treaty rights by allowing a Member to impose duties above their bound GATT rates.

[374] A primary example would be the following: The United States cannot afford respondents with the minimum notice and opportunity to be heard under the AD Agreement, but then favor domestic parties by providing them with *more* notice or *more* opportunities to be heard. In other words, while the notice and hearing rules themselves may not violate the AD, the discriminatory administration of the rules violates Article X:3(a).

- The United States unreasonably accelerated the investigation and thereby prejudiced the position of the foreign respondents, simply because domestic petitioners demanded quick results.

- The United States adopted a new critical circumstances policy at the specific request of the domestic industry and applied it *retroactively* to the already initiated hot-rolled steel investigation.

- The United States ignored its general practice to consider a three-year period of investigation in this case, in an effort to justify an affirmative injury determination in a politically charged case.

1. USDOC improperly administered rules governing the use of facts available

(b) Inconsistent treatment accorded to the individual respondents

274. USDOC treated each individual respondent in a manner inconsistent with Article X:3(a) of GATT 1994 in its administration of its facts available rules. With respect to KSC, USDOC administered the rules so as to assist a petitioner (CSI) and harm a respondent, despite the fact that it was the petitioner that was withholding the requisite information. Moreover, despite the defiance of the petitioner, USDOC chose the harshest penalty it could justify under its law. This punishment was disproportionate in respect of KSC's actions such that it was "unreasonable" under Article X:3(a).

275. Similarly, USDOC afforded a disproportionate and therefore "unreasonable" punishment under Article X:3(a) to NKK and NSC. Despite their good faith actions to provide minor information as soon as practicable and in time for verification, USDOC aggressively utilized the harshest penalty possible under its facts available rules. As Brazil noted in its Third Party Submission, the punishment "does not fit the crime."[375]

276. Under the AD Agreement, Japan challenged the US overall use of punitive facts available as violating Article 6.8 and its related provisions. These claims, therefore, attack the structural foundation of the US practice on facts available under the AD Agreement. Japan's Article X:3(a) claim, on the other hand, goes to the *administration* of the rules relating to the use of adverse inferences in the hot-rolled steel investigation. From the perspective of *administration*, the concept of "reasonable" becomes a test of proportionality or moderation. In applying its law, did the authority administer its discretion "reasonably?" The difference is subtle, but essential to maintaining the integrity of Article X:3(a) in serving as a check on the administration by Members of rules of general application.

(c) USDOC's non-uniform, partial, and unreasonable administration of facts available rules as compared to USITC

277. USDOC's harsh treatment of the Japanese respondents compared to the lenient treatment USITC granted domestic petitioners is a further violation of Article X:3(a).[376] The US response to Panel Question 44 confirms the differential treatment in this case in terms of the administration of "facts available." The Panel asked the parties whether information was submitted and accepted by the USITC "after applicable deadlines." Yet, rather than explain to the Panel when petitioner's initial questionnaire response was due, and when the actual information was finally provided, the USITC cites a general date representing the absolute last day on which, under its regulations, the USITC was

[375] Brazil Third Party Submission, para. 22.

[376] Japan is not challenging USITC's failure to address petitioners' inaction *per se*, but rather the disparate treatment accorded petitioners versus respondents by the US Government as a whole. *See* US First Submission, para. D-16.

willing to accept certain information.[377] This date is not a "deadline" for the information requested, but rather a final date for closing the record.

278. The asymmetry here is incredible.[378] This provision is analogous to a similar regulation maintained by USDOC establishing a final date for the submission of factual information: seven days prior to the verification.[379] Ironically, while the United States claims that the more general USDOC regulation has nothing to do with NKK and NSC's late corrections of their weight conversion factors,[380] the United States also claims that petitioners' information was *timely* because it met the requirements of this analogous USITC regulation. The US Government cannot have it both ways. Petitioners cannot have until the final deadline for new factual information to provide information that they failed to provide by questionnaire deadlines, while respondents must meet the actual submission deadlines for information that they, in good faith, were unable to correct until later.

279. The United States would have this Panel believe that important domestic producer information provided 34 days before the final opportunity to comment was "timely," yet trivial foreign producer information provided at least a full 42 days before the final opportunity to comment was "untimely."[381] Moreover, the information sought from foreign respondents by USDOC was 28 days late,[382] while the information sought from the domestic producers by USITC was at least 42 days late,[383] yet the United States now argues that the situations cannot be compared. The foreign respondent information was not as late, and arrived with more time before final comments. This US position defies belief.

280. The United States claims that this disparate treatment is permissible because it was perpetrated by two separate agencies carrying out two separate fact-finding tasks. In particular, the United States implies that disparate treatment is justifiable because USITC must engage in a subjective analysis that bases its conclusions on the totality of the circumstances, while USDOC does not engage in meaningful analysis, but simply plugs numbers into a formula.[384]

281. This defense fails. Regardless of which US agency carried out the statute, the fact remains that the US Government as a whole treated respondents and petitioners in a non-uniform, partial, and unreasonable manner in contravention of Article X:3(a). The US attempt to distinguish between the activities of the two agencies is nonsensical. Both agencies adhere to the identical statute governing

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[377] US Response to Panel Question 44, para. 55, n.14 (citing 19 C.F.R. § 207.30).

[378] Moreover, the new factual information submitted by petitioners can hardly be described as "comments."

[379] *See* 19 C.F.R. § 351.301(b)(1) (**Exh. JP-5(e)**). The regulations are analogous because of their general application. Questionnaires from the agencies always come with stated deadlines, but each agency also has a regulation governing the date on which the record closes and no further factual information of any sort will be accepted.

[380] *See* US Response to Japan's Questions, para. 13.

[381] The number of days identified in this Paragraph have been calculated as follows. The public administrative record does not reveal the exact date petitioners finally provided complete questionnaire responses to USITC, but it was no earlier than the May 4th hearing at which the Commissioners complained about the missing data, and the last day to comment on new information was 7 June, *see* US Response to Panel Question 44, para. 55, leaving a difference of 10 days. NKK submitted its conversion factors to USDOC on 23 February 1999, *see* Japan's First Submission, para. 97 & n.89, NSC submitted its conversion factors on 22 February, *see id*., para. 98 & n.92, and NSC submitted additional backup data 1 March, *see id*., para. 98 & n.93. The *latest* of these three dates is 1 March. The last day to comment on factual information before USDOC is the date of the initial case briefs, 12 April. *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24330 (**Exh. JP-12**) (noting that case briefs were filed 12 April). There were 42 days between 1 March and 12 April.

[382] The US producers responses were due on 22 March, see **Exh. JP-66**, but the data requested did not arrive until after the USITC hearing on 4 May, see **Exh. JP-73.**

[383] *See* US First Submission, para. B-27 (due date of supplemental questionnaire was 25 January), para. B-29 (requested information submitted on 22 February).

[384] *See* US First Submission, para. D-22.

the application of facts available by the US anti-dumping authority. Moreover, *both* agencies engage in different types of decision-making – one that involves simply plugging data into a mechanical formula or spreadsheet, and a second that involves reaching a more subjective conclusion based on a consideration of various facts.

282. The truth is that both agencies engage in a certain degree of substantive analysis and a certain degree of simple mechanical calculations.[385] There is no meaningful difference in their tasks, therefore, upon which to justify blatantly disparate treatment under the same general facts available rules. Indeed, the only meaningful difference between the agencies' analyses is that USITC focuses on the domestic industry, while USDOC focuses on the foreign respondents. A non-uniform application of the facts available rules, therefore, not surprisingly, biases the system against the foreign respondents. Article X:3(a) prohibits this type of discriminatory administration.

283. In its First Submission, the United States implies that because under Article 3.4 of the AD Agreement, USITC was obligated to consider all relevant factors, it had to accept the untimely submissions. But, USDOC is also obligated to make a "fair comparison" under Article 2.4 and to render the specific calculation set forth in Article 2.3. Yet, USDOC chose non-representative substitutes for its data, despite reasonable and non-prejudicial alternatives available to it. This discriminatory treatment is inconsistent with the requirements of Article X:3(a).

2. USDOC failed to correct ministerial errors

284. NKK specifically requested in writing a correction of a ministerial error that had inflated its preliminary margin by twelve percentage points. Now, in a post hoc rationalization, the United States claims that this failure was a simple "oversight" and not an act of bad faith or "bias." This US plea for the Panel to assume that its untimely response was a good faith "oversight" contrasts directly with USDOC's refusal to assume good faith with respect to NKK and NSC's "untimely" yet non-prejudicial corrections of their weight conversion factors during the investigation.

285. The irony of USDOC's position is clear. At the same time that USDOC was conveniently "forgetting" about NKK's written request for the correction of a significant ministerial error, USDOC was instructing NKK to expunge from the record accurate information regarding the weight conversion factor that USDOC had verified in Japan. Similar to what USDOC now claims about its own mistake, NKK's untimeliness was the result of a simple misunderstanding -- a misunderstanding that NKK in fact tried to clarify with USDOC, but was misled with curt and unresponsive instructions from USDOC staff. According to the US view, therefore, it is reasonable for the US authority to make mistakes and correct them in an untimely manner, but not for the Japanese exporters.

286. Given that NKK made its request for the correction *in writing* and pursuant to the USDOC's *own regulations*, this USDOC claim of "oversight" is hard to believe. Importantly, this failure contributed directly to USDOC's ratification of its earlier critical circumstances finding against NKK, a finding which USDOC later reversed based on NKK's corrected margin. The circumstances of bias and clear indications of non-uniformity in administration here are overwhelming.

287. In answer to Question 30 from Japan, the United States cites to two other examples of such "oversight." But these two examples just underscore the unique situation with respect to NKK. In both of these other cases, there were substantial issues about whether there was in fact a clerical

[385] The US reference to its Statement of Administrative Action in Paragraph D-23 of its First Submission is inapposite. The information kept from USITC officials by petitioners was company-specific information of the type that USDOC also collects from respondents. The United States cannot rely on theoretical situations to defend concrete disparate steps taken by its agencies under the same rules in the same investigation.

error[386] or how to correct the admitted clerical error.[387] In the NKK case, however, there was no disagreement about the clerical error or confusion about how to correct the error. The need to wait to sort out substantial disagreements or to understand the precise error at issue cannot justify the alleged "oversight" in this case.

3. This case was unfairly accelerated

288. The United States fails to recognize the comparative nature of an Article X:3(a) analysis. The aberrant and prejudicial acceleration of this case as compared to the uniform standard by which the United States carries out nearly all of its other cases *does* matter under Article X:3(a).

289. The United States has essentially admitted the acceleration in this case deviated from its standard practice.[388] Contrary to the US assertion, for purposes of Article X:3(a), it does matter what the United States did in 70 out of 76 cases when administering the identical anti-dumping rules,[389] because Article X:3(a) looks at the uniformity of a Member's administration of a rule. Moreover, this acceleration was implemented in an impartial manner, as the result of a promise made by the Secretary of Commerce to the members of the Congressional Steel Caucus. Finally, this acceleration was unreasonable as it decreased respondents' time to prepare responses in the investigation and led to multiple ministerial errors on the part of USDOC officials.

4. The new critical circumstances policy applied retroactively to the Japanese respondents

290. The United States refused to address Japan's Article X:3(a) claims regarding critical circumstances in its brief, and, thus, has failed to meet its burden to overcome Japan's *prima facie* case under Article X:3(a). Japan's argument is clear: the United States changed its general critical circumstances policy *one week after initiation of the hot-rolled steel case in response to a specific request by petitioners*. This behaviour represents exactly the type of non-uniform, partial, and unreasonable behaviour that Article X:3(a) seeks to preclude. The question here is not whether this new policy is consistent with the requirements set forth in Article 10 of the AD Agreement, but whether the *administration* of US anti-dumping rules supposedly attempting to implement Article 10 meets with the fundamental fairness requirements found in Article X:3(a). The sudden and retroactive change in policy directed at the Japanese respondents in the hot-rolled steel case pursuant to specific demands made by the domestic industry is a prime example of biased behaviour.

291. Similarly, USDOC's administration of its new critical circumstances policy failed to meet the "uniform" and "impartial" requirements of Article X:3(a). USDOC administered the new standard so as to rely only upon allegations in the petition, thereby favoring one side in an impartial manner.[390] Similarly, USDOC ignored USITC's preliminary finding of no current injury, thereby leading to non-uniform determinations within the US Government.

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[386] Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Ammonium Nitrate from the Russian Federation, 65 Fed. Reg. 42669, at cmt. 2 (11 Jul. 2000), <http://ia.ita.doc.gov./frn/summary/russia/00-17514-1.txt> (noting that petitioners disagreed with respect to whether certain allegations in fact represented clerical errors.).

[387] *Certain Stainless Steel Wire Rods From France: Amended Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 47169, 47169 (30 Aug. 1999) ("Petitioners acknowledge that they did not provide exact programming language nor locate the exact cause of the alleged clerical error at the time of their original clerical errors comments were filed.…").

[388] USDOC just recently adopted a new policy on expedited investigations. *See* Import Administration Policy Bulletin No. 00.1 on Expediting Antidumping Duty Investigations (8 June 2000) (**Exh. JP-81**).

[389] *See* US First Submission, para. D-13.

[390] US First Submission, para. B-62 ("{I}t is generally understood that applicants will document the highest degree of dumping {in the petition} that the available evidence will support . . . . {I}t generally is presumed to be adverse.").

5. USITC deviated from prior injury practice

292. Until this case, USITC maintained a 10-year-old standard practice of examining a three-year period of investigation. In the hot-rolled steel investigation, USITC acted in a non-uniform manner and based its determination on an unreasonable comparison of only two years. Again, the key issue here is the uniformity with which the United States conducts its injury analysis. It cannot alter its rules in certain investigations to ensure an affirmative injury finding.

IX. CONCLUSION

293. Japan reiterates that the Panel findings in this case should be quite specific and concrete. The Panel should not make general findings, noting violations without specifying precisely what the US authorities did incorrectly, and then leave it to the US authorities to decide what to do. The Panel findings, when considered and implemented in good faith by the US authorities,[391] should lead to lower dumping margins by the USDOC and to a revised determination by USITC. The Panel's duty is to provide a very clear and detailed roadmap for how the US authorities can fulfill their international obligations in this case.

294. That roadmap should include findings about the specific US actions in the hot-rolled steel case under the AD Agreement, and findings about the generally applicable policies and statutes that lead to those actions under the AD Agreement. It should also include the judgment by the Panel on whether the US interpretations of the provisions of AD Agreement are permissible in the context and in the light of the object and purpose of the AD Agreement. In addition, the roadmap should describe the ways in which the United States violated Article X of GATT 1994, a claim separate from and independent of Japan's claims under the AD Agreement. Where necessary, the United States should be requested to change its laws and policies to comply with the US obligations under the AD Agreement, and under Article XVI of the WTO Agreement and Article 18.4 of the AD Agreement.

[391] Japan wishes to clarify that is it not requesting specific remedies in this case. Japan did not mean to imply in Paragraph 325 of its First Submission that the Panel itself must re-determine either the dumping margins in the case, or whether there was injury by reason of imports. Those tasks clearly belong to the US authorities.

ANNEX C-2

Second Submission of the United States

(13 September 2000)

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1. The United States hereby submits its second written submission in this proceeding. This submission is divided into two parts. First, the United States demonstrates that the US laws and practices concerning the calculation of the anti-dumping duty margins and critical circumstances are consistent with the United States' WTO obligations, and that their application in this investigation was in accordance with these obligations. Second, the United States demonstrates that the US laws pertaining to injury determinations, and their application in this investigation, are in accordance with WTO rules. As indicated in the discussions below, the United States will not here address all arguments that Japan has raised, but rather will address most particularly new positions that Japan has taken in its statements and submissions since the parties' first written submissions.

PART 1: THE ANTI-DUMPING DUTY MARGINS AND CRITICAL CIRCUMSTANCES

I. AN INVESTIGATING AUTHORITY MAY MAKE ADVERSE INFERENCES ABOUT INFORMATION THAT A RESPONDENT IN AN ANTI-DUMPING INVESTIGATION HAS FAILED TO PROVIDE

2. Japan's written answer to the United States' third question indicates that Japan has not moderated its extreme position that, in selecting from the facts available, an investigating authority may never intentionally make an adverse inference about information that a respondent has failed to provide, no matter how blatant the respondent's failure to cooperate.[1] Japan has not offered a *single* instance in which an adverse instance would be permitted - - not even the case in which *its own anti-dumping authorities* made an adverse inference concerning uncooperative respondents.[2] Evidently, Japan has put its doubts aside and decided to stick with its original goal of persuading this Panel to strip from the AD Agreement the incentive it now provides for respondents to cooperate in anti-dumping investigations.[3] We explained in our first written submission how this argument runs contrary to many specific provisions in Article 6.8 and Annex II, and is, in fact, designed to defeat the purpose of those provisions.[4]

3. Japan's final answer is that its position is not really extreme.[5] As supporting evidence, it repeats its argument that "less favourable" outcomes are permitted, provided that they are "coincidental,"[6] but that less favourable outcomes that result from deliberately adverse inferences are punishments not authorized by the Agreement.[7] We explained in our first written submission that this nominal concession is, in fact, no concession at all, and would leave respondents with virtually no incentive to participate in anti-dumping proceedings.[8]

4. Like its token concession about coincidentally adverse results, most of Japan's answers attempt to obfuscate the real implications of its current position. We respond to Japan's specific points below.

5. First, Japan notes that Article 6.8 does not "directly address the level of cooperation provided by a party . . . but merely gives the authority for resorting to facts available, assuming the

[1] First Submission of Japan at para. 58.

[2] First Submission of the United States at Part B, para. 72, n. 147. In its investigation of Cotton Yarn from Pakistan, the Japanese anti-dumping authorities calculated the dumping margin for non-cooperative Pakistani companies by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value of the cooperating suppliers.

[3] First Submission of Japan at para. 59.

[4] First Submission of the United States at Part B, paras. 58 - 71.

[5] Japan's Answer to US Question 3 at para.4.

[6] First Submission of Japan at para. 58.

[7] Japan's Answer to US Question 3 at 5.

[8] First Submission of the United States at Part B, paras. 73 - 76.

circumstances identified in Article 6.8 exist."[9] This is highly misleading. Pretending that Article 6.8 does not concern the level of cooperation of the respondent ignores the fact that Article 6.8 addresses "refus[ing] access to information," "not provid[ing] information," and "significantly impeding" anti-dumping proceedings. The United States' collective characterization of these actions as "failing to cooperate" is fair, to say the least. Thus, when Paragraph 7 of Annex II states that non cooperation may result in a less favourable outcome for the respondent, it is referring to the types of behaviour described in Article 6.8.

6. Second, Japan asserts that "Paragraph 7 of Annex II requires investigating authorities, in selecting the facts available, "to find information that most closely approximates reality."[10] By this, Japan means that adverse inferences are not permitted, because, *presumably*, they do not closely approximate reality. Japan's answer ignores a fundamental point - - the only way for the Department to know what information "most closely approximates reality" is *to obtain the real information.* Where a respondent has failed to provide the real information, an investigating authority *has no choice* but to make inferences about that information.[11] And, when the *reason* that the respondent has failed to provide the real information is that it simply has not cooperated in the investigation, the most reasonable inference about the missing information is that it is adverse to the respondent. This inference is not punitive - - it is the most reasonable assumption about the nature of the missing information under the circumstances.

7. Third, Japan argues that the requirement that investigating authorities use "special circumspection" in selecting information from secondary sources indicates that the use of adverse inferences is precluded. The opposite is true. Special circumspection is required precisely because the secondary information (such as information from the petition) is generally presumed to be adverse to the respondent (although an investigating authority can never know for certain whether it is adverse, because it does not have access to the real information).

8. Fourth, Japan misreads the requirement that investigating authorities "should, where practicable, check the information from other independent sources." This does not mean that the information selected may not be adverse. It means that the inference upon which the selection is based should be reasonable in light of other information on the record. A reasonable adverse inference is one at the adverse end of the range of possibilities, to the extent that range is ascertainable.

9. Fifth, Japan argues that Paragraph 7 of Annex II justifies "not rewarding" a respondent for failing to cooperate, but does not justify making an adverse inference about the data not provided. There are two flaws in this argument. First, a result "less favourable" to a non-cooperating party is not merely the absence of a more favourable result (or reward). Cooperative parties are not "rewarded" with automatically low dumping margins. They receive margins calculated *neutrally* on the basis of the data provided. Therefore, a "less favourable" result than if the party had cooperated is a result that is less favourable than a neutral result - - an adverse result. Second, Japan's argument ignores the obvious point that, if the worst that can happen to a respondent for failing to provide information is the application of neutral gap-filler, no respondent in its right mind would ever submit adverse information to an investigating authority.

10. Sixth, Japan suggests that, where a respondent has been generally cooperative, an investigating authority may not make an adverse inference regarding a specific matter with respect to

[9] Japan's Answer to Panel Question 4 at para. 15.

[10] Japan's Answer to Panel Question 4 at para. 15.

[11] Japan will respond that, in the case of the weight conversion factors, the Department actually had the relevant information in its possession. As we have explained, this ignores the Department's clear authority under the Agreement to impose reasonable deadlines.

which that respondent has not supplied necessary information. Neither Article 6.8 nor Annex II provides any basis for this limitation. Article 6.8 refers to parties that do not provide necessary information. It does not suggest that some necessary information may be withheld, if most necessary information is provided. Similarly, Paragraph 7 of Annex II states that a less favourable result may be obtained where "relevant information is being withheld." It does not imply that some relevant information may be withheld if most relevant information is provided. Acceptance of Japan's argument would license every respondent in every dumping proceeding to withhold the single most damaging category of information from the investigating authority.

11. Seventh, Japan charges that the Department reads the sentence in Paragraph 7 of Annex II authorizing a less favourable result for uncooperative parties "as giving it carte blanche to use any facts available it chooses."[12] Japan evidently believes that the Department would feel free to fill in gaps in its administrative record with the team batting average of the Tokyo Giants[13], as long as that would be adverse to the respondents. Of course, any such notion is frivolous. The Department tries to select facts available that are at the adverse end of the likely range, not arbitrary numbers. The object is not to punish parties that fail to provide information, but to attempt to ensure that such parties do not profit from their non-cooperation. As we have explained in detail in our first submission, the Department was extremely circumspect in using adverse inferences to select from the facts available and carefully limited the results of those selections to the scope of the information not provided, or not timely provided.[14]

12. Eighth, Japan implies that failing to supply necessary information within a reasonable period does not "significantly impede" an investigation.[15] This cannot be true, unless the information withheld is insignificant. If the information is significant, then withholding that information must be significant.

13. Finally, Japan argues that information from "secondary sources" is not information from sources other than the respondent, but information from sources other than the questionnaire response (or, possibly, information other than the actual data specifically requested in the questionnaire).[16] This is neither the plain meaning of "secondary sources" nor logical. The most obvious meaning of the "primary source" is the respondent. Therefore, the most obvious meaning of "secondary sources" is "sources other than the respondent." This interpretation is supported by the term "other independent sources" in the second sentence of Paragraph 7, which indicates that secondary sources are independent from the primary source. This makes sense if secondary sources are independent *from the respondent*. But it would be a strained use of the language to describe information from a respondent as "independent from" other information from that same respondent.

14. If accepted, Japan's definition of "secondary sources" would mean that other information from a respondent, *even if verified*, would constitute secondary information that would need to be corroborated from other sources. Japan does not explain why it would be necessary, or how it would be possible, to corroborate such verified information. There is no evident explanation.

15. Japan is also incorrect in asserting that, if "information from secondary sources" in Paragraph 7 means information from sources other than the respondent, then the "less favourable" language does not support the use of adverse inferences.[17] Because the logic, if any, of this argument

[12] Japan's Answer to Panel Question 6 at para. 26.
[13] More precisely, the Yomiuri Giants.
[14] First Submission of the United States, Part B, at paras. 109 - 112 and 163.
[15] Japan's answer to Panel Question 7 at para. 28.
[16] Japan 's answer to Panel Question 8 at para. 30.
[17] Japan's Answer to Panel Question 8 at para. 32.

has eluded the United States, it seems best to respond by explaining our reading of Paragraph 7 as a whole.

16. Paragraph 7 contains three sentences. The first provides that, where investigating authorities base their findings on information from secondary sources (from sources other than the respondent), they should use special circumspection. The second sentence, which begins "[i]n such cases . . ." plainly applies to the use of information from secondary sources, and requires that such information be checked against other independent sources. The third sentence does not provide more procedural safeguards for the selection of information from the secondary sources. Having a different function than the second sentence, it logically is not limited by the opening clause of that sentence. Rather, the third sentence provides a general counterweight to all of the limitations in Annex II on the application of facts available and, more specifically, makes clear that the special circumspection and corroboration requirements do not preclude "less favourable results than if the party did cooperate."[18]

II. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO KSC WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

17. The Department's application of facts available to KSC because of its failure to act to the best of its ability to report the necessary sales and further manufacturing cost data for its sales through its US affiliate, CSI, was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. We will not burden the Panel with a repetition of the facts establishing KSC's failure to use its full authority, as a fifty-per cent owner of CSI, to attempt to obtain that information. Instead, we take this opportunity to show how the arguments that Japan continues to assert on this issue lack any basis in the facts or under the AD Agreement.

18. First, we draw the Panel's attention to Japan's response to the Panel's fifth question, regarding KSC's alleged requests to the Department for assistance concerning this issue.[19] While claiming that there "are many examples of KSC's request for assistance,"[20] Japan cites only three record documents, none of which support its claim. The first letter which Japan cites[21] nowhere requests the Department's assistance. Instead, it repeatedly requests that Commerce excuse KSC from answering Section E of the questionnaire, with respect to the sales through its affiliated further manufacturer, CSI. Japan cites two other letters by KSC to the Department[22] which likewise reiterate KSC's request to be excused from reporting the CSI information.[23] Moreover, these are not the only documents in which KSC requested to be excused from reporting the CSI information: on 21 December 1998, KSC informed Commerce that KSC would not be reporting the CSI information;[24] on 19 January 1999, KSC again informed Commerce that it would not provide the

[18] *See* First Submission of the United States at Part B, paras. 152 and 161.

[19] Japan's Answer to Panel Question 5 at para. 19.

[20] *Id*.

[21] KSC's letter to Commerce of November 10, 1998 (**Exh. JP-42(i)**).

[22] KSC letter of December 3, 1998, (**Exh. JP-78**), and KSC letter of December 18, 1998, (**Exh. JP-42(n)**).

[23] Japan claims that the phrase "[w]e have received no information, guidance, or response from the Department," in KSC's letter of 18 December 1998, constitutes a "specific" request for assistance. Japan's Answer to Panel Question 5 at. para. 20. However, a more reasonable interpretation of that phrase is that KSC wanted confirmation from the Department that it would excuse KSC from providing the CSI information. The meaning is evident from the fact that, in the preceding (and first) paragraph of that letter, KSC informed the Department that, at its recent meeting with Commerce officials, "we asked that KSC be excused from reporting CSI's sales of subject merchandise and of further manufactured subject merchandise because of ... its conflict of interest as a petitioner." (**Exh. JP-42(n)**) (business confidential information omitted). Furthermore, on each of the following two pages of that letter, KSC renewed its request that it be excused from reporting the CSI information. *Id*.

[24] KSC response to section C of the Department's questionnaire, (**Exh. JP-42(p)**).

information;[25] and, on 25 January 1999, KSC reiterated the same position.[26] In none of these letters did KSC request assistance regarding this issue. Thus, the Department's establishment of the facts on this matter is fully supported by record evidence, whereas Japan's factual claim is supported by none.

19. In addition, the Department's interpretation of Articles 2.3, 6.8, and Annex II with regard to the selection of facts available for KSC's sales through CSI is a permissible one. Once Commerce established that it would apply facts available to KSC with regard to the CSI sales, and that it would take an adverse inference with respect to KSC for its failure to act to the best of its ability, it reasonably turned to KSC's calculated dumping margins for actual, verified sales to the United States as a source of facts otherwise available. The reasonableness of this choice is shown by one of Japan' s own affidavits.[27] At paragraph 32 of this affidavit, KSC calculated the dumping margin for the non-CSI portion of its US sales. This calculation, representing the non-adverse facts available rate applicable to Kawasaki, shows dumping.[28] The increase resulting from the Department's choice of facts available represents the logical inference that the information not provided was probably adverse to KSC.-- *i.e.*, that the dumping margins on the unreported sales were generally greater than the margins on the reported sales. Commerce chose a margin from those sales that were reported, and thus based on KSC's own selling practices, and applied it only in proportion to the unreported sales. This was a measured approach and reflected an appropriate adverse inference. Japan, however, would interpret the Agreement to reward respondents with a "neutral" choice of facts available, thereby giving them license to play a shell game by hiding dumped sales through their affiliates and directing non-dumped sales, or sales with lower dumping margins, to their non-affiliated importers.[29] Neither Article 2.3 of the Agreement, nor the facts available provisions of Article 6.8 and Annex II, should be interpreted to require such a result.

20. Finally, we draw the Panel's attention to Japan's persistent claim that it supplied the Department with reliable transfer price data between KSC and CSI that Commerce should have used.[30] Japan has ignored, or chosen not to rebut, the fact that KSC did not supply these data, as we have pointed out.[31] More important, however, is the fact that, if Commerce accepted such data as facts otherwise available, it would give respondents *carte blanche* to set those prices to their affiliates at whatever level they deemed convenient to shelter dumping. Thus, the Department's choice of facts available with respect to the affected sales represented a permissible interpretation of the Agreement.

III. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO NSC AND NKK WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

21. The Department's application of the facts available to NSC and NKK's theoretical weight sales for which they did not timely provide a theoretical-to-actual weight conversion factor was fully in accordance with the Agreement. Japan's position, that the Department should be compelled either to ignore altogether the sales affected by the missing factors or to accept the factors which NSC and NKK could have timely provided, but did not provide until well after the reasonable deadlines

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[25] KSC response to the first section A supplemental questionnaire, (**Exh. JP-42(u)**).

[26] KSC response to sections B and C of the Department's supplemental request for information (**Exh. JP-42(v)**).

[27] Affidavit of Robert H. Huey, Counsel to KSC, (**Exh. JP-44**). The United States has asked the Panel to disregard Japan's affidavits because they are extra-record evidence. Thus, we cite to this affidavit only in the event that the Panel does examine it.

[28] The exact level is business confidential information. *See id*., paragraphs 32 and 33.

[29] Japan's Answer to Panel Question 42 at para. 93. Japan also expresses the startling view that anti-dumping investigations are usually a "surprise." *Id.* That certainly was not the case in this instance, as the Department's critical circumstances determination shows.

[30] *Id*. at paras. 93 and 18.

[31] *See* First Submission of United States at Part B, para. 123.

established for this purpose in the questionnaires, would write out of the Agreement an administering authority's ability to establish and enforce reasonable deadlines for the submission of information. This right is guaranteed by Articles 6.1, 6.8, and Annex II at paragraphs 1 and 6. Likewise, for the reasons discussed above, the Department's use of an adverse inference in selecting from the facts available with respect to the affected sales, was authorized under Article 6.8 and Annex II, paragraph 7.

22. We will not burden the Panel with a repetition of all of the facts regarding the conversion factor issue. The following pertinent points have been demonstrated in our First Submission and in our responses to the questions posed by the Panel and Japan: (1) The conversion factors were presented well after questionnaire deadlines that were twice extended and provided more than ample opportunity to respond. (2) Despite the fact that NSC and NKK both argued that such factors were unnecessary and impossible to provide, they proved to be necessary and possible to provide for both companies. (3) Despite claiming that a factor was impossible to provide, NKK's counsel received KSC's submission demonstrating how they calculated the factor when KSC filed and served its questionnaire response on December 21, 1998. (4) When finally provided by NSC and NKK, the factors were not timely because the so-called "seven day rule" (19 CFR § 351.301(b)((1)), upon which Japan relies, expressly does not apply to deadlines for responses to questionnaires, which are governed by 19 CFR § 351.301(c)(2). (5) The Department's practice of accepting minor corrections to timely presented data also does not constitute a blanket loophole covering data respondents have declined to submit (at all) in response to questionnaires. (6) The facts available the Department selected with respect to this issue were based on NSC and NKK's own data and were reasonably related to the affected sales. In sum, NSC's and NKK's theoretical weight factor submissions were rejected because they were untimely, and Article 6.8 and Annex II expressly permit the Department to enforce reasonable deadlines by use of facts available. Accordingly, the Department's application of facts available to NSC and NKK was consistent with the Agreement.

23. Finally, because this question is so clearly one of deadline enforcement, rather than of bias, the Department objects to Japan's characterization of the Department's treatment of the conversion factor issue as the result of an "effort to apply adverse facts available."[32] Had the Department been making an "effort" to apply adverse facts available, rather than conducting this investigation strictly on the merits of the case, a much better target existed. The most hotly contested substantive issue at the administrative level of this case before the Department of Commerce was the question of whether invoice/shipment date or date of order confirmation should be used as the date of sale for reporting US and home market databases.[33] Despite being asked by the Department to report separate US and home market sales databases using the date of order confirmation, as well as the date of invoice/shipment it had originally used to report its sales, NKK declined to report its sales databases using order confirmation date.[34] Had the Department been acting in a biased manner, motivated only by an "effort to apply adverse facts available," it could have determined that the order confirmation date was the proper date of sale, and could have applied facts available much more extensively to NKK. Instead, the Department made the date of sale determination, as it made all of its determinations, on the merits, and used the invoice/shipment date as the date of sale.

[32] Japan's Answer to Panel Question 1 at para. 4.
[33] *See Final Determination*, 64 Fed. Reg. at 243331-24335 (Comment 1)(**Exh. JP-12**).
[34] *See Preliminary Determination*, 64 Fed. Reg. at 8294 (**Exh. JP-11**).

IV. THE DEPARTMENT'S APPLICATION OF ITS "99.5 PER CENT" ARM'S LENGTH TEST, TO DETERMINE THAT SOME EXPORTERS' HOME MARKET SALES TO AFFILIATES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE, AND ITS SUBSEQUENT USE OF HOME MARKET DOWNSTREAM SALES TO CALCULATE THE NORMAL VALUE FOR SUCH SALES, WERE CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

24. The Department's application of its 99.5 per cent test to determine which home market sales to affiliates could be used in the normal value calculation embodies a permissible interpretation of the Agreement, as does its use of downstream sales. Although Japan has criticized the specifics of the 99.5 per cent test, it is clear from Japan's response to Panel Question 17 that Japan's primary goal with respect to the arm's length test is not to require the Department to improve it. Instead, Japan urges upon the Panel an interpretation that would write out of the Agreement any interpretation of "ordinary course of trade" that would permit any scrutiny of prices to affiliates. Because Japan has not demonstrated that the Agreement compels such an interpretation, the standard of review requires that the Panel find that the Department permissibly interprets the Agreement to allow it to assume that sales to affiliates are *not* made in the ordinary course of trade absent a showing that sales to the affiliate are made at not less than average market prices despite the affiliation. Furthermore, because Japan has not demonstrated that the Department's 99.5 per cent test is biased against respondents or otherwise fails to achieve this reasonable goal, it should likewise uphold the Department's use of this test.

25. As the Panel has recognized, Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade.[35] What Japan does not appear to accept is that a Member may permissibly consider that sales to an affiliated customer may be outside the ordinary course of trade precisely *because* the affiliation may cause the pricing relationship to be "unreliable because of association." In its response to Panel Question 17, Japan appears to argue that the Agreement requires the Department to use "all these ordinary course sales – including sales to companies that did not survive the 99.5 per cent test." Although this states Japan's preferred outcome, it also begs the question of whether all of its sales to affiliates <u>are</u> sales in the ordinary course of trade. Japan seeks to compel an interpretation that they are, absent some reason not necessarily related to affiliation, such as having been made at below-cost prices. Because the Department's interpretation that sales to affiliates are inherently "unreliable because of association," and may be deemed outside the ordinary course of trade *unless* it is demonstrated that the affiliation has not resulted in favourable pricing, is a permissible one, it must be upheld. To do otherwise would compel authorities to base normal value on sales to affiliates, regardless of whether these are real market prices or not, and despite the considerable potential for a manufacturer to manipulate the results of an anti-dumping proceeding by selling to affiliates at low-margin-generating prices before re-selling the merchandise into the open marketplace. Such an interpretation would seriously interfere with the administration of the Agreement.

26. The 99.5 per cent test is a perfectly reasonable methodology by which to determine whether affiliated party sales can be considered equivalent to arm's-length sales, as demonstrated by the fact that it is virtually the same as the margin calculation – itself prescribed by the Agreement. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is nearly identical to the margin calculation. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and target-country export sales; the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated home market customer sales.

[35] *See* Panel Question 17 to Japan.

27. Japan claims that the 99.5 per cent test is a "results-oriented approach" because it excludes only lower-priced sales as outside the ordinary course of trade.[36] But this simply is not the case. When an affiliated customer passes the 99.5 per cent test, all of the sales to that customer are retained, including those for products sold at prices below the average price to the unaffiliated customers. Conversely, when an affiliated customer fails the 99.5 per cent test, all of the sales to that customer are rejected, including those for products sold at above average prices that would otherwise have been used to calculate normal value. Thus, application of the 99.5 per cent test may increase or decrease normal value.

28. Furthermore, as Japan readily acknowledges, "[p]rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit."[37] In most situations, therefore, the fact that the test does not "fail" affiliates based on high-priced sales and results in the use of those sales in lieu of the downstream sales may have the effect of reducing margins, compared to the margins that would have resulted from normal values based on even higher priced downstream sales.

29. Although Japan attacks the 99.5 per cent test on the basis that it imposes a floor, but not a ceiling, on prices treated as being in the ordinary course of trade, the Agreement does not require such symmetry. One of the reasons that prices involved in affiliated party transactions are inherently suspect is that they may be manipulated so as to reduce normal value (and hence reduce dumping margins). This concern is simply not implicated where such prices are higher than average prices to unaffiliated customers. There is, therefore, no basis for Japan's contention that the 99.5 per cent test is "biased."[38]

30. Nor is there any merit to Japan's contention that the Agreement precludes the use of downstream home market sales where an affiliated reseller fails the 99.5 per cent test.[39] Japan' s argument hinges solely on the fact that Article 2.3 expressly permits the use of downstream sales from affiliated importers in the export market, while Article 2.2 is silent with respect to the use of such sales in the home market.[40] Japan fails to realize, however, that Article 2.1 already authorizes the use of downstream home market sales. That provision defines normal value simply as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product for consumption in Japan were made in the ordinary course of trade and clearly come within this definition.

31. Article 2.2 plainly states that normal value may be based on third-country sales price or on constructed value only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country." Moreover, in response to Panel Question 17, Japan concurs that the Article 2.2 alternatives to a normal value based on home market prices become relevant only if the administering agency "concludes there are no sales in the home market in the ordinary course of trade." In other words, Japan does not propose to substitute either constructed value or third country sales for sales to affiliates that are outside the ordinary course of trade when other valid home market sales (which would include downstream sales made by affiliates) remain. Instead, Japan claims, in essence, that the Agreement requires that an authority must simply ignore any sales to customers failing the arm's length test, and base the margin solely on "the respondent's home market sales to other customers."[41] The result of such a general policy, however, would be that a producer could shield a large percentage of its home market sales from scrutiny simply by passing

[36] Japan's Opening Statement at para. 38.
[37] Japan's First Submission at para. 170.
[38] Japan's Opening Statement at para 36.
[39] Japan's Opening Statement at para. 41-43.
[40] *Id*.
[41] *See* Japan's Answer to Panel Question 17 at para. 59.

them through an affiliate at below-average prices before selling them to unaffiliated customers in the home country. Indeed, under Japan's preferred approach, producers could make all of their home market sales through affiliated resellers, forcing investigating authorities to use third-country sales or constructed value – a result plainly not intended by the Agreement.

32. Finally, we note that the treatment of sales to and through affiliated parties is an area in which different Member States have evolved different interpretations and practices to deal with this general concern. The approaches of the three third party interveners who provided responses to Panel Question 48 on this topic are at once diverse (demonstrating that the Agreement lends itself to multiple permissible interpretations in this respect) and much less concrete than the Department's arm's-length test. The EC, for example, apparently uses the remaining sales unless it determines that they are not "sufficiently representative" and Brazil has used sales to non-affiliated parties when they were "representative." If Korea determines that the affiliated party sales are "inappropriate" it considers "constructed export price or third country sales price." The United States is of the belief that its own practice, which is more transparent and concrete, not only embodies a permissible interpretation, but is better suited for its own administration of the dumping law. Even should the Panel find the approach of another Member State to be more in harmony with its own views on this issue, however, the Panel may not impose that approach upon the United States unless Japan has demonstrated that the Department's practice in this respect is contrary to the Agreement. Japan has not done so.

V. THE DEPARTMENT'S INTERPRETATION WITH RESPECT TO THE CALCULATION OF THE ALL OTHERS RATE, AS EMBODIED IN SECTION 735(C)(5)(A) OF THE TARIFF ACT OF 1930, IS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

33. The Department's calculation of the all others rate using a methodology which excluded from the calculation all margins which were, overall, zero, *de minimis* or based on the facts available, embodies a permissible interpretation of the Agreement. Article 9.4 of the Agreement makes *no* provision for eliminating the "portions of margins," affected by facts available while retaining all other "portions" of the margins, as Japan suggests in its response to Panel Question 10. Indeed, Japan has argued in its response to that question only that "its suggested approach *better reflects* Article 9.4."[42] Under Article 17.6(ii) of the Agreement, the question is not whether Japan's suggested approach "better reflects" Article 9.4 than the US interpretation, but whether the US interpretation is a permissible one.

34. Apart from the obvious fact that Article 9.4 says nothing about and therefore cannot compel such a reading[43], Japan's approach is seriously flawed in other ways. First, were the presumption underlying the approach described in Japan's reply to Panel Question 10 to be adopted as a general rule, the all-others rate would have to be calculated based solely on whatever more favourable data respondents chose to report – whether or not such data are representative of the overall extent to which the respondents are dumping, and thus whether or not they are representative of the overall level of dumping in the industry. This means, for example, that the same high-margin-generating data Japan seeks to remove from scrutiny through the stratagems described above would also not be reflected in the margins for the non-examined members of the industry.

[42] Japan's Answer to Panel Question 10 at para 36 (emphasis added).

[43] For the same reason, the EC's suggestion that they might use one interpretation of Article 9.4 when portions of margins were "significant" and "adverse" (but presumably a different one when the facts available portions were less significant and non-adverse), is not compelled by the plain language of that Article, which does not distinguish between "significant" and non-significant or adverse and non-adverse use of facts available.

35. Second, Japan's *ad hoc* approach to this case is not workable as a general rule. As the EC, another frequent user of the dumping law, has observed in its response to Panel Question 50, most dumping calculations include small elements of facts available. Furthermore, these are not always sale-specific. Even small elements of facts available can affect large numbers of sales, especially when facts available affects cost databases that are used in calculating constructed value, which may be used for comparison to a wide range of export sales. Thus, even if it were desirable to do so, it is in many cases simply not possible to remove all "affected" sales from the margin calculation to create the "expunged" margins Japan would have authorities use to calculate all others rates.

36. Third, Japan's preferred solution can seriously underestimate the average dumping level of the mandatory respondents when, as in this case, the percentage of export sales affected by facts available varies greatly among such respondents. This is not merely a function of the fact that it disregards the high level of dumping that may have been masked by data withheld from the Department. It is true even if it is accepted, as Japan argues it should be, that the margins used in the weighted average calculation should be margins purged of any facts available and should reflect the level of dumping only on those sales for which the respondent was willing to provide full data. Japan argues that, in weight-averaging the purged margins, authorities should assume that the mandatory respondents exported only the volume of product associated with sales that were not affected by facts available. This means that the sales volume of the least-cooperative respondents (those most likely to be willing to dump at the highest rates) will be under-represented in the numerator of all others weighted average. It also means that the total amount of sales forming the denominator of the weighted-average calculation will be reduced to the same degree, thus over-representing the sales volume associated with the margin levels of the more cooperative mandatory respondents.[44] In addition, Japan's preferred solution underestimates the average dumping level of the mandatory respondents by purging their margins of individual sales affected by facts available, but not of individual sales that are not dumped. However a Member may interpret the reference to margins established based on the facts available, Article 9.4 clearly accords the same treatment to "zero and *de minimis* margins." The solution Japan proposes, in short, does not even come close to being the sole permissible interpretation of Article 9.4.

37. Finally, the United States notes that the document contained at **Exh. JP-79** and discussed in Japan's response to Panel Question 9, in no way suggests that the interpretation of the United States is an impermissible one. It merely shows that the United States was unsuccessful in seeking to add the word "solely" to the text and that Japan was similarly unsuccessful in seeking to add the word "primarily." This suggests only that the intent of the Members was that the language remain sufficiently ambiguous to allow for multiple interpretations. Indeed, the most important statement in that document is the final sentence: "No conclusion was reached owing to the conflict of opinions." If no conclusion was reached, the drafters clearly did not conclude that the interpretation suggested by the United States was impermissible.[45] Moreover, the fact that other parties did not agree to the insertion of the word "solely" before the word "established" could also simply mean that those parties believed that the word was unnecessary because the existing language in the provision already sufficiently established that point.

[44] Should the Panel determine to use the attorney affidavits (the United States maintains the Panel should not do so), it may wish to compare the "non-CSI portion" of KSC's margin in **Exh. JP-44**, at para. 32 *with* the average margins for NSC and NKK given in the *Final Determination*, 64 Fed. Reg. at 34780, **Exh. JP-12**.

[45] This is similar to the drafters' decision not to adopt an illustrative list of the types of sales that could be considered outside the ordinary course of trade. *See* First Submission of the United States at para. 216 and fn. 297.

VI. JAPAN IS ATTEMPTING TO WRITE ARTICLE 10.7 OUT OF THE AD AGREEMENT

38. Japan suggests that, "as a practical matter," a critical circumstances finding (as referenced in Article 10.7) cannot be made prior to the preliminary determination of dumping. This position ignores the existence of, and writes out of the Agreement, Article 10.7. Article 10.7 is distinct from other provisions in the Agreement in two fundamental respects. *First,* it does not require administering authorities to await the preliminary determination of dumping prior to making a determination to withhold appraisement or assessment. In every other instance, the Agreement expressly provides that provisional measures may not be taken until after the preliminary determination of dumping. *Second,* Article 10.7 is unique in its directive that there be "sufficient evidence" to support the finding. The requirement for " sufficient evidence" arises in two places in the Agreement: Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). The presence of this standard in these provisions suggests a threshold - a quantum and quality of evidence that must be present despite the fact that the record is incomplete.

A. ARTICLE 10.7 EXPRESSLY AUTHORIZES CRITICAL CIRCUMSTANCES FINDINGS *PRIOR* TO THE PRELIMINARY DETERMINATION OF DUMPING

39. Japan argues that, "as a practical matter," the "sufficient evidence" standard cannot be met prior to the preliminary determination of dumping (as set forth in Article 7.1). This argument ignores the plain language and intent of Article 10.7. Although Article 10.1 of the Agreement generally requires, with respect to the application of provisional measures, that there first be a preliminary determination of dumping, injury, and causation.[46] Article 10.7 provides the express exception to this rule. Specifically, Article 10.7 provides that investigative authorities may make critical circumstances findings and withhold appraisement or assessment at any time "after initiating and investigation." Thus, Japan's claim that the "sufficient evidence" requirement in Article 10.7 mandates a delay until the preliminary finding of dumping is untenable.[47]

B. "SUFFICIENT" EVIDENCE DOES NOT MEAN ALL POTENTIAL EVIDENCE

40. The drafters of the Agreement expressly provided that certain decisions may be made on the basis of "sufficient evidence." These express statements are found in Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). Thus, the members of the Agreement have specifically denoted two instances in which there must be a certain quantum and quality of evidence - *despite the fact that the record may be incomplete.*

41. Japan contends that the evidentiary standard applied in preliminary dumping determinations (as provided for in Article 7.1) is the same as that to be applied in determinations made under Article 10.7. This argument is incorrect. Normally, provisional measures may not be applied until

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[46] *See* Article 10.1 ("Provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 {preliminary determination of dumping and injury} ... enters into force, *subject to the exceptions set out in this Article.*") (emphasis added); and Article 7.2 ("Withholding of appraisement is an appropriate provisional measure, ... as long as the withholding of appraisement is subject to the same conditions as other provisional measures.").

[47] Japan implies, with the use of the word "generally" that it is not taking an absolute position (which would be clearly contrary to the Agreement). *See* Japan's Answer to Panel Question 11 at para. 37. However, Japan does not provide any example of a situation in which an administering authority would have *more* evidence prior to the preliminary determination of dumping than was on the record for this case. In fact, the Department in this case not only relied on the overwhelming evidence in the petition, but conducted external research, corroborated the data in the petition, and relied upon the USITC preliminary finding of threat of injury.

parties have had the opportunity to submit evidence and comments, and the administering authority has made a preliminary determination of dumping and injury.[48] An exception to this rule, however, is found in Article 10.7, which provides simply that withholding of appraisement or other necessary measures may be taken "after initiating an investigation" as soon as there is "sufficient evidence." It does *not* state that the measures must await a preliminary determination of dumping, nor does it require that the decision occur after the receipt of information from respondents. Rather, in order to preserve the ultimate remedy, it simply states that the measures may be taken "after initiation" if there is sufficient evidence.

42. The US agrees that the evidence necessary to sustain a preliminary critical circumstances finding may be, and indeed often will be, different than that required for initiation of an investigation, even though the standards are the same. The inquiries involved are different, and as such, the evidence that is sufficient for each determination will depend on the factors being considered and the context of the inquiry.[49] As explained above, it is especially notable that the Agreement provides that the evidence simply be "sufficient" in two instances which occur early in the investigative proceedings.

43. Japan suggests that a petition, along with the Department's independent research and analysis, can <u>never</u> serve as a basis for a preliminary determination of critical circumstances, regardless of the strength and quality of the evidence on the record. Japan bases this conclusion on three arguments. First, Japan argues that the reference to "dumped imports" in Article 10.6 requires a preliminary dumping finding as described in Article 7.1. Second, Japan argues that an administering authority cannot possibly make a critical circumstances finding prior to the Article 7.1 finding, because it has not conducted any investigation whatsoever. Finally, Japan argues that the evidence cannot be sufficient prior to an Article 7.1 finding, because the margins are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities." These arguments are without merit.

44. As explained above, Japan's first argument, that a preliminary finding of dumping is required, is contrary to the Agreement because it ignores the existence of Article 10.7, which expressly contemplates that measures may be taken at any time after initiation. Japan's second claim, that the Department has conducted no investigation when making its early critical circumstances finding, is flatly incorrect. The Department indeed investigated the allegations, reviewed the evidence contained in the petition for adequacy and accuracy, supplemented that information with additional relevant data and analyzed and relied upon the USITC's preliminary determination of threat to the domestic industry. Furthermore, Japan implies that the evidence necessary for a preliminary dumping determination is the same evidence that is necessary for an early critical circumstances determination. This position, however, confuses the findings being made. Each determination is based upon distinct factors, and thus, at least in part, involves collection and analysis of different evidence. Finally, Japan's argument that the margins utilized are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities," is disingenuous. *Japan does not contest that the margins are based upon comparisons of <u>actual</u> sales*

[48] *See* Article 7.1 (provisional measures may only be taken after "parties have been given adequate opportunities to submit information and make comments" and "a preliminary affirmative determination has been made of dumping....") and 10.1 (provisional measures are to be applied in accordance with Article 7.1 *subject to the exceptions set forth in Article 10*).

[49] This distinction was recognized by the Panel in *HFCS.* In that case, the panel explained that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation." Panel Report on *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From (HFCS) the United States,* adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.94.

offers by NKK and NSC to US customers and actual transactions in the home market.[50] Indeed, Japan has not rebutted the legitimacy of any of the specific evidence contained in the petition. Rather, Japan simply argues that, because it is contained in the petition, it is meaningless. This absolute argument should be rejected by the Panel.

45. In fact, the evidence supporting each element of the preliminary critical circumstances determination in this case was sufficient, and indeed, substantial. Japan repeatedly claims that, "the only evidence USDOC had was the petition."[51] However, while much of the evidence was taken from the petition (after being corroborated and reviewed for accuracy), the determination did not rest entirely on the petition data. Japan cannot contest that the Department not only corroborated the petition evidence with external research sources (Internet trade publications and general news articles, US Customs Service data, and American Iron and Steel Institute data),[52] but also relied significantly on the USITC preliminary determination of threat to the US industry. Furthermore, Japan does not suggest that the plethora of newspaper articles, consultant reports, and industry publications attached to the petition are unreliable or otherwise unrepresentative. Again, Japan simply states that, because they were contained in the petition, they are "mere allegations."

46. Although Japan repeatedly argues that the findings made were not based upon "sufficient evidence," Japan has never addressed the specific information that was on the record to support the critical circumstances finding. For example, with respect to importer knowledge of dumping and consequent injury, as discussed above, the record contained *actual* evidence of significantly high margins, and widespread, publicly distributed, media, consultant, and industry reports detailing the massive dumping and the negative impacts on the domestic industry.[53] Japan cannot possibly claim

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[50] *See* Initiation Checklist, at 7 (**US/B-18)**. Furthermore, the calculation of the dumping margins that were based upon constructed value were calculated using *NSC's and NKK's own financial statements. Id.*

[51] *See, e.g.,* Japan's Answer to Panel Question 13 at para. 37 (emphasis added).

[52] *See* Initiation Checklist at 70-71 **(Exh. US/B-18)**.

[53] *See* **Exh. US/B-40(b) and (c)**. The Wall Street Journal, *"Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing,"* ("In the latest month, imports took 34 per cent of the domestic market for steel .... That lost market share has hit US steelmakers hard, particularly in the last three months as the US industry pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earning estimates for the third and fourth quarters. .... 'Japanese steel is just murdering' the US steelmakers."); Metal Bulletin (24 Sept. 1998) (" The July figure fully supports our industry's contention that massive levels of steel are being dumped."); Metal Bulletin (7 Sept. 1998) ("Nucor has cut production ... in response to low market prices ... because of market turmoil in the wake of a flood of cheap imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.... The collapse in steel prices on the world steel market this year has been almost unprecedented."); Japan Economic Newswire (19 Sept. 1998) ("officials of major US steelmakers ... made an appeal for the US government to take measures against what they view as unfair steel shipments from Japan ...."); Morgan Stanley, Dean Witter - Industry Report (21 July 1998) ("hot-rolled imports are coming in at ... 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in late September or early October."); The Wall Street Journal, *"Rising Imports Distress US Steelmakers,"* (8 Sept. 1998) ("And while it took months for major effects of inflows from overseas to show up in the US, industry analysts and executives now say they definitely have. 'The pricing has just collapsed....'"); American Metal Market (11 Sept. 1998) ("For the second time in less than two months, Nucor Corp., ... is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("We expect the US flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998."); Wall Street Transcript Corporation - Industry Report (20 July 1998) ("Imports were simply so large, and prices at which the entered markets so low, that steel pricing was compromised"); CRU Steel Monitor (April 1998) ("This decline in corporate profitability is being exacerbated by the Asian financial crisis.").

that the importers (many of which are sophisticated, large corporations) were not aware, or should not have been aware of the information reported in the Wall Street Journal, the PaineWebber reports and the other steel industry publications.[54] What is more, with respect to knowledge of injury, the Department also looked to the injury information in the petition (charts and industry data demonstrating drastic decreases in prices and resulting declines in profitability), the 101 per cent increase in imports during the surge period, and the USITC's preliminary determination of threat. As such, Japan's claims that the determination was based solely upon allegations from the petition are unfounded.

47. In sum, an administering authority is not merely capable of making an early critical circumstances determination based upon "sufficient evidence," like that presented here, but such an action is expressly authorized under the Agreement. The Panel should uphold the Department's preliminary critical circumstances determination in this case and the US statute upon which it is based.

PART 2: INJURY

I. THE CAPTIVE PRODUCTION PROVISION, ON ITS FACE AND AS APPLIED IN THIS CASE, IS CONSISTENT WITH THE OBLIGATIONS IN THE ANTI-DUMPING AGREEMENT

A. THE DIRECTION IN THE CAPTIVE PRODUCTION PROVISION TO "FOCUS PRIMARILY" ON THE MERCHANT MARKET PERMITS AN OBJECTIVE ANALYSIS OF RELEVANT ECONOMIC FACTORS CONSISTENT WITH ARTICLES 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

48. In arguing that the captive production provision of the United States' anti-dumping and countervailing duty statute on its face violates the Anti-dumping Agreement, Japan faces a high burden which its submissions fail entirely to meet. As GATT and WTO panels have repeatedly stated, only legislation that requires WTO-inconsistent action can itself be WTO-inconsistent.[55]

Japan also argues in its answer to Panel question 15, para. 9, that many of the newspaper articles do not establish knowledge of dumping and injury because they were published just weeks before the petition was filed. According to Japan, this was long after the date that USDOC concluded that importers knew or should have known of the dumping and consequent injury. If, however, the importers had knowledge at an earlier date, this only supports Commerce's finding of knowledge of dumping and injury for purposes of the critical circumstances determination. The Agreement does not specify *when* the importers had to be aware of dumping practices. Rather, it merely inquires as to whether dumping practices "exist," and whether importers should be aware that such dumping would cause injury. The newspaper articles and press releases demonstrate that dumping had been widespread for months and that the effects on the industry were widely apparent. This type of evidence (including both the early and later articles) certainly satisfies the question under Article 10.6(i). (Note, It also appears that Japan's reference the US First Submission Paragraph B-273, footnote 288, is incorrect. This cite should reference Paragraph B-476, footnote 388).

[54] Japan argues that knowledge of dumping cannot be determined without a preliminary dumping finding. Article 10.6 directs the administering authority to determine whether importer *should have known that dumping was occurring and that such dumping would cause injury.* The Agreement does *not* specify how to determine such awareness. Although Japan would prefer a requirement that there be a concise, determined dumping margin, this is simply not necessary under the Agreement. If the Department's method for determining importer knowledge is a permissible interpretation of the Agreement, and if it rests upon sufficient evidence, it must be upheld.

[55] Panel Report on Canada - Measures Affecting the Export of Civilian Aircraft, adopted on 14 April 1999, WT/DS70/R, para. 9.124 ("Canada – Aircraft"), citing the Panel Report on United States -

Panels have found that even legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action.[56] Indeed, these principles apply even where a Member has in fact used the provision to take action inconsistent with its obligations.[57]

49. Here, Japan seeks to have this Panel declare the United States' captive production provision unlawful on its face, even if the Panel should find that the determination by those Commissioners who applied the provision in this case is permissible. However, Japan's challenge must fail if the United States establishes, as it believes it has, that those three Commissioners who invoked the provision in the underlying investigation applied the provision in a way consistent with the Anti-dumping Agreement. If their findings here are consistent with the Agreement, the Panel should find that the provision that they applied is consistent as well.

50. Indeed, Japan's arguments in this proceeding appear to rest on the premise that the Panel should impose its own interpretation of US law in order to find the captive production provision contrary to the United States' obligations. This, however, is not the Panel's task. When examination of a law is solely for the purpose of determining whether a member meets its WTO obligations, the panel does not interpret the party's law "as such", the way it would, for instance, interpret provisions of the covered agreements.[58] Rather, a panel is called upon to establish the meaning of the provision as a factual element and to determine whether the factual element constitutes conduct contrary to WTO obligations.[59] When an interpretation of municipal law is at issue, a panel cannot assume that municipal authorities will choose an interpretation which is inconsistent with their international obligations.[60] This principle should apply all the more forcefully in the interpretation of an agreement, like the Anti-dumping Agreement, which specifically requires that independent judicial review of administrative decisions be available[61], an avenue that Japanese producers have declined to take in this case, and explicitly recognizes that Members may interpret the Agreement differently.[62] Thus, even if the application of the provision in this case were not consistent with the Anti-dumping Agreement, Japan must establish that a United States court could not interpret the provision in a manner consistent with the Agreement.

51. The captive production provision of United States law is entirely consistent with the Anti-dumping Agreement. The provision provides that, when certain prerequisites are met, the Commission shall "focus primarily" on the merchant market in its consideration of market share and financial indicators.[63] Japan ascribes two meanings to the "focus primarily" language that conflict

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Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted on 4 October 1994, BISD 41S/131, para 118 ("United States – Tobacco").

[56] Panel Report on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 138 ("US – Superfund").

[57] Panel Report on EEC - Regulation on Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132 ("EEC – Parts and Components"), at paras. 5.9, 5.21, 5.25-5.26.

[58] Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents"), WT/DS50/AB/R (19 December 1997) at para. 65, quoting Certain German Interests in Polish Upper Silesia, 1926, PCIJ Rep., Series A, No. 7, p. 19.

[59] *India-Patents* at para. 65.

[60] Under the municipal law of the United States, if a statute that an authority is charged with administering permits multiple interpretations, a court will uphold an authority's construction of the statute if that construction is reasonable; the interpretation's conformity with international obligations is a basis for finding the authority's action to be reasonable. *See, e.g., Chaparral Steel Corp. v. United States*, 901 F.2d 1097, 1101, 1103 n.5 (Fed. Cir. 1990) (**Exh. US/C 24**).

[61] Anti-dumping Agreement, Article 13.

[62] Anti-dumping Agreement, Article 17.6.

[63] Sec. 771(7)(C)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(C)(iv). (**Exh. Jp-4(e)**).

with the plain reading of the statute and that are not meanings the USITC has ascribed in applying the provision. In so doing, Japan is attempting to mischaracterize and reshape United States law in order to make it fit Japan's idea of a violation of the Anti-dumping Agreement. Japan cannot make out its case in this manner.

1. "Focus primarily" on the merchant market speaks to a segmented market analysis, but not to one where the USITC focuses exclusively on a particular market segment

52. The statutory provision at issue requires the USITC to focus *primarily* on the merchant market in evaluating certain factors. By definition, therefore, there is some *other* focus that the USITC should have as well. That is, under the statute's plain meaning, the inquiry does not end with examination of the merchant market. The statutory mandate that the impact upon the industry as a whole be assessed continues to be the overarching concern in the analysis.

53. Perhaps recognizing the flaw in its early reading of the statute, Japan retreats from its initial position that the statute mandates a focus exclusively on the merchant market. It now argues, instead, that, when the USITC focuses upon the merchant market, it improperly uses the entire industry as the other point of focus. According to Japan, an appropriate segmented analysis would look at the merchant market and the captive market separately.[64] Whether or not Japan's proposed alternative analysis would be consistent with the Agreement is not at issue here. "Conformity [with WTO obligations] can be assured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved."[65]

54. By advancing its alternative, Japan implicitly acknowledges that there are various ways to consider the fact that the performance of each segment of an industry may influence the performance of the whole industry differently. Japan has not articulated any basis for concluding that looking at the merchant market as a step in considering the market as a whole is less in accord with the Anti-dumping Agreement than the separate merchant/captive market analysis Japan suggests as an alternative. Indeed, Japan seems to concede that the US statute's initial focus on the segment in which imports primarily compete with domestic product is, as the *High Fructose Corn Syrup* panel suggested, calculated to allow the authority "to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry."[66] Japan's approach might also serve the same end; this would not mean, however, that its approach would be required.

55. Moreover, Japan does not show that the alternative approach it would prefer would be precluded by the United States statute, a burden that it must carry if it is to establish that the law is impermissible on its face. As the United States has previously indicated, a requirement to "focus primarily" on a certain segment does not prohibit other focuses, including on other segments. Moreover, under the United States statute, in evaluating the impact of dumped imports, the USITC is required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States".[67] In short, the form of segmented analysis preferred by Japan is neither required by the Agreement nor precluded by the United States statute.

56. As the United States has previously discussed, what the United States statute does require is a focus on the entire domestic industry after the merchant market is examined. This approach is clearly

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[64] Japan's Answer to Panel Question 19 at para. 70.

[65] Panel Report on *United States–Sections 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, at para. 7.24.

[66] See Panel Report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.154.

[67] 19 U.S.C. § 1677(7)(C)(iii).

consistent with the principle that the "determination of injury" under Article 3 concerns effects of dumped imports on the industry as a whole. In any event, consideration of the captive market data is inherent in such an analysis. Because the data for the entire industry incorporated data for the captive market, the side-by-side discussion of the merchant market and the entire industry inescapably reflected any similarities or differences between the merchant market and the captive market.

57. Contrary to Japan's claim that the USITC does not "relate its merchant market findings to producers as a whole"[68], the determination here shows how a primary focus on the merchant market for certain factors is consistent with such an analysis of the industry as a whole. In examining the volume of imports, the USITC set forth data and made parallel findings regarding the merchant market and the entire industry, finding on the basis of both that the volume of and increase in dumped imports was significant.[69] The USITC's findings as to the impact of dumped imports begin with an analysis that does not focus on the merchant market *per se*. Rather, the USITC found that the increased volume and market share of dumped imports led to the US industry's increased capacity becoming excess capacity almost immediately.[70] By these findings, the USITC's impact analysis tied its findings on market share, to which the captive production provision applies, to a key indicator of the performance of the industry as a whole -- capacity utilization -- to which the provision does not apply.

58. In analyzing financial performance, the USITC again made parallel findings, which showed that declines in the industry's performance on merchant market sales were mirrored by overall declines. Japan's claim[71], that the USITC discussed the data for the entire market only in its staff report, not in its determination, thus is belied by the face of the determination itself. The USITC found these trends not to be consistent with the industry's improvement in productivity and the rise in apparent consumption in the United States, both of which are overall measures not particular to the merchant market.[72] The USITC amply tied its findings concerning the merchant market segment to the industry as a whole.

59. The USITC's analysis, moreover, assured that the causal relationship that it saw between developments in the merchant market and the condition of the industry as a whole were not in fact due to developments in the captive sector of the industry. It compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition. It found their operating income to be falling both for merchant market sales and overall.[73] The USITC then compared the operating results of integrated producers to those of minimills. The USITC recognized that the minimills had "greater dependence on the merchant market, where imports are concentrated."[74] If this comparison had shown that minimills were performing as well or better overall as integrated producers, or that minimills were not similarly declining in performance, it might have indicated that the decline in the industry operating figures was not due in particular to the effects of imports. However, the USITC found minimills to be experiencing a "worse financial performance", evidently due to their greater exposure to import competition.[75] In short, contrary to Japan's contention, the USITC explicitly took into account that captive production is relatively shielded from the effects of imports. It nevertheless found that the record evidence supported the conclusion that the effects of imports in the merchant market adversely affected the industry as a whole.

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[68] Japan's Answer to Panel Question 19 at para. 66.
[69] USITC Views at 12-13 (**Exh. US/C-1**).
[70] USITC Views at 17.
[71] Japan's Opening Statement at para. 21.
[72] USITC Views at 18.
[73] USITC Views at 19.
[74] USITC Views at 19.
[75] USITC Views at 19.

60. As the USITC's determination shows, the captive production provision is entirely consistent with the Agreement. As the USITC's determination further shows, it examined the relevant economic factors and, on an objective basis, found a causal relationship between developments in the merchant market segment and the injury suffered by the industry as a whole.

2. "Focus primarily" does not dictate that any particular weight be given to the merchant market in the USITC 's evaluation of the relevant factors

61. Japan now states that it takes issue only with the particular analysis that it views as required by the captive production provision, not that an analysis of the merchant market violates the Agreement. In this regard, Japan acknowledges that it is permissible to consider "as a condition of competition, the merchant versus captive portions of the [market]."[76] It frames its challenge, therefore, in terms of the "weights" it believes the statute requires to be given to "factors."

62. It is unclear, however, whether Japan is arguing that the captive production provision requires the USITC to give weight to one factor over another or to give inappropriate weight to the merchant market segment. In either case, Japan misreads the captive production provision and misunderstands the USITC's application of the provision in this investigation.

63. To the extent that Japan claims the captive production provision requires greater weight to be given to some delineated factors over others, there is no basis for the claim. The "focus primarily" language does not require that emphasis be placed on any factor. The captive production provision gives direction to the USITC "*in determining* market share and the factors affecting financial performance"[77] (emphasis added). It therefore only implicates the evaluation *of those factors* and not the evaluation of *how those factors* relate to any of the other factors that the USITC must consider. The provisions of the Anti-dumping Agreement[78] and the US statute[79] that permit the USITC to give the weight it deems appropriate to any relevant factor is not affected by the terms of the captive production provision. As has been seen, in this case, the USITC gave emphasis to the effect of dumped imports on capacity utilization, a factor not implicated by the provision, in establishing the impact of dumped imports on the domestic industry. Japan's allegation that the captive production provision impermissibly constrains the USITC's ability to objectively assess all the relevant economic factors is belied both by the face of the statute and the determination at issue here.

64. To the extent that Japan is arguing that, in evaluating certain factors, the captive production provision requires that undue weight be given to the merchant market, this argument too should not hold sway. The USITC has not given any indication that the captive production provision requires it to place more weight on the merchant market data for any factor than on the data for the industry as a whole. As is reflected in the USITC's determination here, the requirement to "focus primarily" on the merchant market in establishing certain factors does not necessarily mean more than to collect and make specific findings based on merchant market data that, which always possible, might not otherwise be required. It does not mean that, having examined that data, the USITC is required to give weight to that data over what other evidence might show. And, indeed, on each relevant factor concerning market share and financial indicators, the USITC assured that it examined and gave weight to data for the industry as a whole.

65. Such a requirement is neither, as Japan asserts, meaningless, nor a violation of the Anti-dumping Agreement. The captive production provision requires the gathering and analysis of

[76] Japan's Opening Statement at para. 23.
[77] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).
[78] Article 3.4 of the Anti-dumping Agreement.
[79] § 771(7)(E)(ii) of the Act, 19 U.S.C. § 1677(7)(E)(ii) (**Exh. Jpn-4(e)**).

evidence that the statute might not otherwise require of the USITC. The provision may be said to require, as a matter of municipal law, a form of segmented analysis such as that which the *HFCS* panel indicated was permitted under the Anti-dumping Agreement. This does not mean that, even as to the factors to which the provision applies, the USITC must give the merchant market segment data weight over contrary evidence on which it otherwise may also focus. The provision does not prevent an objective examination of all the information collected.

66. Japan's distrust of special examination of merchant market trends is based on the false premise that such an examination will necessarily skew data concerning the domestic industry's performance unfavourably to foreign producers.[80] This is not the case. First, as has been seen, the USITC nevertheless collects and assesses the data concerning the entire industry. Second, an examination of data particular to the segment where competition primarily occurs may disclose that trends concerning the industry as a whole, which might otherwise appear to disclose a connection between imports and injury, are misleading. Japan's allegation assumes that the domestic industry will always fare worse in the merchant market than it does in the captive market. The industry, however, could be performing worse in the captive market than in the merchant market. In that scenario, a failure to look at the merchant market may exaggerate the effects of dumped imports.

67. The captive production provision in no way mandates action in conflict with the Agreement. It does not preclude an objective evaluation consistent with the requirement of the Agreement, as well as US law, that the assessment be made, to the extent possible, in relation to the dumped imports' impact on domestic producers of the like product "as a whole". The law on its face does not constitute conduct by the United States contrary to its WTO obligations.

II. THE USITC'S ANALYSIS IN THIS CASE WAS IN ACCORDANCE WITH THE ANTI-DUMPING AGREEMENT

A. THE USITC PERFORMED AN OBJECTIVE EVALUATION OF ALL THE RELEVANT ECONOMIC FACTORS OVER THE ENTIRE PERIOD OF INVESTIGATION

68. Despite the fact that the USITC's determination clearly contains an analysis of data over the three year period of investigation, Japan continues to claim that the USITC did not evaluate data about the impact factors over the entire period.[81] By simply reading the USITC's determination, this panel can see that Japan's claim is patently false. With respect to the impact factors in particular, despite Japan's allegations to the contrary, the USITC explicitly evaluated capacity, capacity utilization, productivity, unit costs of goods sold, unit values, employment, wages, and capital expenditures from 1996 to 1998.[82] The USITC plainly examined trends over the full period investigated.

69. Japan then narrows its objection even further. From focusing on the impact factors, it turns to arguing that the USITC did not discuss the fact that the financial performance of the industry as a whole purportedly improved over the three year period of investigation.[83] Once again, this claim is specious. The USITC discussed three year trends of financial indicators, expressly noting that the cost of goods sold declined by more than the unit values over the entire period of investigation.[84] The USITC also found that the domestic industry "maintained an operating profit."[85] As the USITC explained, however, other evidence made this profitability less important to its determination.

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[80] Japan's Opening Statement at para. 21.
[81] Japan's Answer to Panel Question 18 at para. 60.
[82] USITC Views at 17-18 nn.100-101.
[83] Japan's Answer to Panel Question 18 at para. 65.
[84] USITC Views at 18 n.100.
[85] USITC Views at 18.

70. The fact that the USITC *also* examined the data from 1997 to 1998 does not detract from this full-period analysis. Japan attempts to characterize the decision of the USITC to consider the 1997 to 1998 data as a decision to reject an analysis of trends over the entire period. Japan's account does not comport, however, with what the USITC did. Consistent with Article 12.2 of the Agreement, the USITC provided its "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." In particular, importers and exporters before the USITC, like Japan here, contended that the USITC should rely on 1996-98 performance data to find the domestic industry not to be injured, rather than on the 1997-98 trends.[86]

71. The USITC's explanation of why it chose to rely on 1997-98 data rather than on the 1996-1998 data evidences the USITC's consideration of the 1996-98 data. Article 3.4 does not require that an authority's determination restate every index having a bearing on the state of the industry. Rather, Article 3.4 states that the examination of the impact of dumped imports shall include an "evaluation" of all relevant indices. The USITC's statement of its reasons for rejecting respondents' arguments concerning the 1996-98 data demonstrates its evaluation of that index.

72. Japan's argument confuses the USITC's justification for comparing the data from1997 to 1998 with an expression of its intention not to examine data over the 1996 to 1998 period. To the contrary, the USITC's justification for making a comparison between the 1997 and 1998 data reflected its evaluation of the probative value of the 1996-98 data in view of the changes in demand in the market that had occurred since 1996. Indeed, the USITC based the decision to rely on 1997 to 1998 data on the fact that "US apparent consumption increased throughout the period of investigation, both *from 1996 to 1997* and from 1997 to 1998, reaching record levels."[87] The USITC's determination shows that it evaluated "trends between the first and third years of a period that conflict with trends between the second and third years of a period," which Japan claims are "especially relevant."[88] What Japan couches as an argument that the USITC did not examine 1996-98 data is no more than a challenge to the weight that the USITC gave to 1997-98 data;[89] the weight of evidence, however, is for the authority to decide.

73. Japan cites *Argentina - Footwear*[90] as support for its position that the USITC improperly evaluated the data from 1997 to 1998 instead of comparing 1996 to 1998.[91] In fact, this decision shows the flaws in the Japanese position. *Argentina - Footwear* expressly rejects the notion that an authority should simply make a comparison of the data between the beginning and endpoints of the period of investigation. It states that trends within the period are an important part of any decision.[92] Thus, *Argentina - Footwear* in fact supports the USITC's determination.

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[86] USITC Views at 18.

[87] USITC Views at 18.

[88] Japan's Answers to Panel Question 18 at para. 60.

[89] Cf. United States -- Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87) ("Atlantic Salmon"), at ¶ 539.("Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 3:3 [now Article 3.4] that the positive developments reflected in the indicators referred to by Norway could not per se have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury.") (emphasis in original).

[90] Report of the Appellate Body, *Argentina -Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), adopted on 12 January 2000, WT/DS121/AB/R.

[91] Japan's Answer to Panel Question 18 at paras. 62-63

[92] *Argentina - Footwear* at para. 129.

74. Further, this panel should note that Japan makes inconsistent arguments about the appropriate time frame in an analysis of injury. With regard to the financial indicators, it is claiming that the USITC erred because it considered intervening trends, but when it discusses alternative causes of injury, it is alleging that the USITC erred because it did *not* consider trends within the period.[93] In the latter context, it argues that the USITC improperly did not compare data for the first half of 1998 with data from the second half of 1998 in order to fully appreciate the effect of the General Motors strike on the domestic industry.[94] Not only is Japan incorrect in stating that the USITC did not consider this time frame, but, in making this argument, it is conceding that an evaluation of trends within the period may, under certain circumstances, be more probative.

B. THE USITC PROPERLY DETERMINED THAT DUMPED IMPORTS WERE CAUSING MATERIAL INJURY TO THE DOMESTIC INDUSTRY

1. The USITC demonstrated a causal relationship between dumped imports and material injury

75. Contrary to Japan's argument, which it raised for the first time in its opening statement at the first panel meeting, the USITC amply established the causal relationship between dumped imports and the injury to the domestic industry. As has been seen, the USITC found that the increased dumped imports led the domestic industry to have excess capacity. Further, for example, it found that "at the same time as subject import volumes and market share increased dramatically, the domestic industry's market share declined;"[95] "domestic producers were prevented from participating in the increasing demand as subject imports increased their market share",[96] "declines [in prices] were most precipitous in the third and fourth quarters of 1998, at a time when the volume of subject imports was peaking;"[97] and "unit values fell significantly in 1998 as subject imports increased in volume and market share."[98] Such findings demonstrate "a causal relationship between the dumped imports and the injury to the domestic industry" as required by Article 3.5.

(a) The USITC properly found a correlation between the dumped imports and the price declines

76. Japan points to a three-month lag time between orders for Japanese product and its importation.[99] The existence of this lag time does not, however, defeat the USITC's conclusion that the increase in imports when price underselling increased supported the causal relationship between dumped imports and injury. First, this nexus was not established solely on the basis of a relationship between imports and prices in a particular quarter. Rather, the USITC found the instances of underselling to have increased in 1997 and 1998 as opposed to 1996, concurrently with a rise in import volume and market share and a decline in industry annual performance indicators.[100] As the USITC concluded, full year data was sufficient to support its affirmative determination.[101]

77. Moreover, evidence concerning the nature of pricing in the market supported the USITC's reliance on the fact that price declines were most precipitous in the third and fourth quarters of 1998, when import volumes peaked. The fact that some imports in those quarters were made pursuant to earlier contracts does not mean that the prices of those imports were not set when the importations

[93] First Submission of Japan at para. 275.
[94] First Submission of Japan at para. 277.
[95] USITC Views at 12.
[96] USITC Views at 12.
[97] USITC Views at 14.
[98] USITC Views at 18.
[99] Japan's Answer to Panel Question 47 at para. 107.
[100] USITC Views at 14-15.
[101] USITC Views at 20.

were made. To the contrary, during the hearing, respondents' witnesses testified that, in many cases, purchasers demanded lower prices after a contract had been negotiated, threatening to cancel the order if the prices did not come down.[102] In fact, Japanese respondents testified that, if prices in the market fell between the time of an order and the time scheduled for delivery, the prices were renegotiated.[103] This evidence shows that the lag time for orders does not translate into a lag time for price effects of imports. Therefore, consistent with the Japanese parties' own witnesses, the correlations that the USITC drew between the time of entry of the imports and the declining prices for hot rolled steel in the United States are not affected by the lag time between date of order and date of delivery.

(b) The USITC determined that the dumped imports were causing material injury in accordance with Article 3.5 of the Anti-dumping Agreement.

78. As the United States has discussed in its answer to the Panel's questions[104], the phrase "imports are causing material injury" had been interpreted under the Tokyo Round Anti-dumping Code not to require that an authority isolate the particular quantum of injury due to imports from the injuries due to other causes and determine that quantum of injury to be "material". In adopting that phrase in Article 3.5, the negotiators of the Anti-dumping Agreement reflected that they would not change that conclusion. Rather, adopting also the phrase "a causal relationship", they indicated that a demonstration of causation must show a connection between the effects of imports and material injury, not that dumped imports are the only factor so connected. Such a demonstration, consistent with the requirement not to attribute to dumped imports the effects of other causes, must not mistakenly rely on indicators of such a relationship that are in fact due to other causes of injury.

79. Japan nevertheless argues that the USITC violated the Agreement by stating that "the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance."[105] The USITC's legal conclusion was that the domestic industry "is materially injured by reason of LTFV [*i.e.*, dumped] imports of hot rolled steel from Japan."[106] Japan does not contend that this conclusion differs from the conclusion that dumped imports are causing material injury.

80. The USITC's use of the phrase "materially contributed" in effect recognizes that, although in using the phrase "a causal relationship" Article 3.4 does not establish a precise degree of relationship that must be demonstrated between the effects of imports and injury, that relationship must not be trivial. Use of the phrase "materially contributed" is entirely in accord with the ordinary meaning of the term "cause." *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." *Webster' s* makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> CAUSE indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[107]

In short, the phrasing of which Japan complains is simply one way of restating the term "cause."

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[102] Transcript of 4 May 1999, Hearing at 242 (testimony of Mr. Curtis) (**Exh. US/C 25**).
[103] Transcript at 246-47 (testimony of Mr. Stapp).
[104] US Answer to Panel Question 46.
[105] USITC Views at 20-21.
[106] USITC Views at 23.
[107] Webster's Third New International Dictionary (Unabridged) at 356 (1981) (**Exh. US/C 26**).

81. In considering the adequacy of the USITC's demonstration of this causal relationship, it is instructive to compare the findings that it made here to those upheld by the panel in *Atlantic Salmon*, whose analysis was before the negotiators of the Anti-dumping Agreement. In *Atlantic Salmon*, the panel found that the "USITC had not failed to consider whether there had been a significant increase in the volume of subject imports."[108] The USITC's decision that the panel upheld discussed the existence of a surge in imports from Norway, but also found that market penetration of these dumped imports declined.[109] In the current case, not only did dumped imports double in volume; they doubled their market shares as well.[110]

82. As to price effects, the *Atlantic Salmon* panel found that, "on its face, the text of the USITC determination demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway."[111] As part of its analysis in that case, the USITC concluded that, "[a]lthough other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a role in the price decline."[112] The *Atlantic Salmon* panel reached this conclusion notwithstanding the fact that in that case the dumped imports persistently oversold the domestic product.[113] In the current case, the USITC found that imports that increased by 10 million tons over 1997 and 1998, including 7 million tons in 1998, and increasingly undersold the US product in that period, had significant price effects. Japan's argument that a strike at General Motors that affected no more than 685,000 tons of product over a period of five weeks had significant price effects only reinforces the USITC's conclusions about the price effects of the massively increased imports.

83. The panel in *Atlantic Salmon* also upheld the USITC's determination about the negative financial performance of the US industry[114] when the USITC found, "After posting a large operating loss in 1987, the domestic industry recorded an overall operating profit in 1988. However, the financial state of the US Atlantic salmon industry declined precipitously in 1989."[115] The USITC found a similar end-of-period trend in operating income in this case.

84. In short, the United States submits that, in order to establish that the USITC's demonstration of a causal relationship between dumped imports and material injury in this case violates the Anti-dumping Agreement, Japan must establish that the Anti-dumping Agreement requires an analysis significantly different from that upheld under the Tokyo Round Code. Japan has not attempted such a showing, and cannot make it.

III. THE USITC CONDUCTED THE PROCEEDINGS IN THIS INVESTIGATION IN AN UNBIASED AND FAIR MANNER

85. The United States has previously addressed Japan's argument that the USITC Commissioners should not have requested at the USITC's hearing that domestic producers provide information that they had not previously provided. The United States will not here reiterate its points on the matter. Japan now, however, takes issue with the USITC's acceptance of that submission because, it claims, "respondents literally had less than a week to comment on the corrected figures, and then only briefly,

[108] *Atlantic Salmon* at para. 501.
[109] *Atlantic Salmon* at para 499.
[110] USITC Views at 12.
[111] *Atlantic Salmon* at para. 514.
[112] *Atlantic Salmon* at para. 514.
[113] *Atlantic Salmon* at para. 518.
[114] *Atlantic Salmon* at para. 538.
[115] *Atlantic Salmon* at para. 535.

as final comments are strictly limited to fifteen pages in length per respondent country."[116] This contention fails to make out a claim under the Agreement.

86. As reflected in the final USITC's staff report, US producers submitted the requested data before the report issued, and that information was incorporated into the report.[117] The staff report was issued to the parties on 27 May 1999. In fact, the US producers had submitted to the USITC and served on the other parties the final piece of information on this point several weeks prior to issuance of the final report. Parties submitted their final comments on the information obtained in the investigation to the USITC on 7 June 1999. Thus, respondents had several weeks to prepare their comments on this information, not the seven days that Japan claims.

87. Further, respondents were not limited to a fifteen page submission. On 2 June 1999, respondents requested to file more than fifteen pages for their final comments. They made this request, not because of an issue with the information in the record, but because of the fact that one counsel was representing producers from several different countries.[118] In fact, respondents' final comments were 29 pages long.[119]

88. In any event, Japan's argument does not establish that the USITC in any way violated the applicable provision concerning parties' opportunity to comment on information. The relevant provision is Article 6.9, which provides that authorities, before a final determination is made, shall inform all interested parties of the essential facts under consideration. Article 6.9 further provides, "Such disclosure should take place in sufficient time for the parties to defend their interests."

89. Notably, Article 6.9 does not define what constitutes a "sufficient time" nor does it require authorities to afford parties unlimited numbers of pages in which to present their arguments. In the current case, respondent interested parties in fact commented on the US producers' data in final submissions. None complained that either the time or pages that they were afforded for comment was insufficient. None complained that, with more time or space, they would have had more to say. None requested that, as its rules allow, the USITC make an exception to the limitations set forth in its normal procedures.[120] They only requested clarification of the rule on comments, and they never made reference to the domestic industry's data in that request. In short, the Japanese respondents having failed in the administrative proceedings to object to the time and space they were given, Japan's argument at best consists of the contention that a week for response and a limitation of the number of pages in which to make that response is *per se* insufficient. Nothing in the Agreement supports such a contention.

90. Indeed, Japan should be barred from making such a contention. In arguing the USITC failed to afford parties sufficient time to defend their interests, that contention is beyond this Panel's terms of reference. Japan's panel request does not state any claim arising under Article 6.9 or mention that Article at all. Thus, unable to make a substantive claim under Article 6.9, Japan should not be permitted to substantiate this claim through vague and unsupported allegations of bias.

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[116] Japan's Answer to Question 44 at para. 98.
[117] USITC Views at VI-1.
[118] 2 June 1999 letter to Chairman Bragg (**Exh. US/C-27**).
[119] Selected pages from Respondents' Comments (**Exh. US/C-28**).
[120] *See* 19 C.F.R. §§ 201.4(b) & 201.14(b)(2) (**Exh. US/C-29**).

CONCLUSION

91. For the foregoing reasons, the United States requests that the Panel reject Japan's claims in their entirety.

ANNEX C-3

Letter from the United States to the Chairman of the Panel

(21 September 2000)

The United States has raised a preliminary objection to Japan's submission to the Panel of factual information not made available to the US authorities during the antidumping duty investigation, i.e., extra-record evidence. In its questions to the United States, the Panel asked the United States to list the exhibits that should not be considered by the Panel because they are extra-record evidence. The United States responded on 6 September. Since the time of that response, the United States notes that Japan has put before this Panel, in its second submission of 13 September, two additional pieces of extra-record evidence that should not be considered by the Panel.

First, at note 353, Japan cites profit figures from an annual report of a US producer. Japan apparently admits that the annual report was not submitted to the US International Trade Commission ("USITC"), but states that purportedly similar information was given to the USITC. As the United States has previously made clear, we have no objection to Japan's use of any information presented to the USITC, with respect to "injury" issues, but ask that the Panel disregard this new, extra-record evidence.

Second, Japan's exhibit JP-105 contains information from two web sites, described at note 372 of Japan's second submission. Neither these web sites nor their content were presented to the USITC during the course of the antidumping investigation. In addition, Japan retrieved these web sites on 5 September 2000, as the date on the pages demonstrates. Therefore, the information contained in those documents may not even be relevant to the time period under investigation, and may not even have existed at the time of the investigation.

We ask that the panel disregard the above extra-record evidence contained in Japan's second submission.

The United States is providing a copy of this submission directly to the Government of Japan.

ANNEX C-4

Letter from Japan to Chairman of the Panel

(25 September 2000)

On 21 September 2000, the United States filed a letter with your office registering its objection to certain evidence referenced in Japan's Second Submission. Japan believes that the items to which the United States now objects are properly before the Panel, for the following reasons:

The information contained in footnote 353 of Japan's Second Submission is from the 1999 annual report of Steel Dynamics Inc. ("SDI"). During the course of its investigations, USITC requests the annual reports of domestic producers in their questionnaires. Specifically, Question III-4 of the domestic producer questionnaire issued in the hot-rolled steel case requested the producers to submit their annual reports if they were not available on the internet.[1] (While the staff report does not state which domestic producers submitted completed questionnaires, it can be assumed that SDI did so given that it was named as a petitioner.[2]) Therefore, although USITC's confidential record has not been made available to the Panel, it is safe to assume that the information cited in footnote 353 - SDI's operating profits for 1997 and 1998 - was contained in the annual report(s) accompanying SDI's questionnaire response. Given that this 1997 and 1998 data is the only information referenced in footnote 353, it is irrelevant whether the 1999 annual report itself was on the record (Japan did not provide the entirety of the 1999 annual report as an exhibit to its Second Submission).

The documents in Exhibit JP-105 merely show that Lone Star Steel and Newport Steel specialize in supplying hot-rolled steel sheet for pipe and tube production. Question II-23 of USITC's domestic producers' questionnaire asked each company to report the percentage of its shipments devoted to pipe and tube products.[3] Japan admits that, unless Lone Star and Newport submitted questionnaire responses, USITC might not have had record information before it to suggest that they specialized in hot-rolled steel for pipe and tube production.

Neither producer was a petitioner, and the public staff report gives no indication that either firm returned a questionnaire response to the staff. The staff report does, however, identify both companies as hot-rolled steel producers[4], and it is a matter of public record that both companies specialize in pipe and tube production, as demonstrated by their websites. Further, Japan only offers Lone Star Steel and Newport Steel as examples of companies dependant on the pipe and tube market that would have been hard hit by the pipe and tube recession. Even without these examples, Japan's logic is irrefutable: Even though overall apparent consumption reached a record high in 1998, companies dependant on the pipe and tube market would have nevertheless lost money for reasons unrelated to subject imports. Nonetheless, USITC completely ignored this alternative cause in its determination.

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[1] **Exh. JP-106** (attached).
[2] *USITC Final Injury Determination*, USITC Pub. 3202 at III-3 (**Exh. JP-14**).
[3] **Exh. JP-106** (attached).
[4] *USITC Final Injury Determination*, USITC Pub.3202 at III-2 (**Exh. JP-14**).

ANNEX C-2

Second Submission of the United States

(13 September 2000)

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1. The United States hereby submits its second written submission in this proceeding. This submission is divided into two parts. First, the United States demonstrates that the US laws and practices concerning the calculation of the anti-dumping duty margins and critical circumstances are consistent with the United States' WTO obligations, and that their application in this investigation was in accordance with these obligations. Second, the United States demonstrates that the US laws pertaining to injury determinations, and their application in this investigation, are in accordance with WTO rules. As indicated in the discussions below, the United States will not here address all arguments that Japan has raised, but rather will address most particularly new positions that Japan has taken in its statements and submissions since the parties' first written submissions.

PART 1: THE ANTI-DUMPING DUTY MARGINS AND CRITICAL CIRCUMSTANCES

I. AN INVESTIGATING AUTHORITY MAY MAKE ADVERSE INFERENCES ABOUT INFORMATION THAT A RESPONDENT IN AN ANTI-DUMPING INVESTIGATION HAS FAILED TO PROVIDE

2. Japan's written answer to the United States' third question indicates that Japan has not moderated its extreme position that, in selecting from the facts available, an investigating authority may never intentionally make an adverse inference about information that a respondent has failed to provide, no matter how blatant the respondent's failure to cooperate.[1] Japan has not offered a *single* instance in which an adverse instance would be permitted - - not even the case in which *its own anti-dumping authorities* made an adverse inference concerning uncooperative respondents.[2] Evidently, Japan has put its doubts aside and decided to stick with its original goal of persuading this Panel to strip from the AD Agreement the incentive it now provides for respondents to cooperate in anti-dumping investigations.[3] We explained in our first written submission how this argument runs contrary to many specific provisions in Article 6.8 and Annex II, and is, in fact, designed to defeat the purpose of those provisions.[4]

3. Japan's final answer is that its position is not really extreme.[5] As supporting evidence, it repeats its argument that "less favourable" outcomes are permitted, provided that they are "coincidental,"[6] but that less favourable outcomes that result from deliberately adverse inferences are punishments not authorized by the Agreement.[7] We explained in our first written submission that this nominal concession is, in fact, no concession at all, and would leave respondents with virtually no incentive to participate in anti-dumping proceedings.[8]

4. Like its token concession about coincidentally adverse results, most of Japan's answers attempt to obfuscate the real implications of its current position. We respond to Japan's specific points below.

5. First, Japan notes that Article 6.8 does not "directly address the level of cooperation provided by a party . . . but merely gives the authority for resorting to facts available, assuming the

[1] First Submission of Japan at para. 58.

[2] First Submission of the United States at Part B, para. 72, n. 147. In its investigation of Cotton Yarn from Pakistan, the Japanese anti-dumping authorities calculated the dumping margin for non-cooperative Pakistani companies by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value of the cooperating suppliers.

[3] First Submission of Japan at para. 59.

[4] First Submission of the United States at Part B, paras. 58 - 71.

[5] Japan's Answer to US Question 3 at para.4.

[6] First Submission of Japan at para. 58.

[7] Japan's Answer to US Question 3 at 5.

[8] First Submission of the United States at Part B, paras. 73 - 76.

circumstances identified in Article 6.8 exist."[9] This is highly misleading. Pretending that Article 6.8 does not concern the level of cooperation of the respondent ignores the fact that Article 6.8 addresses "refus[ing] access to information," "not provid[ing] information," and "significantly impeding" anti-dumping proceedings. The United States' collective characterization of these actions as "failing to cooperate" is fair, to say the least. Thus, when Paragraph 7 of Annex II states that non cooperation may result in a less favourable outcome for the respondent, it is referring to the types of behaviour described in Article 6.8.

6. Second, Japan asserts that "Paragraph 7 of Annex II requires investigating authorities, in selecting the facts available, "to find information that most closely approximates reality."[10] By this, Japan means that adverse inferences are not permitted, because, *presumably*, they do not closely approximate reality. Japan's answer ignores a fundamental point - - the only way for the Department to know what information "most closely approximates reality" is *to obtain the real information.* Where a respondent has failed to provide the real information, an investigating authority *has no choice* but to make inferences about that information.[11] And, when the *reason* that the respondent has failed to provide the real information is that it simply has not cooperated in the investigation, the most reasonable inference about the missing information is that it is adverse to the respondent. This inference is not punitive - - it is the most reasonable assumption about the nature of the missing information under the circumstances.

7. Third, Japan argues that the requirement that investigating authorities use "special circumspection" in selecting information from secondary sources indicates that the use of adverse inferences is precluded. The opposite is true. Special circumspection is required precisely because the secondary information (such as information from the petition) is generally presumed to be adverse to the respondent (although an investigating authority can never know for certain whether it is adverse, because it does not have access to the real information).

8. Fourth, Japan misreads the requirement that investigating authorities "should, where practicable, check the information from other independent sources." This does not mean that the information selected may not be adverse. It means that the inference upon which the selection is based should be reasonable in light of other information on the record. A reasonable adverse inference is one at the adverse end of the range of possibilities, to the extent that range is ascertainable.

9. Fifth, Japan argues that Paragraph 7 of Annex II justifies "not rewarding" a respondent for failing to cooperate, but does not justify making an adverse inference about the data not provided. There are two flaws in this argument. First, a result "less favourable" to a non-cooperating party is not merely the absence of a more favourable result (or reward). Cooperative parties are not "rewarded" with automatically low dumping margins. They receive margins calculated *neutrally* on the basis of the data provided. Therefore, a "less favourable" result than if the party had cooperated is a result that is less favourable than a neutral result - - an adverse result. Second, Japan's argument ignores the obvious point that, if the worst that can happen to a respondent for failing to provide information is the application of neutral gap-filler, no respondent in its right mind would ever submit adverse information to an investigating authority.

10. Sixth, Japan suggests that, where a respondent has been generally cooperative, an investigating authority may not make an adverse inference regarding a specific matter with respect to

[9] Japan's Answer to Panel Question 4 at para. 15.

[10] Japan's Answer to Panel Question 4 at para. 15.

[11] Japan will respond that, in the case of the weight conversion factors, the Department actually had the relevant information in its possession. As we have explained, this ignores the Department's clear authority under the Agreement to impose reasonable deadlines.

which that respondent has not supplied necessary information. Neither Article 6.8 nor Annex II provides any basis for this limitation. Article 6.8 refers to parties that do not provide necessary information. It does not suggest that some necessary information may be withheld, if most necessary information is provided. Similarly, Paragraph 7 of Annex II states that a less favourable result may be obtained where "relevant information is being withheld." It does not imply that some relevant information may be withheld if most relevant information is provided. Acceptance of Japan's argument would license every respondent in every dumping proceeding to withhold the single most damaging category of information from the investigating authority.

11. Seventh, Japan charges that the Department reads the sentence in Paragraph 7 of Annex II authorizing a less favourable result for uncooperative parties "as giving it carte blanche to use any facts available it chooses."[12] Japan evidently believes that the Department would feel free to fill in gaps in its administrative record with the team batting average of the Tokyo Giants[13], as long as that would be adverse to the respondents. Of course, any such notion is frivolous. The Department tries to select facts available that are at the adverse end of the likely range, not arbitrary numbers. The object is not to punish parties that fail to provide information, but to attempt to ensure that such parties do not profit from their non-cooperation. As we have explained in detail in our first submission, the Department was extremely circumspect in using adverse inferences to select from the facts available and carefully limited the results of those selections to the scope of the information not provided, or not timely provided.[14]

12. Eighth, Japan implies that failing to supply necessary information within a reasonable period does not "significantly impede" an investigation.[15] This cannot be true, unless the information withheld is insignificant. If the information is significant, then withholding that information must be significant.

13. Finally, Japan argues that information from "secondary sources" is not information from sources other than the respondent, but information from sources other than the questionnaire response (or, possibly, information other than the actual data specifically requested in the questionnaire).[16] This is neither the plain meaning of "secondary sources" nor logical. The most obvious meaning of the "primary source" is the respondent. Therefore, the most obvious meaning of "secondary sources" is "sources other than the respondent." This interpretation is supported by the term "other independent sources" in the second sentence of Paragraph 7, which indicates that secondary sources are independent from the primary source. This makes sense if secondary sources are independent *from the respondent*. But it would be a strained use of the language to describe information from a respondent as "independent from" other information from that same respondent.

14. If accepted, Japan's definition of "secondary sources" would mean that other information from a respondent, *even if verified*, would constitute secondary information that would need to be corroborated from other sources. Japan does not explain why it would be necessary, or how it would be possible, to corroborate such verified information. There is no evident explanation.

15. Japan is also incorrect in asserting that, if "information from secondary sources" in Paragraph 7 means information from sources other than the respondent, then the "less favourable" language does not support the use of adverse inferences.[17] Because the logic, if any, of this argument

[12] Japan's Answer to Panel Question 6 at para. 26.
[13] More precisely, the Yomiuri Giants.
[14] First Submission of the United States, Part B, at paras. 109 - 112 and 163.
[15] Japan's answer to Panel Question 7 at para. 28.
[16] Japan 's answer to Panel Question 8 at para. 30.
[17] Japan's Answer to Panel Question 8 at para. 32.

has eluded the United States, it seems best to respond by explaining our reading of Paragraph 7 as a whole.

16. Paragraph 7 contains three sentences. The first provides that, where investigating authorities base their findings on information from secondary sources (from sources other than the respondent), they should use special circumspection. The second sentence, which begins "[i]n such cases . . ." plainly applies to the use of information from secondary sources, and requires that such information be checked against other independent sources. The third sentence does not provide more procedural safeguards for the selection of information from the secondary sources. Having a different function than the second sentence, it logically is not limited by the opening clause of that sentence. Rather, the third sentence provides a general counterweight to all of the limitations in Annex II on the application of facts available and, more specifically, makes clear that the special circumspection and corroboration requirements do not preclude "less favourable results than if the party did cooperate."[18]

II. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO KSC WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

17. The Department's application of facts available to KSC because of its failure to act to the best of its ability to report the necessary sales and further manufacturing cost data for its sales through its US affiliate, CSI, was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. We will not burden the Panel with a repetition of the facts establishing KSC's failure to use its full authority, as a fifty-per cent owner of CSI, to attempt to obtain that information. Instead, we take this opportunity to show how the arguments that Japan continues to assert on this issue lack any basis in the facts or under the AD Agreement.

18. First, we draw the Panel's attention to Japan's response to the Panel's fifth question, regarding KSC's alleged requests to the Department for assistance concerning this issue.[19] While claiming that there "are many examples of KSC's request for assistance,"[20] Japan cites only three record documents, none of which support its claim. The first letter which Japan cites[21] nowhere requests the Department's assistance. Instead, it repeatedly requests that Commerce excuse KSC from answering Section E of the questionnaire, with respect to the sales through its affiliated further manufacturer, CSI. Japan cites two other letters by KSC to the Department[22] which likewise reiterate KSC's request to be excused from reporting the CSI information.[23] Moreover, these are not the only documents in which KSC requested to be excused from reporting the CSI information: on 21 December 1998, KSC informed Commerce that KSC would not be reporting the CSI information;[24] on 19 January 1999, KSC again informed Commerce that it would not provide the

[18] *See* First Submission of the United States at Part B, paras. 152 and 161.

[19] Japan's Answer to Panel Question 5 at para. 19.

[20] *Id*.

[21] KSC's letter to Commerce of November 10, 1998 (**Exh. JP-42(i)**).

[22] KSC letter of December 3, 1998, (**Exh. JP-78**), and KSC letter of December 18, 1998, (**Exh. JP-42(n)**).

[23] Japan claims that the phrase "[w]e have received no information, guidance, or response from the Department," in KSC's letter of 18 December 1998, constitutes a "specific" request for assistance. Japan's Answer to Panel Question 5 at. para. 20. However, a more reasonable interpretation of that phrase is that KSC wanted confirmation from the Department that it would excuse KSC from providing the CSI information. The meaning is evident from the fact that, in the preceding (and first) paragraph of that letter, KSC informed the Department that, at its recent meeting with Commerce officials, "we asked that KSC be excused from reporting CSI's sales of subject merchandise and of further manufactured subject merchandise because of ... its conflict of interest as a petitioner." (**Exh. JP-42(n)**) (business confidential information omitted). Furthermore, on each of the following two pages of that letter, KSC renewed its request that it be excused from reporting the CSI information. *Id*.

[24] KSC response to section C of the Department's questionnaire, (**Exh. JP-42(p)**).

information;[25] and, on 25 January 1999, KSC reiterated the same position.[26] In none of these letters did KSC request assistance regarding this issue. Thus, the Department's establishment of the facts on this matter is fully supported by record evidence, whereas Japan's factual claim is supported by none.

19. In addition, the Department's interpretation of Articles 2.3, 6.8, and Annex II with regard to the selection of facts available for KSC's sales through CSI is a permissible one. Once Commerce established that it would apply facts available to KSC with regard to the CSI sales, and that it would take an adverse inference with respect to KSC for its failure to act to the best of its ability, it reasonably turned to KSC's calculated dumping margins for actual, verified sales to the United States as a source of facts otherwise available. The reasonableness of this choice is shown by one of Japan' s own affidavits.[27] At paragraph 32 of this affidavit, KSC calculated the dumping margin for the non-CSI portion of its US sales. This calculation, representing the non-adverse facts available rate applicable to Kawasaki, shows dumping.[28] The increase resulting from the Department's choice of facts available represents the logical inference that the information not provided was probably adverse to KSC.-- *i.e.*, that the dumping margins on the unreported sales were generally greater than the margins on the reported sales. Commerce chose a margin from those sales that were reported, and thus based on KSC's own selling practices, and applied it only in proportion to the unreported sales. This was a measured approach and reflected an appropriate adverse inference. Japan, however, would interpret the Agreement to reward respondents with a "neutral" choice of facts available, thereby giving them license to play a shell game by hiding dumped sales through their affiliates and directing non-dumped sales, or sales with lower dumping margins, to their non-affiliated importers.[29] Neither Article 2.3 of the Agreement, nor the facts available provisions of Article 6.8 and Annex II, should be interpreted to require such a result.

20. Finally, we draw the Panel's attention to Japan's persistent claim that it supplied the Department with reliable transfer price data between KSC and CSI that Commerce should have used.[30] Japan has ignored, or chosen not to rebut, the fact that KSC did not supply these data, as we have pointed out.[31] More important, however, is the fact that, if Commerce accepted such data as facts otherwise available, it would give respondents *carte blanche* to set those prices to their affiliates at whatever level they deemed convenient to shelter dumping. Thus, the Department's choice of facts available with respect to the affected sales represented a permissible interpretation of the Agreement.

III. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO NSC AND NKK WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

21. The Department's application of the facts available to NSC and NKK's theoretical weight sales for which they did not timely provide a theoretical-to-actual weight conversion factor was fully in accordance with the Agreement. Japan's position, that the Department should be compelled either to ignore altogether the sales affected by the missing factors or to accept the factors which NSC and NKK could have timely provided, but did not provide until well after the reasonable deadlines

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[25] KSC response to the first section A supplemental questionnaire, (**Exh. JP-42(u)**).

[26] KSC response to sections B and C of the Department's supplemental request for information (**Exh. JP-42(v)**).

[27] Affidavit of Robert H. Huey, Counsel to KSC, (**Exh. JP-44**). The United States has asked the Panel to disregard Japan's affidavits because they are extra-record evidence. Thus, we cite to this affidavit only in the event that the Panel does examine it.

[28] The exact level is business confidential information. *See id*., paragraphs 32 and 33.

[29] Japan's Answer to Panel Question 42 at para. 93. Japan also expresses the startling view that anti-dumping investigations are usually a "surprise." *Id.* That certainly was not the case in this instance, as the Department's critical circumstances determination shows.

[30] *Id*. at paras. 93 and 18.

[31] *See* First Submission of United States at Part B, para. 123.

established for this purpose in the questionnaires, would write out of the Agreement an administering authority's ability to establish and enforce reasonable deadlines for the submission of information. This right is guaranteed by Articles 6.1, 6.8, and Annex II at paragraphs 1 and 6. Likewise, for the reasons discussed above, the Department's use of an adverse inference in selecting from the facts available with respect to the affected sales, was authorized under Article 6.8 and Annex II, paragraph 7.

22. We will not burden the Panel with a repetition of all of the facts regarding the conversion factor issue. The following pertinent points have been demonstrated in our First Submission and in our responses to the questions posed by the Panel and Japan: (1) The conversion factors were presented well after questionnaire deadlines that were twice extended and provided more than ample opportunity to respond. (2) Despite the fact that NSC and NKK both argued that such factors were unnecessary and impossible to provide, they proved to be necessary and possible to provide for both companies. (3) Despite claiming that a factor was impossible to provide, NKK's counsel received KSC's submission demonstrating how they calculated the factor when KSC filed and served its questionnaire response on December 21, 1998. (4) When finally provided by NSC and NKK, the factors were not timely because the so-called "seven day rule" (19 CFR § 351.301(b)((1)), upon which Japan relies, expressly does not apply to deadlines for responses to questionnaires, which are governed by 19 CFR § 351.301(c)(2). (5) The Department's practice of accepting minor corrections to timely presented data also does not constitute a blanket loophole covering data respondents have declined to submit (at all) in response to questionnaires. (6) The facts available the Department selected with respect to this issue were based on NSC and NKK's own data and were reasonably related to the affected sales. In sum, NSC's and NKK's theoretical weight factor submissions were rejected because they were untimely, and Article 6.8 and Annex II expressly permit the Department to enforce reasonable deadlines by use of facts available. Accordingly, the Department's application of facts available to NSC and NKK was consistent with the Agreement.

23. Finally, because this question is so clearly one of deadline enforcement, rather than of bias, the Department objects to Japan's characterization of the Department's treatment of the conversion factor issue as the result of an "effort to apply adverse facts available."[32] Had the Department been making an "effort" to apply adverse facts available, rather than conducting this investigation strictly on the merits of the case, a much better target existed. The most hotly contested substantive issue at the administrative level of this case before the Department of Commerce was the question of whether invoice/shipment date or date of order confirmation should be used as the date of sale for reporting US and home market databases.[33] Despite being asked by the Department to report separate US and home market sales databases using the date of order confirmation, as well as the date of invoice/shipment it had originally used to report its sales, NKK declined to report its sales databases using order confirmation date.[34] Had the Department been acting in a biased manner, motivated only by an "effort to apply adverse facts available," it could have determined that the order confirmation date was the proper date of sale, and could have applied facts available much more extensively to NKK. Instead, the Department made the date of sale determination, as it made all of its determinations, on the merits, and used the invoice/shipment date as the date of sale.

[32] Japan's Answer to Panel Question 1 at para. 4.
[33] *See Final Determination*, 64 Fed. Reg. at 243331-24335 (Comment 1)(**Exh. JP-12**).
[34] *See Preliminary Determination*, 64 Fed. Reg. at 8294 (**Exh. JP-11**).

IV. THE DEPARTMENT'S APPLICATION OF ITS "99.5 PER CENT" ARM'S LENGTH TEST, TO DETERMINE THAT SOME EXPORTERS' HOME MARKET SALES TO AFFILIATES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE, AND ITS SUBSEQUENT USE OF HOME MARKET DOWNSTREAM SALES TO CALCULATE THE NORMAL VALUE FOR SUCH SALES, WERE CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

24. The Department's application of its 99.5 per cent test to determine which home market sales to affiliates could be used in the normal value calculation embodies a permissible interpretation of the Agreement, as does its use of downstream sales. Although Japan has criticized the specifics of the 99.5 per cent test, it is clear from Japan's response to Panel Question 17 that Japan's primary goal with respect to the arm's length test is not to require the Department to improve it. Instead, Japan urges upon the Panel an interpretation that would write out of the Agreement any interpretation of "ordinary course of trade" that would permit any scrutiny of prices to affiliates. Because Japan has not demonstrated that the Agreement compels such an interpretation, the standard of review requires that the Panel find that the Department permissibly interprets the Agreement to allow it to assume that sales to affiliates are *not* made in the ordinary course of trade absent a showing that sales to the affiliate are made at not less than average market prices despite the affiliation. Furthermore, because Japan has not demonstrated that the Department's 99.5 per cent test is biased against respondents or otherwise fails to achieve this reasonable goal, it should likewise uphold the Department's use of this test.

25. As the Panel has recognized, Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade.[35] What Japan does not appear to accept is that a Member may permissibly consider that sales to an affiliated customer may be outside the ordinary course of trade precisely *because* the affiliation may cause the pricing relationship to be "unreliable because of association." In its response to Panel Question 17, Japan appears to argue that the Agreement requires the Department to use "all these ordinary course sales – including sales to companies that did not survive the 99.5 per cent test." Although this states Japan's preferred outcome, it also begs the question of whether all of its sales to affiliates <u>are</u> sales in the ordinary course of trade. Japan seeks to compel an interpretation that they are, absent some reason not necessarily related to affiliation, such as having been made at below-cost prices. Because the Department's interpretation that sales to affiliates are inherently "unreliable because of association," and may be deemed outside the ordinary course of trade *unless* it is demonstrated that the affiliation has not resulted in favourable pricing, is a permissible one, it must be upheld. To do otherwise would compel authorities to base normal value on sales to affiliates, regardless of whether these are real market prices or not, and despite the considerable potential for a manufacturer to manipulate the results of an anti-dumping proceeding by selling to affiliates at low-margin-generating prices before re-selling the merchandise into the open marketplace. Such an interpretation would seriously interfere with the administration of the Agreement.

26. The 99.5 per cent test is a perfectly reasonable methodology by which to determine whether affiliated party sales can be considered equivalent to arm's-length sales, as demonstrated by the fact that it is virtually the same as the margin calculation – itself prescribed by the Agreement. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is nearly identical to the margin calculation. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and target-country export sales; the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated home market customer sales.

[35] *See* Panel Question 17 to Japan.

27. Japan claims that the 99.5 per cent test is a "results-oriented approach" because it excludes only lower-priced sales as outside the ordinary course of trade.[36] But this simply is not the case. When an affiliated customer passes the 99.5 per cent test, all of the sales to that customer are retained, including those for products sold at prices below the average price to the unaffiliated customers. Conversely, when an affiliated customer fails the 99.5 per cent test, all of the sales to that customer are rejected, including those for products sold at above average prices that would otherwise have been used to calculate normal value. Thus, application of the 99.5 per cent test may increase or decrease normal value.

28. Furthermore, as Japan readily acknowledges, "[p]rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit."[37] In most situations, therefore, the fact that the test does not "fail" affiliates based on high-priced sales and results in the use of those sales in lieu of the downstream sales may have the effect of reducing margins, compared to the margins that would have resulted from normal values based on even higher priced downstream sales.

29. Although Japan attacks the 99.5 per cent test on the basis that it imposes a floor, but not a ceiling, on prices treated as being in the ordinary course of trade, the Agreement does not require such symmetry. One of the reasons that prices involved in affiliated party transactions are inherently suspect is that they may be manipulated so as to reduce normal value (and hence reduce dumping margins). This concern is simply not implicated where such prices are higher than average prices to unaffiliated customers. There is, therefore, no basis for Japan's contention that the 99.5 per cent test is "biased."[38]

30. Nor is there any merit to Japan's contention that the Agreement precludes the use of downstream home market sales where an affiliated reseller fails the 99.5 per cent test.[39] Japan' s argument hinges solely on the fact that Article 2.3 expressly permits the use of downstream sales from affiliated importers in the export market, while Article 2.2 is silent with respect to the use of such sales in the home market.[40] Japan fails to realize, however, that Article 2.1 already authorizes the use of downstream home market sales. That provision defines normal value simply as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product for consumption in Japan were made in the ordinary course of trade and clearly come within this definition.

31. Article 2.2 plainly states that normal value may be based on third-country sales price or on constructed value only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country." Moreover, in response to Panel Question 17, Japan concurs that the Article 2.2 alternatives to a normal value based on home market prices become relevant only if the administering agency "concludes there are no sales in the home market in the ordinary course of trade." In other words, Japan does not propose to substitute either constructed value or third country sales for sales to affiliates that are outside the ordinary course of trade when other valid home market sales (which would include downstream sales made by affiliates) remain. Instead, Japan claims, in essence, that the Agreement requires that an authority must simply ignore any sales to customers failing the arm's length test, and base the margin solely on "the respondent's home market sales to other customers."[41] The result of such a general policy, however, would be that a producer could shield a large percentage of its home market sales from scrutiny simply by passing

[36] Japan's Opening Statement at para. 38.
[37] Japan's First Submission at para. 170.
[38] Japan's Opening Statement at para 36.
[39] Japan's Opening Statement at para. 41-43.
[40] *Id*.
[41] *See* Japan's Answer to Panel Question 17 at para. 59.

them through an affiliate at below-average prices before selling them to unaffiliated customers in the home country. Indeed, under Japan's preferred approach, producers could make all of their home market sales through affiliated resellers, forcing investigating authorities to use third-country sales or constructed value – a result plainly not intended by the Agreement.

32. Finally, we note that the treatment of sales to and through affiliated parties is an area in which different Member States have evolved different interpretations and practices to deal with this general concern. The approaches of the three third party interveners who provided responses to Panel Question 48 on this topic are at once diverse (demonstrating that the Agreement lends itself to multiple permissible interpretations in this respect) and much less concrete than the Department's arm's-length test. The EC, for example, apparently uses the remaining sales unless it determines that they are not "sufficiently representative" and Brazil has used sales to non-affiliated parties when they were "representative." If Korea determines that the affiliated party sales are "inappropriate" it considers "constructed export price or third country sales price." The United States is of the belief that its own practice, which is more transparent and concrete, not only embodies a permissible interpretation, but is better suited for its own administration of the dumping law. Even should the Panel find the approach of another Member State to be more in harmony with its own views on this issue, however, the Panel may not impose that approach upon the United States unless Japan has demonstrated that the Department's practice in this respect is contrary to the Agreement. Japan has not done so.

V. THE DEPARTMENT'S INTERPRETATION WITH RESPECT TO THE CALCULATION OF THE ALL OTHERS RATE, AS EMBODIED IN SECTION 735(C)(5)(A) OF THE TARIFF ACT OF 1930, IS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

33. The Department's calculation of the all others rate using a methodology which excluded from the calculation all margins which were, overall, zero, *de minimis* or based on the facts available, embodies a permissible interpretation of the Agreement. Article 9.4 of the Agreement makes *no* provision for eliminating the "portions of margins," affected by facts available while retaining all other "portions" of the margins, as Japan suggests in its response to Panel Question 10. Indeed, Japan has argued in its response to that question only that "its suggested approach *better reflects* Article 9.4."[42] Under Article 17.6(ii) of the Agreement, the question is not whether Japan's suggested approach "better reflects" Article 9.4 than the US interpretation, but whether the US interpretation is a permissible one.

34. Apart from the obvious fact that Article 9.4 says nothing about and therefore cannot compel such a reading[43], Japan's approach is seriously flawed in other ways. First, were the presumption underlying the approach described in Japan's reply to Panel Question 10 to be adopted as a general rule, the all-others rate would have to be calculated based solely on whatever more favourable data respondents chose to report – whether or not such data are representative of the overall extent to which the respondents are dumping, and thus whether or not they are representative of the overall level of dumping in the industry. This means, for example, that the same high-margin-generating data Japan seeks to remove from scrutiny through the stratagems described above would also not be reflected in the margins for the non-examined members of the industry.

[42] Japan's Answer to Panel Question 10 at para 36 (emphasis added).

[43] For the same reason, the EC's suggestion that they might use one interpretation of Article 9.4 when portions of margins were "significant" and "adverse" (but presumably a different one when the facts available portions were less significant and non-adverse), is not compelled by the plain language of that Article, which does not distinguish between "significant" and non-significant or adverse and non-adverse use of facts available.

35. Second, Japan's *ad hoc* approach to this case is not workable as a general rule. As the EC, another frequent user of the dumping law, has observed in its response to Panel Question 50, most dumping calculations include small elements of facts available. Furthermore, these are not always sale-specific. Even small elements of facts available can affect large numbers of sales, especially when facts available affects cost databases that are used in calculating constructed value, which may be used for comparison to a wide range of export sales. Thus, even if it were desirable to do so, it is in many cases simply not possible to remove all "affected" sales from the margin calculation to create the "expunged" margins Japan would have authorities use to calculate all others rates.

36. Third, Japan's preferred solution can seriously underestimate the average dumping level of the mandatory respondents when, as in this case, the percentage of export sales affected by facts available varies greatly among such respondents. This is not merely a function of the fact that it disregards the high level of dumping that may have been masked by data withheld from the Department. It is true even if it is accepted, as Japan argues it should be, that the margins used in the weighted average calculation should be margins purged of any facts available and should reflect the level of dumping only on those sales for which the respondent was willing to provide full data. Japan argues that, in weight-averaging the purged margins, authorities should assume that the mandatory respondents exported only the volume of product associated with sales that were not affected by facts available. This means that the sales volume of the least-cooperative respondents (those most likely to be willing to dump at the highest rates) will be under-represented in the numerator of all others weighted average. It also means that the total amount of sales forming the denominator of the weighted-average calculation will be reduced to the same degree, thus over-representing the sales volume associated with the margin levels of the more cooperative mandatory respondents.[44] In addition, Japan's preferred solution underestimates the average dumping level of the mandatory respondents by purging their margins of individual sales affected by facts available, but not of individual sales that are not dumped. However a Member may interpret the reference to margins established based on the facts available, Article 9.4 clearly accords the same treatment to "zero and *de minimis* margins." The solution Japan proposes, in short, does not even come close to being the sole permissible interpretation of Article 9.4.

37. Finally, the United States notes that the document contained at **Exh. JP-79** and discussed in Japan's response to Panel Question 9, in no way suggests that the interpretation of the United States is an impermissible one. It merely shows that the United States was unsuccessful in seeking to add the word "solely" to the text and that Japan was similarly unsuccessful in seeking to add the word "primarily." This suggests only that the intent of the Members was that the language remain sufficiently ambiguous to allow for multiple interpretations. Indeed, the most important statement in that document is the final sentence: "No conclusion was reached owing to the conflict of opinions." If no conclusion was reached, the drafters clearly did not conclude that the interpretation suggested by the United States was impermissible.[45] Moreover, the fact that other parties did not agree to the insertion of the word "solely" before the word "established" could also simply mean that those parties believed that the word was unnecessary because the existing language in the provision already sufficiently established that point.

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[44] Should the Panel determine to use the attorney affidavits (the United States maintains the Panel should not do so), it may wish to compare the "non-CSI portion" of KSC's margin in **Exh. JP-44**, at para. 32 *with* the average margins for NSC and NKK given in the *Final Determination*, 64 Fed. Reg. at 34780, **Exh. JP-12**.

[45] This is similar to the drafters' decision not to adopt an illustrative list of the types of sales that could be considered outside the ordinary course of trade. *See* First Submission of the United States at para. 216 and fn. 297.

VI. JAPAN IS ATTEMPTING TO WRITE ARTICLE 10.7 OUT OF THE AD AGREEMENT

38. Japan suggests that, "as a practical matter," a critical circumstances finding (as referenced in Article 10.7) cannot be made prior to the preliminary determination of dumping. This position ignores the existence of, and writes out of the Agreement, Article 10.7. Article 10.7 is distinct from other provisions in the Agreement in two fundamental respects. *First,* it does not require administering authorities to await the preliminary determination of dumping prior to making a determination to withhold appraisement or assessment. In every other instance, the Agreement expressly provides that provisional measures may not be taken until after the preliminary determination of dumping. *Second,* Article 10.7 is unique in its directive that there be "sufficient evidence" to support the finding. The requirement for " sufficient evidence" arises in two places in the Agreement: Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). The presence of this standard in these provisions suggests a threshold - a quantum and quality of evidence that must be present despite the fact that the record is incomplete.

A. ARTICLE 10.7 EXPRESSLY AUTHORIZES CRITICAL CIRCUMSTANCES FINDINGS *PRIOR* TO THE PRELIMINARY DETERMINATION OF DUMPING

39. Japan argues that, "as a practical matter," the "sufficient evidence" standard cannot be met prior to the preliminary determination of dumping (as set forth in Article 7.1). This argument ignores the plain language and intent of Article 10.7. Although Article 10.1 of the Agreement generally requires, with respect to the application of provisional measures, that there first be a preliminary determination of dumping, injury, and causation.[46] Article 10.7 provides the express exception to this rule. Specifically, Article 10.7 provides that investigative authorities may make critical circumstances findings and withhold appraisement or assessment at any time "after initiating and investigation." Thus, Japan's claim that the "sufficient evidence" requirement in Article 10.7 mandates a delay until the preliminary finding of dumping is untenable.[47]

B. "SUFFICIENT" EVIDENCE DOES NOT MEAN ALL POTENTIAL EVIDENCE

40. The drafters of the Agreement expressly provided that certain decisions may be made on the basis of "sufficient evidence." These express statements are found in Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). Thus, the members of the Agreement have specifically denoted two instances in which there must be a certain quantum and quality of evidence - *despite the fact that the record may be incomplete.*

41. Japan contends that the evidentiary standard applied in preliminary dumping determinations (as provided for in Article 7.1) is the same as that to be applied in determinations made under Article 10.7. This argument is incorrect. Normally, provisional measures may not be applied until

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[46] *See* Article 10.1 ("Provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 {preliminary determination of dumping and injury} ... enters into force, *subject to the exceptions set out in this Article.*") (emphasis added); and Article 7.2 ("Withholding of appraisement is an appropriate provisional measure, ... as long as the withholding of appraisement is subject to the same conditions as other provisional measures.").

[47] Japan implies, with the use of the word "generally" that it is not taking an absolute position (which would be clearly contrary to the Agreement). *See* Japan's Answer to Panel Question 11 at para. 37. However, Japan does not provide any example of a situation in which an administering authority would have *more* evidence prior to the preliminary determination of dumping than was on the record for this case. In fact, the Department in this case not only relied on the overwhelming evidence in the petition, but conducted external research, corroborated the data in the petition, and relied upon the USITC preliminary finding of threat of injury.

parties have had the opportunity to submit evidence and comments, and the administering authority has made a preliminary determination of dumping and injury.[48] An exception to this rule, however, is found in Article 10.7, which provides simply that withholding of appraisement or other necessary measures may be taken "after initiating an investigation" as soon as there is "sufficient evidence." It does *not* state that the measures must await a preliminary determination of dumping, nor does it require that the decision occur after the receipt of information from respondents. Rather, in order to preserve the ultimate remedy, it simply states that the measures may be taken "after initiation" if there is sufficient evidence.

42. The US agrees that the evidence necessary to sustain a preliminary critical circumstances finding may be, and indeed often will be, different than that required for initiation of an investigation, even though the standards are the same. The inquiries involved are different, and as such, the evidence that is sufficient for each determination will depend on the factors being considered and the context of the inquiry.[49] As explained above, it is especially notable that the Agreement provides that the evidence simply be "sufficient" in two instances which occur early in the investigative proceedings.

43. Japan suggests that a petition, along with the Department's independent research and analysis, can <u>never</u> serve as a basis for a preliminary determination of critical circumstances, regardless of the strength and quality of the evidence on the record. Japan bases this conclusion on three arguments. First, Japan argues that the reference to "dumped imports" in Article 10.6 requires a preliminary dumping finding as described in Article 7.1. Second, Japan argues that an administering authority cannot possibly make a critical circumstances finding prior to the Article 7.1 finding, because it has not conducted any investigation whatsoever. Finally, Japan argues that the evidence cannot be sufficient prior to an Article 7.1 finding, because the margins are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities." These arguments are without merit.

44. As explained above, Japan's first argument, that a preliminary finding of dumping is required, is contrary to the Agreement because it ignores the existence of Article 10.7, which expressly contemplates that measures may be taken at any time after initiation. Japan's second claim, that the Department has conducted no investigation when making its early critical circumstances finding, is flatly incorrect. The Department indeed investigated the allegations, reviewed the evidence contained in the petition for adequacy and accuracy, supplemented that information with additional relevant data and analyzed and relied upon the USITC's preliminary determination of threat to the domestic industry. Furthermore, Japan implies that the evidence necessary for a preliminary dumping determination is the same evidence that is necessary for an early critical circumstances determination. This position, however, confuses the findings being made. Each determination is based upon distinct factors, and thus, at least in part, involves collection and analysis of different evidence. Finally, Japan's argument that the margins utilized are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities," is disingenuous. *Japan does not contest that the margins are based upon comparisons of <u>actual</u> sales*

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[48] *See* Article 7.1 (provisional measures may only be taken after "parties have been given adequate opportunities to submit information and make comments" and "a preliminary affirmative determination has been made of dumping....") and 10.1 (provisional measures are to be applied in accordance with Article 7.1 *subject to the exceptions set forth in Article 10*).

[49] This distinction was recognized by the Panel in *HFCS.* In that case, the panel explained that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation." Panel Report on *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From (HFCS) the United States,* adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.94.

offers by NKK and NSC to US customers and actual transactions in the home market.[50] Indeed, Japan has not rebutted the legitimacy of any of the specific evidence contained in the petition. Rather, Japan simply argues that, because it is contained in the petition, it is meaningless. This absolute argument should be rejected by the Panel.

45. In fact, the evidence supporting each element of the preliminary critical circumstances determination in this case was sufficient, and indeed, substantial. Japan repeatedly claims that, "the only evidence USDOC had was the petition."[51] However, while much of the evidence was taken from the petition (after being corroborated and reviewed for accuracy), the determination did not rest entirely on the petition data. Japan cannot contest that the Department not only corroborated the petition evidence with external research sources (Internet trade publications and general news articles, US Customs Service data, and American Iron and Steel Institute data),[52] but also relied significantly on the USITC preliminary determination of threat to the US industry. Furthermore, Japan does not suggest that the plethora of newspaper articles, consultant reports, and industry publications attached to the petition are unreliable or otherwise unrepresentative. Again, Japan simply states that, because they were contained in the petition, they are "mere allegations."

46. Although Japan repeatedly argues that the findings made were not based upon "sufficient evidence," Japan has never addressed the specific information that was on the record to support the critical circumstances finding. For example, with respect to importer knowledge of dumping and consequent injury, as discussed above, the record contained *actual* evidence of significantly high margins, and widespread, publicly distributed, media, consultant, and industry reports detailing the massive dumping and the negative impacts on the domestic industry.[53] Japan cannot possibly claim

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[50] *See* Initiation Checklist, at 7 (**US/B-18)**. Furthermore, the calculation of the dumping margins that were based upon constructed value were calculated using *NSC's and NKK's own financial statements. Id.*

[51] *See, e.g.,* Japan's Answer to Panel Question 13 at para. 37 (emphasis added).

[52] *See* Initiation Checklist at 70-71 **(Exh. US/B-18)**.

[53] *See* **Exh. US/B-40(b) and (c)**. The Wall Street Journal, *"Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing,"* ("In the latest month, imports took 34 per cent of the domestic market for steel .... That lost market share has hit US steelmakers hard, particularly in the last three months as the US industry pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earning estimates for the third and fourth quarters. .... 'Japanese steel is just murdering' the US steelmakers."); Metal Bulletin (24 Sept. 1998) (" The July figure fully supports our industry's contention that massive levels of steel are being dumped."); Metal Bulletin (7 Sept. 1998) ("Nucor has cut production ... in response to low market prices ... because of market turmoil in the wake of a flood of cheap imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.... The collapse in steel prices on the world steel market this year has been almost unprecedented."); Japan Economic Newswire (19 Sept. 1998) ("officials of major US steelmakers ... made an appeal for the US government to take measures against what they view as unfair steel shipments from Japan ...."); Morgan Stanley, Dean Witter - Industry Report (21 July 1998) ("hot-rolled imports are coming in at ... 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in late September or early October."); The Wall Street Journal, *"Rising Imports Distress US Steelmakers,"* (8 Sept. 1998) ("And while it took months for major effects of inflows from overseas to show up in the US, industry analysts and executives now say they definitely have. 'The pricing has just collapsed....'"); American Metal Market (11 Sept. 1998) ("For the second time in less than two months, Nucor Corp., ... is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("We expect the US flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998."); Wall Street Transcript Corporation - Industry Report (20 July 1998) ("Imports were simply so large, and prices at which the entered markets so low, that steel pricing was compromised"); CRU Steel Monitor (April 1998) ("This decline in corporate profitability is being exacerbated by the Asian financial crisis.").

that the importers (many of which are sophisticated, large corporations) were not aware, or should not have been aware of the information reported in the Wall Street Journal, the PaineWebber reports and the other steel industry publications.[54] What is more, with respect to knowledge of injury, the Department also looked to the injury information in the petition (charts and industry data demonstrating drastic decreases in prices and resulting declines in profitability), the 101 per cent increase in imports during the surge period, and the USITC's preliminary determination of threat. As such, Japan's claims that the determination was based solely upon allegations from the petition are unfounded.

47. In sum, an administering authority is not merely capable of making an early critical circumstances determination based upon "sufficient evidence," like that presented here, but such an action is expressly authorized under the Agreement. The Panel should uphold the Department's preliminary critical circumstances determination in this case and the US statute upon which it is based.

PART 2: INJURY

I. THE CAPTIVE PRODUCTION PROVISION, ON ITS FACE AND AS APPLIED IN THIS CASE, IS CONSISTENT WITH THE OBLIGATIONS IN THE ANTI-DUMPING AGREEMENT

A. THE DIRECTION IN THE CAPTIVE PRODUCTION PROVISION TO "FOCUS PRIMARILY" ON THE MERCHANT MARKET PERMITS AN OBJECTIVE ANALYSIS OF RELEVANT ECONOMIC FACTORS CONSISTENT WITH ARTICLES 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

48. In arguing that the captive production provision of the United States' anti-dumping and countervailing duty statute on its face violates the Anti-dumping Agreement, Japan faces a high burden which its submissions fail entirely to meet. As GATT and WTO panels have repeatedly stated, only legislation that requires WTO-inconsistent action can itself be WTO-inconsistent.[55]

Japan also argues in its answer to Panel question 15, para. 9, that many of the newspaper articles do not establish knowledge of dumping and injury because they were published just weeks before the petition was filed. According to Japan, this was long after the date that USDOC concluded that importers knew or should have known of the dumping and consequent injury. If, however, the importers had knowledge at an earlier date, this only supports Commerce's finding of knowledge of dumping and injury for purposes of the critical circumstances determination. The Agreement does not specify *when* the importers had to be aware of dumping practices. Rather, it merely inquires as to whether dumping practices "exist," and whether importers should be aware that such dumping would cause injury. The newspaper articles and press releases demonstrate that dumping had been widespread for months and that the effects on the industry were widely apparent. This type of evidence (including both the early and later articles) certainly satisfies the question under Article 10.6(i). (Note, It also appears that Japan's reference the US First Submission Paragraph B-273, footnote 288, is incorrect. This cite should reference Paragraph B-476, footnote 388).

[54] Japan argues that knowledge of dumping cannot be determined without a preliminary dumping finding. Article 10.6 directs the administering authority to determine whether importer *should have known that dumping was occurring and that such dumping would cause injury.* The Agreement does *not* specify how to determine such awareness. Although Japan would prefer a requirement that there be a concise, determined dumping margin, this is simply not necessary under the Agreement. If the Department's method for determining importer knowledge is a permissible interpretation of the Agreement, and if it rests upon sufficient evidence, it must be upheld.

[55] Panel Report on Canada - Measures Affecting the Export of Civilian Aircraft, adopted on 14 April 1999, WT/DS70/R, para. 9.124 ("Canada – Aircraft"), citing the Panel Report on United States -

Panels have found that even legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action.[56] Indeed, these principles apply even where a Member has in fact used the provision to take action inconsistent with its obligations.[57]

49. Here, Japan seeks to have this Panel declare the United States' captive production provision unlawful on its face, even if the Panel should find that the determination by those Commissioners who applied the provision in this case is permissible. However, Japan's challenge must fail if the United States establishes, as it believes it has, that those three Commissioners who invoked the provision in the underlying investigation applied the provision in a way consistent with the Anti-dumping Agreement. If their findings here are consistent with the Agreement, the Panel should find that the provision that they applied is consistent as well.

50. Indeed, Japan's arguments in this proceeding appear to rest on the premise that the Panel should impose its own interpretation of US law in order to find the captive production provision contrary to the United States' obligations. This, however, is not the Panel's task. When examination of a law is solely for the purpose of determining whether a member meets its WTO obligations, the panel does not interpret the party's law "as such", the way it would, for instance, interpret provisions of the covered agreements.[58] Rather, a panel is called upon to establish the meaning of the provision as a factual element and to determine whether the factual element constitutes conduct contrary to WTO obligations.[59] When an interpretation of municipal law is at issue, a panel cannot assume that municipal authorities will choose an interpretation which is inconsistent with their international obligations.[60] This principle should apply all the more forcefully in the interpretation of an agreement, like the Anti-dumping Agreement, which specifically requires that independent judicial review of administrative decisions be available[61], an avenue that Japanese producers have declined to take in this case, and explicitly recognizes that Members may interpret the Agreement differently.[62] Thus, even if the application of the provision in this case were not consistent with the Anti-dumping Agreement, Japan must establish that a United States court could not interpret the provision in a manner consistent with the Agreement.

51. The captive production provision of United States law is entirely consistent with the Anti-dumping Agreement. The provision provides that, when certain prerequisites are met, the Commission shall "focus primarily" on the merchant market in its consideration of market share and financial indicators.[63] Japan ascribes two meanings to the "focus primarily" language that conflict

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Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted on 4 October 1994, BISD 41S/131, para 118 ("United States – Tobacco").

[56] Panel Report on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 138 ("US – Superfund").

[57] Panel Report on EEC - Regulation on Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132 ("EEC – Parts and Components"), at paras. 5.9, 5.21, 5.25-5.26.

[58] Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents"), WT/DS50/AB/R (19 December 1997) at para. 65, quoting Certain German Interests in Polish Upper Silesia, 1926, PCIJ Rep., Series A, No. 7, p. 19.

[59] *India-Patents* at para. 65.

[60] Under the municipal law of the United States, if a statute that an authority is charged with administering permits multiple interpretations, a court will uphold an authority's construction of the statute if that construction is reasonable; the interpretation's conformity with international obligations is a basis for finding the authority's action to be reasonable. *See, e.g., Chaparral Steel Corp. v. United States*, 901 F.2d 1097, 1101, 1103 n.5 (Fed. Cir. 1990) (**Exh. US/C 24**).

[61] Anti-dumping Agreement, Article 13.

[62] Anti-dumping Agreement, Article 17.6.

[63] Sec. 771(7)(C)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(C)(iv). (**Exh. Jp-4(e)**).

with the plain reading of the statute and that are not meanings the USITC has ascribed in applying the provision. In so doing, Japan is attempting to mischaracterize and reshape United States law in order to make it fit Japan's idea of a violation of the Anti-dumping Agreement. Japan cannot make out its case in this manner.

1. "Focus primarily" on the merchant market speaks to a segmented market analysis, but not to one where the USITC focuses exclusively on a particular market segment

52. The statutory provision at issue requires the USITC to focus *primarily* on the merchant market in evaluating certain factors. By definition, therefore, there is some *other* focus that the USITC should have as well. That is, under the statute's plain meaning, the inquiry does not end with examination of the merchant market. The statutory mandate that the impact upon the industry as a whole be assessed continues to be the overarching concern in the analysis.

53. Perhaps recognizing the flaw in its early reading of the statute, Japan retreats from its initial position that the statute mandates a focus exclusively on the merchant market. It now argues, instead, that, when the USITC focuses upon the merchant market, it improperly uses the entire industry as the other point of focus. According to Japan, an appropriate segmented analysis would look at the merchant market and the captive market separately.[64] Whether or not Japan's proposed alternative analysis would be consistent with the Agreement is not at issue here. "Conformity [with WTO obligations] can be assured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved."[65]

54. By advancing its alternative, Japan implicitly acknowledges that there are various ways to consider the fact that the performance of each segment of an industry may influence the performance of the whole industry differently. Japan has not articulated any basis for concluding that looking at the merchant market as a step in considering the market as a whole is less in accord with the Anti-dumping Agreement than the separate merchant/captive market analysis Japan suggests as an alternative. Indeed, Japan seems to concede that the US statute's initial focus on the segment in which imports primarily compete with domestic product is, as the *High Fructose Corn Syrup* panel suggested, calculated to allow the authority "to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry."[66] Japan's approach might also serve the same end; this would not mean, however, that its approach would be required.

55. Moreover, Japan does not show that the alternative approach it would prefer would be precluded by the United States statute, a burden that it must carry if it is to establish that the law is impermissible on its face. As the United States has previously indicated, a requirement to "focus primarily" on a certain segment does not prohibit other focuses, including on other segments. Moreover, under the United States statute, in evaluating the impact of dumped imports, the USITC is required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States".[67] In short, the form of segmented analysis preferred by Japan is neither required by the Agreement nor precluded by the United States statute.

56. As the United States has previously discussed, what the United States statute does require is a focus on the entire domestic industry after the merchant market is examined. This approach is clearly

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[64] Japan's Answer to Panel Question 19 at para. 70.

[65] Panel Report on *United States–Sections 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, at para. 7.24.

[66] See Panel Report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.154.

[67] 19 U.S.C. § 1677(7)(C)(iii).

consistent with the principle that the "determination of injury" under Article 3 concerns effects of dumped imports on the industry as a whole. In any event, consideration of the captive market data is inherent in such an analysis. Because the data for the entire industry incorporated data for the captive market, the side-by-side discussion of the merchant market and the entire industry inescapably reflected any similarities or differences between the merchant market and the captive market.

57. Contrary to Japan's claim that the USITC does not "relate its merchant market findings to producers as a whole"[68], the determination here shows how a primary focus on the merchant market for certain factors is consistent with such an analysis of the industry as a whole. In examining the volume of imports, the USITC set forth data and made parallel findings regarding the merchant market and the entire industry, finding on the basis of both that the volume of and increase in dumped imports was significant.[69] The USITC's findings as to the impact of dumped imports begin with an analysis that does not focus on the merchant market *per se*. Rather, the USITC found that the increased volume and market share of dumped imports led to the US industry's increased capacity becoming excess capacity almost immediately.[70] By these findings, the USITC's impact analysis tied its findings on market share, to which the captive production provision applies, to a key indicator of the performance of the industry as a whole -- capacity utilization -- to which the provision does not apply.

58. In analyzing financial performance, the USITC again made parallel findings, which showed that declines in the industry's performance on merchant market sales were mirrored by overall declines. Japan's claim[71], that the USITC discussed the data for the entire market only in its staff report, not in its determination, thus is belied by the face of the determination itself. The USITC found these trends not to be consistent with the industry's improvement in productivity and the rise in apparent consumption in the United States, both of which are overall measures not particular to the merchant market.[72] The USITC amply tied its findings concerning the merchant market segment to the industry as a whole.

59. The USITC's analysis, moreover, assured that the causal relationship that it saw between developments in the merchant market and the condition of the industry as a whole were not in fact due to developments in the captive sector of the industry. It compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition. It found their operating income to be falling both for merchant market sales and overall.[73] The USITC then compared the operating results of integrated producers to those of minimills. The USITC recognized that the minimills had "greater dependence on the merchant market, where imports are concentrated."[74] If this comparison had shown that minimills were performing as well or better overall as integrated producers, or that minimills were not similarly declining in performance, it might have indicated that the decline in the industry operating figures was not due in particular to the effects of imports. However, the USITC found minimills to be experiencing a "worse financial performance", evidently due to their greater exposure to import competition.[75] In short, contrary to Japan's contention, the USITC explicitly took into account that captive production is relatively shielded from the effects of imports. It nevertheless found that the record evidence supported the conclusion that the effects of imports in the merchant market adversely affected the industry as a whole.

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[68] Japan's Answer to Panel Question 19 at para. 66.
[69] USITC Views at 12-13 (**Exh. US/C-1**).
[70] USITC Views at 17.
[71] Japan's Opening Statement at para. 21.
[72] USITC Views at 18.
[73] USITC Views at 19.
[74] USITC Views at 19.
[75] USITC Views at 19.

60. As the USITC's determination shows, the captive production provision is entirely consistent with the Agreement. As the USITC's determination further shows, it examined the relevant economic factors and, on an objective basis, found a causal relationship between developments in the merchant market segment and the injury suffered by the industry as a whole.

2. "Focus primarily" does not dictate that any particular weight be given to the merchant market in the USITC 's evaluation of the relevant factors

61. Japan now states that it takes issue only with the particular analysis that it views as required by the captive production provision, not that an analysis of the merchant market violates the Agreement. In this regard, Japan acknowledges that it is permissible to consider "as a condition of competition, the merchant versus captive portions of the [market]."[76] It frames its challenge, therefore, in terms of the "weights" it believes the statute requires to be given to "factors."

62. It is unclear, however, whether Japan is arguing that the captive production provision requires the USITC to give weight to one factor over another or to give inappropriate weight to the merchant market segment. In either case, Japan misreads the captive production provision and misunderstands the USITC's application of the provision in this investigation.

63. To the extent that Japan claims the captive production provision requires greater weight to be given to some delineated factors over others, there is no basis for the claim. The "focus primarily" language does not require that emphasis be placed on any factor. The captive production provision gives direction to the USITC "*in determining* market share and the factors affecting financial performance"[77] (emphasis added). It therefore only implicates the evaluation *of those factors* and not the evaluation of *how those factors* relate to any of the other factors that the USITC must consider. The provisions of the Anti-dumping Agreement[78] and the US statute[79] that permit the USITC to give the weight it deems appropriate to any relevant factor is not affected by the terms of the captive production provision. As has been seen, in this case, the USITC gave emphasis to the effect of dumped imports on capacity utilization, a factor not implicated by the provision, in establishing the impact of dumped imports on the domestic industry. Japan's allegation that the captive production provision impermissibly constrains the USITC's ability to objectively assess all the relevant economic factors is belied both by the face of the statute and the determination at issue here.

64. To the extent that Japan is arguing that, in evaluating certain factors, the captive production provision requires that undue weight be given to the merchant market, this argument too should not hold sway. The USITC has not given any indication that the captive production provision requires it to place more weight on the merchant market data for any factor than on the data for the industry as a whole. As is reflected in the USITC's determination here, the requirement to "focus primarily" on the merchant market in establishing certain factors does not necessarily mean more than to collect and make specific findings based on merchant market data that, which always possible, might not otherwise be required. It does not mean that, having examined that data, the USITC is required to give weight to that data over what other evidence might show. And, indeed, on each relevant factor concerning market share and financial indicators, the USITC assured that it examined and gave weight to data for the industry as a whole.

65. Such a requirement is neither, as Japan asserts, meaningless, nor a violation of the Anti-dumping Agreement. The captive production provision requires the gathering and analysis of

[76] Japan's Opening Statement at para. 23.
[77] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).
[78] Article 3.4 of the Anti-dumping Agreement.
[79] § 771(7)(E)(ii) of the Act, 19 U.S.C. § 1677(7)(E)(ii) (**Exh. Jpn-4(e)**).

evidence that the statute might not otherwise require of the USITC. The provision may be said to require, as a matter of municipal law, a form of segmented analysis such as that which the *HFCS* panel indicated was permitted under the Anti-dumping Agreement. This does not mean that, even as to the factors to which the provision applies, the USITC must give the merchant market segment data weight over contrary evidence on which it otherwise may also focus. The provision does not prevent an objective examination of all the information collected.

66. Japan's distrust of special examination of merchant market trends is based on the false premise that such an examination will necessarily skew data concerning the domestic industry's performance unfavourably to foreign producers.[80] This is not the case. First, as has been seen, the USITC nevertheless collects and assesses the data concerning the entire industry. Second, an examination of data particular to the segment where competition primarily occurs may disclose that trends concerning the industry as a whole, which might otherwise appear to disclose a connection between imports and injury, are misleading. Japan's allegation assumes that the domestic industry will always fare worse in the merchant market than it does in the captive market. The industry, however, could be performing worse in the captive market than in the merchant market. In that scenario, a failure to look at the merchant market may exaggerate the effects of dumped imports.

67. The captive production provision in no way mandates action in conflict with the Agreement. It does not preclude an objective evaluation consistent with the requirement of the Agreement, as well as US law, that the assessment be made, to the extent possible, in relation to the dumped imports' impact on domestic producers of the like product "as a whole". The law on its face does not constitute conduct by the United States contrary to its WTO obligations.

II. THE USITC'S ANALYSIS IN THIS CASE WAS IN ACCORDANCE WITH THE ANTI-DUMPING AGREEMENT

A. THE USITC PERFORMED AN OBJECTIVE EVALUATION OF ALL THE RELEVANT ECONOMIC FACTORS OVER THE ENTIRE PERIOD OF INVESTIGATION

68. Despite the fact that the USITC's determination clearly contains an analysis of data over the three year period of investigation, Japan continues to claim that the USITC did not evaluate data about the impact factors over the entire period.[81] By simply reading the USITC's determination, this panel can see that Japan's claim is patently false. With respect to the impact factors in particular, despite Japan's allegations to the contrary, the USITC explicitly evaluated capacity, capacity utilization, productivity, unit costs of goods sold, unit values, employment, wages, and capital expenditures from 1996 to 1998.[82] The USITC plainly examined trends over the full period investigated.

69. Japan then narrows its objection even further. From focusing on the impact factors, it turns to arguing that the USITC did not discuss the fact that the financial performance of the industry as a whole purportedly improved over the three year period of investigation.[83] Once again, this claim is specious. The USITC discussed three year trends of financial indicators, expressly noting that the cost of goods sold declined by more than the unit values over the entire period of investigation.[84] The USITC also found that the domestic industry "maintained an operating profit."[85] As the USITC explained, however, other evidence made this profitability less important to its determination.

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[80] Japan's Opening Statement at para. 21.
[81] Japan's Answer to Panel Question 18 at para. 60.
[82] USITC Views at 17-18 nn.100-101.
[83] Japan's Answer to Panel Question 18 at para. 65.
[84] USITC Views at 18 n.100.
[85] USITC Views at 18.

70. The fact that the USITC *also* examined the data from 1997 to 1998 does not detract from this full-period analysis. Japan attempts to characterize the decision of the USITC to consider the 1997 to 1998 data as a decision to reject an analysis of trends over the entire period. Japan's account does not comport, however, with what the USITC did. Consistent with Article 12.2 of the Agreement, the USITC provided its "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." In particular, importers and exporters before the USITC, like Japan here, contended that the USITC should rely on 1996-98 performance data to find the domestic industry not to be injured, rather than on the 1997-98 trends.[86]

71. The USITC's explanation of why it chose to rely on 1997-98 data rather than on the 1996-1998 data evidences the USITC's consideration of the 1996-98 data. Article 3.4 does not require that an authority's determination restate every index having a bearing on the state of the industry. Rather, Article 3.4 states that the examination of the impact of dumped imports shall include an "evaluation" of all relevant indices. The USITC's statement of its reasons for rejecting respondents' arguments concerning the 1996-98 data demonstrates its evaluation of that index.

72. Japan's argument confuses the USITC's justification for comparing the data from1997 to 1998 with an expression of its intention not to examine data over the 1996 to 1998 period. To the contrary, the USITC's justification for making a comparison between the 1997 and 1998 data reflected its evaluation of the probative value of the 1996-98 data in view of the changes in demand in the market that had occurred since 1996. Indeed, the USITC based the decision to rely on 1997 to 1998 data on the fact that "US apparent consumption increased throughout the period of investigation, both *from 1996 to 1997* and from 1997 to 1998, reaching record levels."[87] The USITC's determination shows that it evaluated "trends between the first and third years of a period that conflict with trends between the second and third years of a period," which Japan claims are "especially relevant."[88] What Japan couches as an argument that the USITC did not examine 1996-98 data is no more than a challenge to the weight that the USITC gave to 1997-98 data;[89] the weight of evidence, however, is for the authority to decide.

73. Japan cites *Argentina - Footwear*[90] as support for its position that the USITC improperly evaluated the data from 1997 to 1998 instead of comparing 1996 to 1998.[91] In fact, this decision shows the flaws in the Japanese position. *Argentina - Footwear* expressly rejects the notion that an authority should simply make a comparison of the data between the beginning and endpoints of the period of investigation. It states that trends within the period are an important part of any decision.[92] Thus, *Argentina - Footwear* in fact supports the USITC's determination.

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[86] USITC Views at 18.

[87] USITC Views at 18.

[88] Japan's Answers to Panel Question 18 at para. 60.

[89] Cf. United States -- Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87) ("Atlantic Salmon"), at ¶ 539.("Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 3:3 [now Article 3.4] that the positive developments reflected in the indicators referred to by Norway could not per se have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury.") (emphasis in original).

[90] Report of the Appellate Body, *Argentina -Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), adopted on 12 January 2000, WT/DS121/AB/R.

[91] Japan's Answer to Panel Question 18 at paras. 62-63

[92] *Argentina - Footwear* at para. 129.

74. Further, this panel should note that Japan makes inconsistent arguments about the appropriate time frame in an analysis of injury. With regard to the financial indicators, it is claiming that the USITC erred because it considered intervening trends, but when it discusses alternative causes of injury, it is alleging that the USITC erred because it did *not* consider trends within the period.[93] In the latter context, it argues that the USITC improperly did not compare data for the first half of 1998 with data from the second half of 1998 in order to fully appreciate the effect of the General Motors strike on the domestic industry.[94] Not only is Japan incorrect in stating that the USITC did not consider this time frame, but, in making this argument, it is conceding that an evaluation of trends within the period may, under certain circumstances, be more probative.

B. THE USITC PROPERLY DETERMINED THAT DUMPED IMPORTS WERE CAUSING MATERIAL INJURY TO THE DOMESTIC INDUSTRY

1. The USITC demonstrated a causal relationship between dumped imports and material injury

75. Contrary to Japan's argument, which it raised for the first time in its opening statement at the first panel meeting, the USITC amply established the causal relationship between dumped imports and the injury to the domestic industry. As has been seen, the USITC found that the increased dumped imports led the domestic industry to have excess capacity. Further, for example, it found that "at the same time as subject import volumes and market share increased dramatically, the domestic industry's market share declined;"[95] "domestic producers were prevented from participating in the increasing demand as subject imports increased their market share",[96] "declines [in prices] were most precipitous in the third and fourth quarters of 1998, at a time when the volume of subject imports was peaking;"[97] and "unit values fell significantly in 1998 as subject imports increased in volume and market share."[98] Such findings demonstrate "a causal relationship between the dumped imports and the injury to the domestic industry" as required by Article 3.5.

(a) The USITC properly found a correlation between the dumped imports and the price declines

76. Japan points to a three-month lag time between orders for Japanese product and its importation.[99] The existence of this lag time does not, however, defeat the USITC's conclusion that the increase in imports when price underselling increased supported the causal relationship between dumped imports and injury. First, this nexus was not established solely on the basis of a relationship between imports and prices in a particular quarter. Rather, the USITC found the instances of underselling to have increased in 1997 and 1998 as opposed to 1996, concurrently with a rise in import volume and market share and a decline in industry annual performance indicators.[100] As the USITC concluded, full year data was sufficient to support its affirmative determination.[101]

77. Moreover, evidence concerning the nature of pricing in the market supported the USITC's reliance on the fact that price declines were most precipitous in the third and fourth quarters of 1998, when import volumes peaked. The fact that some imports in those quarters were made pursuant to earlier contracts does not mean that the prices of those imports were not set when the importations

[93] First Submission of Japan at para. 275.
[94] First Submission of Japan at para. 277.
[95] USITC Views at 12.
[96] USITC Views at 12.
[97] USITC Views at 14.
[98] USITC Views at 18.
[99] Japan's Answer to Panel Question 47 at para. 107.
[100] USITC Views at 14-15.
[101] USITC Views at 20.

were made. To the contrary, during the hearing, respondents' witnesses testified that, in many cases, purchasers demanded lower prices after a contract had been negotiated, threatening to cancel the order if the prices did not come down.[102] In fact, Japanese respondents testified that, if prices in the market fell between the time of an order and the time scheduled for delivery, the prices were renegotiated.[103] This evidence shows that the lag time for orders does not translate into a lag time for price effects of imports. Therefore, consistent with the Japanese parties' own witnesses, the correlations that the USITC drew between the time of entry of the imports and the declining prices for hot rolled steel in the United States are not affected by the lag time between date of order and date of delivery.

(b) The USITC determined that the dumped imports were causing material injury in accordance with Article 3.5 of the Anti-dumping Agreement.

78. As the United States has discussed in its answer to the Panel's questions[104], the phrase "imports are causing material injury" had been interpreted under the Tokyo Round Anti-dumping Code not to require that an authority isolate the particular quantum of injury due to imports from the injuries due to other causes and determine that quantum of injury to be "material". In adopting that phrase in Article 3.5, the negotiators of the Anti-dumping Agreement reflected that they would not change that conclusion. Rather, adopting also the phrase "a causal relationship", they indicated that a demonstration of causation must show a connection between the effects of imports and material injury, not that dumped imports are the only factor so connected. Such a demonstration, consistent with the requirement not to attribute to dumped imports the effects of other causes, must not mistakenly rely on indicators of such a relationship that are in fact due to other causes of injury.

79. Japan nevertheless argues that the USITC violated the Agreement by stating that "the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance."[105] The USITC's legal conclusion was that the domestic industry "is materially injured by reason of LTFV [*i.e.*, dumped] imports of hot rolled steel from Japan."[106] Japan does not contend that this conclusion differs from the conclusion that dumped imports are causing material injury.

80. The USITC's use of the phrase "materially contributed" in effect recognizes that, although in using the phrase "a causal relationship" Article 3.4 does not establish a precise degree of relationship that must be demonstrated between the effects of imports and injury, that relationship must not be trivial. Use of the phrase "materially contributed" is entirely in accord with the ordinary meaning of the term "cause." *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." *Webster' s* makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> CAUSE indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[107]

In short, the phrasing of which Japan complains is simply one way of restating the term "cause."

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[102] Transcript of 4 May 1999, Hearing at 242 (testimony of Mr. Curtis) (**Exh. US/C 25**).
[103] Transcript at 246-47 (testimony of Mr. Stapp).
[104] US Answer to Panel Question 46.
[105] USITC Views at 20-21.
[106] USITC Views at 23.
[107] Webster's Third New International Dictionary (Unabridged) at 356 (1981) (**Exh. US/C 26**).

81. In considering the adequacy of the USITC's demonstration of this causal relationship, it is instructive to compare the findings that it made here to those upheld by the panel in *Atlantic Salmon*, whose analysis was before the negotiators of the Anti-dumping Agreement. In *Atlantic Salmon*, the panel found that the "USITC had not failed to consider whether there had been a significant increase in the volume of subject imports."[108] The USITC's decision that the panel upheld discussed the existence of a surge in imports from Norway, but also found that market penetration of these dumped imports declined.[109] In the current case, not only did dumped imports double in volume; they doubled their market shares as well.[110]

82. As to price effects, the *Atlantic Salmon* panel found that, "on its face, the text of the USITC determination demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway."[111] As part of its analysis in that case, the USITC concluded that, "[a]lthough other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a role in the price decline."[112] The *Atlantic Salmon* panel reached this conclusion notwithstanding the fact that in that case the dumped imports persistently oversold the domestic product.[113] In the current case, the USITC found that imports that increased by 10 million tons over 1997 and 1998, including 7 million tons in 1998, and increasingly undersold the US product in that period, had significant price effects. Japan's argument that a strike at General Motors that affected no more than 685,000 tons of product over a period of five weeks had significant price effects only reinforces the USITC's conclusions about the price effects of the massively increased imports.

83. The panel in *Atlantic Salmon* also upheld the USITC's determination about the negative financial performance of the US industry[114] when the USITC found, "After posting a large operating loss in 1987, the domestic industry recorded an overall operating profit in 1988. However, the financial state of the US Atlantic salmon industry declined precipitously in 1989."[115] The USITC found a similar end-of-period trend in operating income in this case.

84. In short, the United States submits that, in order to establish that the USITC's demonstration of a causal relationship between dumped imports and material injury in this case violates the Anti-dumping Agreement, Japan must establish that the Anti-dumping Agreement requires an analysis significantly different from that upheld under the Tokyo Round Code. Japan has not attempted such a showing, and cannot make it.

III. THE USITC CONDUCTED THE PROCEEDINGS IN THIS INVESTIGATION IN AN UNBIASED AND FAIR MANNER

85. The United States has previously addressed Japan's argument that the USITC Commissioners should not have requested at the USITC's hearing that domestic producers provide information that they had not previously provided. The United States will not here reiterate its points on the matter. Japan now, however, takes issue with the USITC's acceptance of that submission because, it claims, "respondents literally had less than a week to comment on the corrected figures, and then only briefly,

[108] *Atlantic Salmon* at para. 501.
[109] *Atlantic Salmon* at para 499.
[110] USITC Views at 12.
[111] *Atlantic Salmon* at para. 514.
[112] *Atlantic Salmon* at para. 514.
[113] *Atlantic Salmon* at para. 518.
[114] *Atlantic Salmon* at para. 538.
[115] *Atlantic Salmon* at para. 535.

as final comments are strictly limited to fifteen pages in length per respondent country."[116] This contention fails to make out a claim under the Agreement.

86. As reflected in the final USITC's staff report, US producers submitted the requested data before the report issued, and that information was incorporated into the report.[117] The staff report was issued to the parties on 27 May 1999. In fact, the US producers had submitted to the USITC and served on the other parties the final piece of information on this point several weeks prior to issuance of the final report. Parties submitted their final comments on the information obtained in the investigation to the USITC on 7 June 1999. Thus, respondents had several weeks to prepare their comments on this information, not the seven days that Japan claims.

87. Further, respondents were not limited to a fifteen page submission. On 2 June 1999, respondents requested to file more than fifteen pages for their final comments. They made this request, not because of an issue with the information in the record, but because of the fact that one counsel was representing producers from several different countries.[118] In fact, respondents' final comments were 29 pages long.[119]

88. In any event, Japan's argument does not establish that the USITC in any way violated the applicable provision concerning parties' opportunity to comment on information. The relevant provision is Article 6.9, which provides that authorities, before a final determination is made, shall inform all interested parties of the essential facts under consideration. Article 6.9 further provides, "Such disclosure should take place in sufficient time for the parties to defend their interests."

89. Notably, Article 6.9 does not define what constitutes a "sufficient time" nor does it require authorities to afford parties unlimited numbers of pages in which to present their arguments. In the current case, respondent interested parties in fact commented on the US producers' data in final submissions. None complained that either the time or pages that they were afforded for comment was insufficient. None complained that, with more time or space, they would have had more to say. None requested that, as its rules allow, the USITC make an exception to the limitations set forth in its normal procedures.[120] They only requested clarification of the rule on comments, and they never made reference to the domestic industry's data in that request. In short, the Japanese respondents having failed in the administrative proceedings to object to the time and space they were given, Japan's argument at best consists of the contention that a week for response and a limitation of the number of pages in which to make that response is *per se* insufficient. Nothing in the Agreement supports such a contention.

90. Indeed, Japan should be barred from making such a contention. In arguing the USITC failed to afford parties sufficient time to defend their interests, that contention is beyond this Panel's terms of reference. Japan's panel request does not state any claim arising under Article 6.9 or mention that Article at all. Thus, unable to make a substantive claim under Article 6.9, Japan should not be permitted to substantiate this claim through vague and unsupported allegations of bias.

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[116] Japan's Answer to Question 44 at para. 98.
[117] USITC Views at VI-1.
[118] 2 June 1999 letter to Chairman Bragg (**Exh. US/C-27**).
[119] Selected pages from Respondents' Comments (**Exh. US/C-28**).
[120] *See* 19 C.F.R. §§ 201.4(b) & 201.14(b)(2) (**Exh. US/C-29**).

CONCLUSION

91. For the foregoing reasons, the United States requests that the Panel reject Japan's claims in their entirety.

ANNEX C-3

Letter from the United States to the Chairman of the Panel

(21 September 2000)

The United States has raised a preliminary objection to Japan's submission to the Panel of factual information not made available to the US authorities during the antidumping duty investigation, i.e., extra-record evidence. In its questions to the United States, the Panel asked the United States to list the exhibits that should not be considered by the Panel because they are extra-record evidence. The United States responded on 6 September. Since the time of that response, the United States notes that Japan has put before this Panel, in its second submission of 13 September, two additional pieces of extra-record evidence that should not be considered by the Panel.

First, at note 353, Japan cites profit figures from an annual report of a US producer. Japan apparently admits that the annual report was not submitted to the US International Trade Commission ("USITC"), but states that purportedly similar information was given to the USITC. As the United States has previously made clear, we have no objection to Japan's use of any information presented to the USITC, with respect to "injury" issues, but ask that the Panel disregard this new, extra-record evidence.

Second, Japan's exhibit JP-105 contains information from two web sites, described at note 372 of Japan's second submission. Neither these web sites nor their content were presented to the USITC during the course of the antidumping investigation. In addition, Japan retrieved these web sites on 5 September 2000, as the date on the pages demonstrates. Therefore, the information contained in those documents may not even be relevant to the time period under investigation, and may not even have existed at the time of the investigation.

We ask that the panel disregard the above extra-record evidence contained in Japan's second submission.

The United States is providing a copy of this submission directly to the Government of Japan.

ANNEX C-4

Letter from Japan to Chairman of the Panel

(25 September 2000)

On 21 September 2000, the United States filed a letter with your office registering its objection to certain evidence referenced in Japan's Second Submission. Japan believes that the items to which the United States now objects are properly before the Panel, for the following reasons:

The information contained in footnote 353 of Japan's Second Submission is from the 1999 annual report of Steel Dynamics Inc. ("SDI"). During the course of its investigations, USITC requests the annual reports of domestic producers in their questionnaires. Specifically, Question III-4 of the domestic producer questionnaire issued in the hot-rolled steel case requested the producers to submit their annual reports if they were not available on the internet.[1] (While the staff report does not state which domestic producers submitted completed questionnaires, it can be assumed that SDI did so given that it was named as a petitioner.[2]) Therefore, although USITC's confidential record has not been made available to the Panel, it is safe to assume that the information cited in footnote 353 - SDI's operating profits for 1997 and 1998 - was contained in the annual report(s) accompanying SDI's questionnaire response. Given that this 1997 and 1998 data is the only information referenced in footnote 353, it is irrelevant whether the 1999 annual report itself was on the record (Japan did not provide the entirety of the 1999 annual report as an exhibit to its Second Submission).

The documents in Exhibit JP-105 merely show that Lone Star Steel and Newport Steel specialize in supplying hot-rolled steel sheet for pipe and tube production. Question II-23 of USITC's domestic producers' questionnaire asked each company to report the percentage of its shipments devoted to pipe and tube products.[3] Japan admits that, unless Lone Star and Newport submitted questionnaire responses, USITC might not have had record information before it to suggest that they specialized in hot-rolled steel for pipe and tube production.

Neither producer was a petitioner, and the public staff report gives no indication that either firm returned a questionnaire response to the staff. The staff report does, however, identify both companies as hot-rolled steel producers[4], and it is a matter of public record that both companies specialize in pipe and tube production, as demonstrated by their websites. Further, Japan only offers Lone Star Steel and Newport Steel as examples of companies dependant on the pipe and tube market that would have been hard hit by the pipe and tube recession. Even without these examples, Japan's logic is irrefutable: Even though overall apparent consumption reached a record high in 1998, companies dependant on the pipe and tube market would have nevertheless lost money for reasons unrelated to subject imports. Nonetheless, USITC completely ignored this alternative cause in its determination.

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[1] **Exh. JP-106** (attached).
[2] *USITC Final Injury Determination*, USITC Pub. 3202 at III-3 (**Exh. JP-14**).
[3] **Exh. JP-106** (attached).
[4] *USITC Final Injury Determination*, USITC Pub.3202 at III-2 (**Exh. JP-14**).

ANNEX D

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ANNEX D-1

Opening Statement of Japan

(22-23 August 2000)

INTRODUCTION

1. Mr. Chairman, members of the Panel and members of the delegation of the United States, it is a great honour for me to represent the Government of Japan before this distinguished Panel of the WTO Dispute Settlement Body. On behalf of the Government of Japan and the Japanese delegation, I wish to express our appreciation to the members of the Panel for accepting the weighty responsibility of serving on this Panel.

I. STANDARD OF REVIEW AND AMERICAN POLITICS

2. At the core of this dispute lies a simple but fundamental question: will there be meaningful WTO review of antidumping measures? Or instead will the WTO review be so narrow, so constrained, with so much deference to Members implementing AD measures so as to render WTO oversight essentially meaningless except in the most egregious cases? As a number of antidumping measures proliferate, and increasingly replace other types of trade restrictions, the need for meaningful discipline becomes more and more important.

3. Before moving onto the specific issues in this case, I would first like to address two broader issues that are crucial to this Panel's work. The first is the issue of "permissible interpretations" under the standards of review. The second is the political context from which the United States seeks to divert the Panel's attention.

4. The United States tries to cloak its various abuses in this case behind the standards of review found in Article 17.6 of the Anti-Dumping Agreement. But, in doing so, it mischaracterizes the standards and seeks to have narrow exceptions swallow the basic rules.

5. With regard to Article 17.6(ii), it is well settled that interpretations of any given treaty provision should not be arbitrary. International agreements lose their *raison d'être* if signatories have unlimited liberty to craft their own arbitrary interpretations at will. Article 31.1 of the Vienna Convention requires a treaty to be interpreted in good faith in the light of its object and purpose, so as to avoid any situation in which the parties craft a plethora of self-serving interpretations. The United States argues that interpretation of any treaty should be done to ensure the maximum flexibility to do as it pleases, provided one of its lawyers can think of a clever interpretation to justify it. The US contention that ambiguity found in the Anti-Dumping Agreement and varying practices of other Members automatically serve as a basis for "multiple permissible interpretations" is based on self-serving interpretation of the Vienna Convention and runs counter to its basic tenet.

6. Even if more than one interpretation did apply in this case (which is not the case), this would not give carte blanche legitimacy for any interpretation. "Permissible interpretation" under Article 17.6(ii) does not mean any interpretation. The panel must closely scrutinize these alternative interpretations to determine whether they rise to the level of "permissible" in the context of the Anti-Dumping Agreement. The panel must also ensure that the alternative interpretations do not

compromise the proper establishment and unbiased and objective evaluation of the facts, all of which are crucial to proper implementation of the Agreement.

7. The United States similarly mischaracterizes the Panel's obligation when assessing the facts of any case. To protect the factual conclusions in its hot-rolled steel determinations, the United States claims that Japan is asking for *de novo* review, even though we clearly indicated that we are not doing so. The United States creates this straw man to sidestep the clear requirement of Article 17.6(i) that the Panel must evaluate whether the facts were established properly and evaluated in an unbiased and objective manner. As the panel decision in *the US-Wheat Gluten* case clearly recognized in paragraph 8.5, DSU Article 11 imposes a similar obligation on panels in all disputes. This requirement provides a solid basis for Japan's attack on factual conclusions made by the United States. Japan believes that the facts were established improperly, were evaluated in a biased and non-objective manner, and were inappropriate and insufficient to justify the conclusions being reached. Once these flaws in the establishment and evaluation of the facts are fixed, Japan believes a different conclusion is then warranted.

8. The second broad issue is the political context, which is indispensable to assess whether the United States conducted an unbiased and objective investigation. Japan opened its first submission with a discussion of, among other things, the Stand Up For Steel campaign; the multiple meetings held between US government officials and the US steel industry and unions; the various expressions of support and promises granted by USDOC Secretary Daley before and during the investigation; and the ultimately favourable determinations issued for the domestic industry. The United States calls our discussion of this political manoeuvring "extraordinary." We agree -- but only because the US conduct in this particular antidumping investigation was extraordinary and inconsistent with US WTO obligations.

9. In setting forth the political context of these investigations, Japan is not alleging a conspiracy. Rather, we are arguing that the United States buckled under intense and continuous political pressure from its steel industry and, as a result, improperly established and evaluated the facts. The United States would have the Panel put on blinders and merely examine without any proper context the pieces of paper on a cold administrative record. The Panel must not do so. This applies in particular to Japan's claims under Article X. How could the Panel appropriately address the question of whether the United States administered its laws uniformly, impartially and reasonably without examining the political pressures that prompted the novel, biased, and unfair administration of those laws in this case?

10. Consider first the change in legislation following the 1993 anti-dumping rulings concerning various flat-rolled steel imports. Because it lost many of these cases at the USITC, the US steel industry lobbied Congress strenuously for passage of the captive production provision. The industry knew that if it did not obtain legislation tying the hands of the USITC in its analysis of the merchant market, it would be more difficult to convince the Commissioners to make an affirmative determination in future cases. The industry's lobbying effort was successful; the provision became law in 1995.

11. Consider also the new policy on early critical circumstances determinations. In a clear effort to respond to the Stand Up For Steel campaign, USDOC issued a new policy, at odds with previous practice, and applied it in this case. No matter that no evidence existed to support the decision. The steel industry asked for it; the industry got it.

12. Consider too the refusal to correct the clerical error for NKK. The decision had real consequences: the correction would have brought NKK's margin below the 25 per cent threshold for applying critical circumstances. The United States tries to shift the focus by arguing that other countries do not have such procedures. But that is not the point. The point is that the US actions were

so pre-ordained and biased in favour of the US industry that the United States ignored its own regulations for correcting clerical errors.

13. Finally, consider the double standard for applying "facts available" to foreign and domestic companies. For NSC and NKK, the United States applied a strict and unforgiving rule -- essentially "zero tolerance" for errors, misunderstandings, and oversights. It did not matter that the information at stake constituted a simple conversion factor among thousands of pages of documents cooperatively submitted by the Japanese companies. It did not matter that the Japanese companies in fact, supplied the information once they independently discovered their mistake. It did not matter that the information arrived within regulatory deadlines. The United States simply refused to accept the information and applied punitive "facts available." Yet for domestic companies, the United States switched to a policy of "anything goes" -- even though the information being withheld by the domestic steel mills went to the very heart of the investigation; even though the information had to be extracted from the domestic mills under threats; even though the information arrived well after all applicable deadlines. Such a double standard can only be explained by a bias in anti-dumping decision making in the United States that favours domestic over foreign companies.

14. These examples show that the politics involved in this case forced decisions that otherwise would not have been made. The resulting bias infected the entire analysis performed by authorities, thus explaining many of the violations.

II. SPECIFIC ANTI-DUMPING AGREEMENT CLAIMS

15. We now address the specific violations that occurred in this case. Under an appropriately understood standard of review for claims under the Anti-Dumping Agreement, we believe the Panel should do something about the US violations in this case.

A. USITC CLAIMS

1. Captive Production Provision On Its Face

16. We begin with injury, and specifically the captive production provision. This provision violates the Agreement's requirement that in examining injury and causation, an authority must analyze the industry as a whole, not just a part of it. The US position, essentially, is that the provision is meaningless because the USITC is still required to consider the industry as a whole.

17. If the provision were truly meaningless, however, why have it at all? If it were truly meaningless, why did the steel industry fight so hard for its passage? If it were truly meaningless, why does the US steel industry fight so consistently and vociferously for its application?

18. The reason is that the provision is not at all meaningless. It has a clear impact -- one that makes affirmative injury determinations more likely. It distorts the USITC's analysis because it requires the Commissioners, if they find certain facts to exist, to focus on one segment of the industry, not on the industry as a whole, when examining financial performance and import penetration -- two of the most important factors in an authority's injury analysis. When doing so, the industry's performance looks worse than it really is; and the apparent effects of imports on the industry are exaggerated because import penetration is inevitably inflated. The provision therefore prevents the USITC from finding, as it did in the 1993 case against hot-rolled steel imports, that (and I quote) "any impact imports may have had on the merchant market segment is not significant when evaluated in terms of their effect on the domestic industry as a whole." In other words, prior to the passage of the captive production provision, a domestic industry could be insulated from the effects of imports by its sizeable captive consumption. Now, the assessment of this insulating effect is distorted by the mandatory focus on the merchant market.

19. The captive market provision constitutes an explicit instruction to an independent agency, which is then statutorily required to decide exclusively on the basis of that instruction notwithstanding US international obligations. The question is therefore not whether the captive production provision could possibly be stretched to yield a result consistent with the Anti-Dumping Agreement, but whether the agency can be expected to act consistently with the Anti-Dumping Agreement in light of that statutory instruction.

20. The United States wants the panel to think that merely emphasizing the merchant market does not preclude an analysis of the industry as a whole. Indeed, they argue that the statute and USITC practice requires an analysis of the industry as a whole. But, the United States underestimates the impact of emphasis. The United States never explains – and cannot explain – how emphasis on the merchant market helps one understand better the domestic market as a whole. In a causation context, emphasis on the merchant market highlights imports as a cause over other causes.

21. This is no different from what the Panel condemned the United States for in the *Wheat Gluten* safeguards dispute. That dispute involved the Safeguards Agreement, but the reasoning applies equally to material injury under the Anti-Dumping Agreement. The problem, the Panel found, was that by focusing on the question of whether imports were a more important cause of injury than other causes, the United States failed to discern whether imports themselves were a cause of serious injury to the domestic industry. The same is true here: when the captive production provision applies, it distorts the relative effects of various causes by elevating one cause -- imports -- over all others. To borrow a term from the Panel in *High Fructose Corn Syrup*, the mere "recitation of data" concerning other causes does not satisfy WTO obligation. The mere existence of data for the industry as a whole in the USITC's staff report is not enough; merely saying that it considered the industry as a whole is not enough.

22. The distortive effect of emphasizing only one part of an industry must not be underestimated. To do so is to open a wide loophole in the requirement of Anti-Dumping Agreement Articles 3 and 4 to analyze the domestic industry as a whole. Indeed, it potentially turns the rule completely on its head, particularly when the authority fails to explain how the segment analysis helps understand the industry as a whole.

23. As Brazil has stated in its third country submission, nothing stops the United States from considering as a condition of competition the merchant versus captive portions of an industry. But to mandate an approach under the statute does not permit the authority to do what the Anti-Dumping Agreement requires: to consider equally and objectively all of the evidence as it relates to the performance of domestic producers as a whole.

2. Injury and Causation In The Hot-Rolled Steel Case

24. In addition to our "on-its-face" claim with respect to the captive production provision, Japan has also made several case-specific arguments regarding the USITC's injury and causation determinations in the hot-rolled steel case.

25. The first is that a majority of the Commissioners improperly established and evaluated the facts by focusing their attention on the merchant market. Three Commissioners specifically applied the captive production provision; Chairman Bragg, though stating that she was not applying the provision, also focused on the merchant market. She indicated in separate remarks that she would switch the order of analysis, starting first with the industry as a whole, but she still joined that part of the majority decision that was distorted by application of the provision. There is no telling how her views would have changed had the other Commissioners not focused primarily on the merchant market in analyzing market share and financial performance. Had merchant market data been simply another economic factor, neither Chairman Bragg nor the rest of the majority would have addressed this part of the industry nearly as much as it did. USITC's examination of the volume, price, and

impact of imports was therefore not objective as required by Article 3.1, nor did it meet the standards of Articles 3.4 and 3.5 to evaluate all economic factors having a bearing on the state of the industry.

26. USITC's hot-rolled steel determination suffered from several other flaws as well. First, USITC focused on the final two years of financial performance rather than the full three years of the investigation period. This approach violated the Anti-Dumping Agreement's requirements that an authority's analysis be objective and that all factors be thoroughly considered. Focusing on the last two years of the period meant that USITC focused on a decline in domestic industry performance in 1998 from 1997 -- one of the best performance years the industry has ever had. Under a normal three-year analysis, the picture was much different: rather than declining, the financial performance of the domestic industry as whole improved -- in the face of increasing imports. Such a picture shows the clear disconnect between industry performance and imports. While Commissioner Askey centered on this fact in finding no current injury to the industry as a whole, the majority **did not even discuss it**. The two-year analysis was therefore not objective, as required by Article 3.1. It also prohibited a proper analysis of the relationship between trends in imports and the trends in injury factors, as required by Article 3.5.

27. Beyond its focus on the final two years, however, the USITC failed to discern the impact of other causes and ensure that it was not attributing to imports the effects of those other causes. Mini-mill capacity, the General Motors strike, and declining demand in the pipe and tube industry were all alternative reasons for the domestic industry's declining performance, but USITC did no more than pay lip service to these causes, if it addressed them at all. To the extent USITC considered alternative causes of injury, it held that each only partly explained the industry's problems in 1998, concluding that subject imports "materially contributed" to industry's injury. A finding that subject imports materially contribute to injury, however, is not the same as finding that subject imports caused present material injury. And indeed, USITC did not consider whether the injury caused by subject imports alone was material, as required by Article 3.5 of the Agreement.

28. The Panel in the *Wheat Gluten* dispute recently held that a similar USITC practice in the realm of the Safeguards Agreement was impermissible. According to that panel, a finding that imports caused more injury than any single alternative factor cannot substitute for a finding that imports themselves caused serious injury. In other words, an authority must isolate causes, not only to ensure that imports are in fact causing injury, but that the more serious impact of other factors is not mistakenly attributed to imports.

29. The language in the US First Submission itself proves our point. In justifying its treatment of the General Motors strike, the United States no where assesses the relative impact of the General Motors strike. Rather, its analysis is circular and conclusory: the General Motors strike was not important because it was subject imports that caused injury. This result-oriented approach to the causation analysis does not reflect the rigorous analysis clearly required by the Agreement. This cannot possibly be deemed to be a proper establishment and objective assessment of the facts within the meaning of Article 17:6 (i).

B. USDOC

30. Moving now to the findings of the US Department of Commerce, Japan has made claims against various decisions and policies that show the bias apparent in this case. USDOC refused to correct the error in NKK's margin calculation. USDOC adopted a new policy on retroactive duties (known as critical circumstances in the United States) to restrict trade earlier. USDOC applied its biased approach to affiliated party sales in the home market. USDOC used adverse "facts available" to punish respondents. Each of these actions violated the Anti-Dumping Agreement.

1. Critical Circumstances

31. Concerning critical circumstances, Japan has identified an abundance of violations, not only with the way in which the US policy was applied in this case, but with the statute itself.

32. The primary problem with the new policy adopted by the United States is that it permits affirmative findings far too early. Any decision to apply retroactive duties must rest on the "sufficient evidence" to justify such a decision. This did not happen in the hot-rolled steel case, and will almost never occur if the United States continues with its early critical circumstances determinations. Articles 10.6 and 10.7 together require that:

- First, the product must already be found to be dumped – the provision specifically refers to "the dumped product in question".
- Second, the importer must have reason to know that the product was dumped.
- Third, importer must have reason to know that its purchase of the imported product would injure the domestic industry.
- Fourth, the massive imports must have actually caused injury.
- Fifth, the injury caused by the massive imports must be likely to undermine the remedial effect of any import relief granted.

33. None of these elements was met in the hot-rolled steel case, nor does the statute or USDOC's new policy bulletin require that any of these be met:

- There was no finding that the products were dumped; USDOC would not even preliminarily determine whether there was dumping until 11 weeks later. Not only was there no finding of dumping, but the only "evidence" to support the existence of dumping was the petition. To suggest that this evidence alone constituted sufficient evidence is simply unsupportable. The United States itself admits in paragraph 72 of its First Submission that, and I quote, "it is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party". The one-sided evidence in a petition can never be "sufficient" for a determination of critical circumstances.
- There was also no evidence that importers had any knowledge that imports were dumped. Petitioners' mere allegation of dumping margins above 25 per cent cannot constitute sufficient evidence of importer knowledge of dumping; indeed, the two respondent companies on which petitioners based its dumping margin allegation -- NKK and NSC -- ultimately received margins of less than 25 per cent in USDOC's final determination.
- There was also no evidence that importers knew their imports were injuring the domestic industry. The USDOC cited a collection of newspaper articles as showing current injury, but then essentially ignored the USITC's analysis of actual facts showing only a threat of future injury. The Agreement does not allow retroactive duties when only a threat of injury exists. Threat indicates a potential problem in the future; retroactive duties are meant to address something that happened in the past. The two concepts simply cannot be reconciled.

- Finally, USDOC did not even address whether imports would undermine the remedial effect of import relief that might be granted in the future.

34. The United States wants the Panel to conclude that because retroactive duties were never actually collected in this case, the United States should be permitted to continue to make early critical circumstances determinations. The Panel must reject this position. To adopt it would be to permit the continued abuse of the anti-dumping laws to improperly chill trade. An authority could accept a petition that just barely passes the test for initiation, knowing full well that the support for a current injury determination by USITC and a dumping determination by USDOC were weak at best. But, with low standards for both initiation and preliminary critical circumstances determinations, the authority can effectively block imports well before the truth comes out. The Agreement is clear: sufficient evidence must exist before an authority can shut down trade with the threat of retroactively imposed dumping duties. There is no permissible interpretation of the Agreement that can help the United States skirt around this obligation.

2. Affiliated Sales In The Home Market

35. As for affiliated party sales, the United States spends a great deal of time defending its right to exclude affiliated party sales in the home market as outside the ordinary course of trade. But, Japan has not challenged whether individual sales in this particular case can be considered outside the ordinary course of trade. What Japan has argued is that the manner in which the United States decides that such sales are outside the ordinary course of trade is not permitted by Article 2 of the Agreement. Japan has further argued that there is no authority in the Agreement permitting the replacement of such sales with an affiliates' resales.

(a) Arm's Length Test For Excluding Affiliated Party Sales

36. The United States applies what it calls the "99.5 per cent arm's length" test to determine whether sales to an affiliate are outside the ordinary course of trade. Under this test, if sales to any affiliated customer are priced just 0.5 per cent less than the average price to unaffiliated customers, then all the sales to that customer are disregarded. This test is biased. It is not truly aimed at determining whether a sale is ordinary or not, but whether it is priced lower than other sales. Time after time, the United States refuses to admit this obvious flaw in its approach.

37. An example should make this crystal clear for the Panel. Assume a company is running losses, but has affiliates whose profits are quite high. Under such circumstances, the company would have the obvious incentive to sell to its affiliates at higher prices to reduce the profits of the affiliates and consequently reduce domestic tax liability. In other words, the existence of the affiliation in this situation tends to increase prices between the companies rather than lower them. The prices are distorted and are therefore not at arm's length. Yet, the United States never takes this situation into consideration in applying its so-called arm's length test. That is because its test addresses only the question of whether the average price to affiliates is simply lower than the average price to non-affiliates.

38. The United States claims in its First Submission that if the Japanese respondents had made the argument that high priced sales should be excluded as well, then USDOC would have also considered whether they were inside or outside the ordinary course of trade. But, this is plainly disingenuous. First, the alternative test proposed by NKK did in fact suggest that high priced sales should likewise be excluded. Second, the United States has explicitly admitted in its First Submission to maintaining a double standard for excluding low-priced versus high-priced sales: low-priced sales are excluded automatically under the 99.5 per cent test merely if they are priced lower than sales to non-affiliates; high-priced sales, on the other hand, would only be excluded if respondents ask that they be excluded -- and then only if they are, in the words of the US First Submission, "aberrationally high".

39. Why doesn't the US apply an "aberrationally low" test to low-priced sales to affiliates? The answer is that this would mean permitting low priced home market sales to stay in the database, thereby lowering normal value and, in turn, decreasing the dumping margin. This results-oriented approach to calculating dumping margins violates Article 2.1 because it is mechanical and does not truly determine whether a sale is outside the ordinary course of trade; it violates Article 2.4 because it is so unfair; and it violates the spirit of Articles 2.2 and 2.2.1 which set forth very carefully the circumstances in which home market sales may be excluded when they are below cost or of insufficient quantities. Perhaps most importantly, it also violates the principle that Members are supposed to adopt and apply their anti-dumping laws in good faith. The United States would have the Panel excuse this action under an extremely permissive interpretation of the Agreement. Yet doing so in the face of such result-oriented motivations cannot be tolerated under any reasonable interpretation of the Vienna Convention and the good faith obligations owed to Japan and other Members by the United States.

40. Once the prejudicial nature of the US arm's length test is laid bare, the US defence falls flat. Reliance on other countries' practices with regard to affiliated party sales is simply irrelevant. While other countries may have policies for excluding sales to affiliated parties, none of them has a test as mechanically unfair as the United States; Brazil and Korea -- two of the countries cited by the United States -- prove this point in their third country submissions supporting Japan's argument on this issue. In any event, other countries' laws on this topic are not at issue. They are irrelevant to this Panel's review of the US law and practice.

(b) Replacement With Affiliated Party Resales

41. As for the US practice of replacing excluded sales to affiliates with resales by the affiliates, Japan's position is clear: nothing in the Agreement authorizes it. What's more, the Agreement's silence -- when read in light of the specific language in Article 2.3 permitting use of affiliated importer resales when calculating export price -- must be interpreted to prohibit the practice on the home market side.

42. The US first responds to this argument by saying that Article 2.2 of the Agreement contains a non-exhaustive list of alternatives that may be used when sales are outside the ordinary course of trade. However, the US has created permissive language where it does not exist. Article 2.2, in fact, contains mandatory language. It reads that when there are no home market sales in the ordinary course of trade, "…the margin of dumping ***shall be determined*** by comparison with" third country sales or constructed value. In other words, the list of alternatives -- third country sales or constructed value -- is not a non-exhaustive list. With the use of the term shall, it is decidedly exhaustive. Therefore, nothing can be read to permit another alternative, such as downstream sales.

43. In addition to its mistakenly permissive reading of Article 2.2, the US also defends its practice largely by reference to the authority granted in Article 2.3 to calculate constructed export price. The argument goes like this: if it's permitted on the export side, it must be permitted on the home market side as well. Yet, the US reliance on Article 2.3 simply highlights why its treatment of home market sales to affiliates is unfair. When constructing export price due to an affiliation between the exporter and importer, the United States conducts an elaborate calculation to ensure that that constructed price is as close to an ex-factory price as possible. In doing so, the US deducts profit from the affiliate's sale price. However, the US does not do this when using affiliated party resales in the home market. Why the difference? Because deducting profits on the export side increases the dumping margin; deducting profit on the home market side decreases the dumping margin. This not only violates Article 2.4's requirement for a fair comparison; it again shows the lack of good faith exhibited in the adoption of US anti-dumping laws and measures.

44. The reason Article 2.3 exists is because there is no alternative for export price but some price at which sales are made in the export market. Hence the authority to construct an export price. There

is no such need for this policy on the home market side because there are plenty of other alternatives. If sales are made to affiliates at prices that are not reliable, then just exclude them and use other home market sales. Alternatively, use constructed value or third country sales if the remaining ordinary sales are too few due to the exclusion. But nothing permits the use of resales in the home market -- particularly when the method for doing so is inconsistent with the method used on the export price side.

3. Facts Available

45. Japan has made four arguments regarding facts available. First, that USDOC's established practice of applying adverse facts available as a means of punishing respondents violates the Agreement. Second, that the application of that practice against Kawasaki with respect to its US sales was also not permitted under the Agreement. Third, that the application of that practice against NSC and NKK with respect to each company's actual-to-theoretical weight conversion factor violated the Agreement. And fourth, that the inclusion of margins for which facts available were used in the calculation of the all others rate is also impermissible.

(a) Established Practice

46. With respect to our claim against USDOC's established practice of applying adverse facts available, the US thinks Japan has gone too far. They have even found it important enough to bring a preliminary objection against the Panel's consideration of the claim. Yet, two of the third countries involved in this case agree with Japan that it is the US policy with respect to adverse facts available goes too far, not Japan's claim.

47. The United States seriously exaggerates what would happen if it was not permitted to use adverse "facts available" to induce cooperation. The extreme US example -- a respondent refusing to cooperate and providing only information that resulted in a favourable dumping margin -- completely ignores the context of the overall process. After all, through its investigation and verification, the authority would discover whether the respondent withheld any necessary or relevant information. It would be perfectly acceptable under such circumstances to use information available from other sources, including that supplied in the petition.

48. Fundamentally, the United States fails to acknowledge the difference between using information that is as representative as possible under the circumstances, even though it might be less favourable to a respondent, compared to using information that is as unrepresentative as possible to punish a respondent. The purpose of the "facts available" provisions of Anti-Dumping Agreement is to allow authorities to calculate dumping margins using alternative information when the party refuses to cooperate, not to allow authorities to use distorted and extreme facts as a punitive club to scare respondents into providing information.

(b) This Case

49. Apart from our argument that "facts available" should reflect market realities and not be used to punish uncooperative companies, Japan also believes that the US contention that Japanese respondents in this case were uncooperative is totally unfounded. The United States uses an indefensibly low standard to trigger the need for punitive "facts available". Rather, the US argument reflects its result-oriented approach to these investigations where the US Government caved in to the political pressures of the US steel industry. Such practice not only violates the Anti-Dumping Agreement, but GATT Article X:3 as well.

50. In stark contrast to the hypothetical uncooperative respondent in the extreme US example, each of the respondents in this case showed an abundance of cooperation. Consider the extensive amount of information provided by each one. Thousands upon thousands of pages of information;

thousands upon thousands of hours of work; weeks and weeks of on-site verifications. These were companies that invested significant resources to comply with each and every one of the requests issued by the Department. In the few instances in which they had difficulties with a request, they explained themselves and asked for guidance. They did not submit false information; they did not purposefully withhold unfavourable information. They were in constant communication with USDOC regarding their progress in obtaining the information. But rather than consider the overall level of cooperation supplied by the respondents, instead of reacting to the respondents' requests for guidance, instead of applying what Annex II calls "special circumspection", each one of the respondents was punished.

(i) KSC

51. This is particularly true for KSC. The evidence shows that KSC sent repeated letters to petitioner CSI to obtain its assistance; it sent repeated letters to USDOC explaining that CSI would not cooperate. Implicit in all of its letters to USDOC was a request that USDOC provide some guidance as to what it should do. USDOC said nothing until it issued its determination, at which point, without warning, it decided to punish KSC and apply adverse facts available.

52. The US approach of surprising and punishing respondents in this manner is the problem here, and it should be stopped. As Japan has detailed in its submission, there are several provisions of the Agreement that give the Panel a method for doing so.

(ii) NSC/NKK

53. With respect to NSC and NKK, we recognize that the impact of the use of adverse facts available here was small. But it is the principle that matters: USDOC should not be permitted to apply adverse facts available to punish respondents. Punish is never appropriate, but particularly those respondents who are not worthy of punishment. The fact is that NKK misunderstood what exactly USDOC was asking for; further, once NKK asked USDOC for guidance, the agency misled NKK. NSC had an internal misunderstanding between company departments that can only be described as an honest mistake. Despite these minor misunderstandings, the companies worked to ensure that USDOC had the information before the regulatory deadline for new facts and in plenty of time for verification. Nonetheless, USDOC refused the information and applied adverse facts available.

54. To be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The zero tolerance applied in cases such as these must not be permitted. The language of Annex II does not permit such an extreme and punitive approach.

(c) All Others Rate

55. Finally, we want to address just one minor point regarding the all others rate. Japan's point on this topic is rather simple: dumping margins calculated based on partial facts available are, in the words of Article 9.4, "margins established under the circumstances referred to in paragraph 8 of Article 6." They are therefore not permitted to be used in calculating the all others rate. The US believes that this phrase in Article 9.4 can only mean margins based <u>entirely</u> on facts available, but Japan respectfully disagrees. The word entirely does not appear in Article 9.4. A plain reading of the phrase is that a margin established using facts available, whether partially or entirely, cannot be used to calculate the all others rate.

III. GATT ARTICLE X:3

56. Last but not least, I would like to draw the Panel's attention to our claim under Article X:3 of GATT 1994. As we have stated in our First Submission, our claim under Article X is independent of other substantive claims; it is not a subsidiary claim. In its *EC Bananas* and *EC Poultry* decisions, the Appellate Body has recognized that while other WTO provisions apply to the substantive content of a Member's laws, regulations, and administrative rulings, Article X:3(a) relates to the administration of those laws – whether they are applied in an uniform, impartial, and reasonable manner. Thus, complaining parties, including the United States, have lodged claims specifically under GATT Article X, as was the case the *Japan - Leather* dispute -- when they perceived a breach of the fundamental international law principle of due process stipulated in the provision. Yet here, when it is being used against them, the United States tries to dismiss this claim in a backhanded way with the conclusory assertion that if the Antidumping Agreement claims fail, then the Article X claims must also fail.

57. This is incorrect. Article X requires a Member to apply its laws, regulations, decisions, and rulings in an uniform, impartial, and reasonable manner. A domestic law may very well be consistent with the Anti-Dumping Agreement but then be administered inconsistently with Article X. Article X is not mooted or rendered irrelevant by the Anti-Dumping Agreement. The US practices that Japan challenges in this dispute are exactly the kind of practices governed by this provision. Nothing in any WTO Agreement either asserts or implies that the disciplines of Article X are inapplicable to anti-dumping proceedings. Furthermore, nothing about Article X is in conflict with anything in the Anti-Dumping Agreement. Rather, for anti-dumping as with all other substantive WTO provisions, Article X serves to ensure that a Member administers its anti-dumping laws, regulations, and administrative decisions in good faith assuring fundamental fairness and avoiding what in international law is called "abus de droit" .

58. The Panel has an important, independent obligation to evaluate the procedural actions of the United States in this case. The WTO does not permit the non-uniform application of critical circumstances. It does not permit a double standard for administering "facts available". It does not permit a country to ignore its own regulations for correcting clerical errors. The standards of uniformity, impartiality, and reasonableness enshrined in Article X of the GATT do not permit a country to do so. With Article X, Japan establishes yet another violation that the Panel should consider separately from Japan's claims under the Anti-Dumping Agreement.

59. Japan's Article X claim is important for another reason. The United States often justifies its actions with the "it didn't matter" defence. It says: "We eventually got around to correcting the NKK clerical error". "We eventually decided not to impose retroactive duties". "We could have used some other legal theory to find injury anyway." Whatever the Panel decides under the Anti-Dumping Agreement, the Panel must also evaluate these actions under Article X. The administration of the US dumping law that allows such underlying actions to occur -- regardless of the eventual outcome -- must be disciplined under Article X. Otherwise, the abuses will continue. And if antidumping measures like those imposed on hot rolled steel are allowed to stand without any meaningful discipline, then it is hard to imagine what level of conduct would be egregious enough to trigger Article X.

CONCLUSION AND REMEDY

The United States actions in this case reveal several serious problems with the US antidumping law and practice. Japan strongly believes that this case provides a compelling set of circumstances – both factually and legally -- for the panel to act to discipline abuses of anti-dumping measures. Whatever remedy the panel ultimately adopts, the panel should bear in mind the need to make the disciplines of the Anti-dumping Agreement real and meaningful.

ANNEX D-2

Closing Statement of Japan

(23 August 2000)

In its comments and questions yesterday and today, the United States tried to shift the focus of this dispute. This dispute is not about the existence of alleged Japanese dumping; rather, this dispute is about the ***manner*** in which the USDOC set the anti-dumping duties. This dispute is not about the alleged injury being experienced by the US steel industry; rather, this dispute is about the ***analytic basis*** for the USITC conclusion of material injury by reason of Japanese imports. Most fundamentally, this dispute is not about the commercial practices of Japanese companies; rather, this dispute is about the ***anti***-dumping measures adopted by the United States ***Government***. We urge the Panel to bear this important point in mind, as it considers this case.

We will respond in detail to the various US arguments in our Second Submission. Here, we simply want to stress for the Panel some very important basic principles that should guide the Panel in its deliberations.

First, we note that the United States repeatedly argues that as long as it can think of some interpretation of the Anti-Dumping Agreement that would permit its actions, then those actions are permitted. But the United States fundamentally confuses the distinction between possible interpretations and permissible interpretations. This Panel has the duty to interpret the Anti-Dumping Agreement properly, and decide whether the US interpretation is permissible and consistent with the text, the context, the purposes of the agreement, and with simple common sense. Contrary to the US argument, there are indeed limits to the permissible interpretations. As the Panel considers the permissible interpretations of the Anti-Dumping Agreement, the Panel should also consider whether the United States has been interpreting its obligations in good faith. Japan believes the concept of good faith plays a crucial role in interpreting legal obligations. So do some of the third countries to this dispute. We believe complying with international obligations means more than just clever lawyering to find loopholes.

Second, the Panel must not forget that Japan has claims under both the Anti-Dumping Agreement and GATT Article X. Japan did not take this step lightly. It is never easy to accuse another country of acting in a biased manner. Unfortunately, in this case the United States went too far. Its actions failed to meet the Article X obligation to administer laws in a uniform, impartial, and reasonable manner. These obligations are crucial to the sound functioning of the entire multilateral trading system. Contrary to the US argument, this case was not "business as usual". This case involved a number of extraordinary steps by the US Government to placate its domestic steel industry. These actions must be scrutinized closely and carefully.

We find it quite ironic that the United States accuses Japan of seeking *de novo* review. Japan's position is that the Panel should simply test the US actions against US international obligations, and is not at all calling for *de novo* review. The Panel has a clear obligation to evaluate whether the US actions were biased or not consistent with the Anti-Dumping Agreement. Rather it is the United States that keeps trying to shift the focus away from its actions to the underlying facts. The US argues the finding of critical circumstances was justified; don't look at the rush to judgment and cursory review of the evidence, look instead at the surge in imports. The US argues the decision

to punish NSC and NKK was justified; don't look at the rigid policy of zero tolerance for any mistake or innocent oversight or the USDOC refusal to correct acknowledged clerical errors, look instead at those sneaky Japanese companies and their efforts to trick the authorities. The US argues the finding of material injury was justified; don't look at the statutory language that explicitly and significantly skews the analysis of the impact of imports on the domestic industry; look instead at the fact that all six Commissioners made affirmative determinations. It is the United States that wants the Panel to engage in *de novo* review, and have the Panel pretend that it is itself the anti-dumping enforcers.

This case is an enforcement action, but not of the sort the United State images. This case is not about policing dumping; it is about policing ***anti***-dumping measures. Are there no limits on what authorities may do? Or are the disciplines in the Anti-Dumping Agreement empty words that authorities may ignore at will, particularly when politically powerful domestic industries demand relief? This Panel will decide whether these disciplines have meaning.

ANNEX D-3

Opening Statement of the United States

(22 August 2000)

1. ***Mr. Hirsh.*** Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. Again for the record, my name is Bruce Hirsh. I am a Legal Advisor with the Office of the US Trade Representative in Geneva. With me from my office in Washington is Associate General Counsel Dan Mullaney, who will begin our presentation today with a discussion of three procedural issues. John McInerney, Acting Chief Counsel for Import Administration at the US Department of Commerce, will then present the issues concerning the anti-dumping calculations and critical circumstances. Finally, Tina Kimble, Attorney-Advisor in the Office of the General Counsel of the US International Trade Commission, will present the issues concerning injury.

2. ***Mr. Mullaney.*** Thank you, Mr. Chairman, and members of the Panel. First, Japan has based part of its argument on evidence that was not presented to the national investigating authorities and is not part of their administrative records. The Japanese producers had ample opportunity to present this evidence to the Commerce Department and the USITC during the course of their investigations, but chose, instead, to wait until this Panel proceeding. (1st US sub., ¶ 56 - ¶ 68.)

3. The submission of new material in this proceeding is inconsistent with Article 17.5(ii) of the Agreement, which requires that the Panel's examination of the matter before it be based upon the facts made available to the authorities of the importing Member. Consideration of this new material would deny parties to the anti-dumping investigation, including the US domestic industry, the protection of Article 6.2 of the Agreement, which guarantees them "a full opportunity for the defence of their interests." Such interested parties cannot have a full opportunity to defend their interests if the responding exporter/manufacturers can withhold relevant evidence until a WTO panel proceeding in which the other interested parties may not participate. This is not a case about whether the US authorities improperly excluded information from their administrative records. This is a case about information that could have and should have been submitted on the record by the Japanese respondents, but was not.

4. Second, Japan has raised an issue that is outside this Panel's terms of reference. In its panel request, Japan stated plainly that it was challenging the Department's *application* of facts available to the Japanese respondent companies in this particular investigation. In its first written submission, however, Japan has argued that the Department's *entire practice* of making adverse inferences in selecting the facts available to be applied to uncooperative respondents is inconsistent with Article 6.8 and Annex II of the Agreement. (Japan's 1st sub., ¶ 57 - ¶ 60.) It is untrue that Japan's panel request properly set out this claim by referring generally to "conformity" of US laws. The statement of a proper claim requires that the particular law or practice be identified. Japan's panel request does not do this.

5. Allowing Japan to introduce this new claim would be contrary to Article 6.2 of the Dispute Settlement Understanding, which requires the requesting parties to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Japan's request failed altogether to disclose this new claim or its legal basis, thereby

depriving other Members of information necessary to determine whether or not to intervene in the proceeding. (1st US sub., ¶ 69 - ¶ 76.) It also prejudiced the United States in the preparation of its first submission, because of the limited time available after Japan's first submission.

6. Third, I would like to emphasize that this Panel's mandate under Article 17.6 of the Agreement permits the Panel to find that the US determinations are inconsistent with the Agreement *only* to the extent that the Panel finds either that the United States' establishment of the facts was not proper, unbiased, and objective, or that a determination was not based on a permissible interpretation of the AD Agreement. This means two things.

7. First, this Panel is not a fact-finding body. Unless it finds that the authorities' establishment of the facts was improper or that their evaluation of those facts was biased and unobjective, the evaluation should not be overturned, *even if the Panel would have reached a different determination had the same facts been before it in the first instance*. (1st US sub., ¶ 77 - 82.)

8. Second, the Panel must uphold the US authorities' interpretations of the Agreement if those interpretations are *permissible*. Where there are several permissible interpretations of an Agreement provision, a panel must not impose its preferred interpretation on the Member concerned. To do so would be to add impermissibly to the obligations to which the WTO Members have agreed. (1st US sub., ¶ 83 - ¶ 87.)

9. I will now turn to my colleague, Mr. McInerney, of the Commerce Department, to present the anti-dumping and critical circumstances issues.

10. ***Mr. McInerney.*** Thank you Mr. Chairman. Japan's challenge to the Department's determination involves four broad issues, which I will briefly address in turn.

11. The first issue is the Department's **Resort to, and Selection of, Facts Available**. Japan begins by asking the Panel to rule that investigating authorities, in selecting facts available to be applied to uncooperative respondents, may *never* make the logical inference that the respondent withheld that information because it was adverse to the respondent. (Japan's 1st sub., ¶ 57 - ¶ 60.) Instead, Japan argues that investigating authorities must *always* fill *any* gaps in their information - - no matter how large, and no matter how blatantly the respondent refused to cooperate - - with neutral information.

12. The Panel should be very clear about Japan's position. Japan is *not* arguing that the Agreement carefully circumscribes the circumstances in which adverse inferences may be used, or that the Agreement limits the extent to which inferences may be adverse. Japan is *not* arguing that adverse inferences must be reasonable, fair, or corroborated. Instead, Japan is arguing that adverse inferences are *never* permitted - - to *any* degree or under *any* circumstances. Mr. Chairman, let me depart for a moment from the prepared text. In its oral statement Japan appears to have retreated from this position. However, they have not really departed from their earlier position, but only make it appear that they are taking a slightly more reasonable position. We will prepare questions for Japan that I believe will show Japan has in fact not retreated from this extreme position.

13. Japan has been surprisingly clear about its motive for pressing this new argument. It has candidly acknowledged that it would like the Panel to remove the incentive that the facts available rule has traditionally provided for respondents to cooperate in investigations. (Japan's 1st sub., ¶ 59.) Because investigating authorities have no legal means to force foreign respondents to provide information, acceptance of Japan's argument would force investigating authorities to rely on such information as those respondents unilaterally elect to provide. That would turn antidumping investigations into pointless charades, a result which the Members cannot have intended.

14. A comprehensive review of Article 6.8 and Annex II of the Agreement demonstrates that they are designed *precisely* to provide uncooperative respondents with an incentive to participate in antidumping investigations. In our written submission, we have identified numerous passages in Article 6.8 and Annex II with which Japan's position cannot be reconciled. (1st US sub., ¶ 54 - ¶ 68.)

15. With regard to the two specific applications of facts available at issue here, I will simply make a few brief observations. First, Japan asserts that KSC cooperated in the investigation, as required by Paragraph 7 of Annex II. (Japan's 1st sub., ¶ 61 - ¶ 77.) The facts on the record do not support Japan's assertion. KSC never even *discussed* with its Brazilian joint venture partner the need to provide the CSI data, and never made any serious effort to obtain information from CSI. Instead, KSC was quite content with making pro-forma requests for the information. When those requests were declined, KSC did not even *attempt* to use any of its manifold powers under the joint venture shareholders' agreement to persuade CSI to supply the necessary information. These desultory gestures cannot possibly be construed as meaningful cooperation. (1st US sub., ¶ 82 - ¶ 98.)

16. Second, Japan implies that NKK and NSC submitted within a reasonable period of time the conversion factors to enable the Department to convert sales based on theoretical weights into actual weights. (Japan's 1st sub., ¶ 105 - ¶ 108.) This is not a plausible claim. Each company was given 87 days to submit this information. This is ample time by any standard, and nearly triple the 30 days required by Article 6.1.1. The ease with which NKK and NSC eventually provided the information, once they had decided to do so, belies Japan's claim that they met the Agreement's standard for cooperation. (1st US sub., ¶ 128 - ¶ 142.) Japan' s argument also ignores the fact that Article 6.8 and Annex II repeatedly emphasize the importance of submitting information in a timely manner, as we have described in detail in our written submission. (US sub., ¶ 143 - ¶ 149.)

17. The second issue is Commerce's **Determination of the "All-Others" Rate**. Japan argues that, in determining the estimated duty rate for companies that were not themselves investigated (or the "all others" rate), Article 9.4 requires investigating authorities to disregard any portion of a margin based in even the slightest degree on the facts available. (Japan's 1st sub., ¶ 136 - ¶ 139.) Japan's argument is based on the statement in Article 9.4 that, in calculating all-others rates, investigating authorities shall disregard any margins "established under the circumstances referred to in paragraph 8 of Article 6," which is the facts-available provision.

18. Japan's interpretation of Article 9.4 is an absurdly broad and unworkable reading of that provision. A dumping margin is not "established under the circumstances " of the facts available rule merely because a component of that margin may be based on the facts available. Accordingly, Article 9.4 does not provide that "portions of margins established under the facts available rule" must be excluded. When Article 9.4 refers to "margins" that are "established under the circumstances" of the facts-available rule, it means *entire margins* that are based on the facts available. (1st US sub., ¶ 176 - ¶ 191.)

19. The context of the Agreement supports this reading. Article 6.10 directs investigating authorities to determine "an individual margin of dumping for each known exporter or producer, where this is practicable." A margin that is substantially based on the data for a specific company is still very much an "individual margin" for that producer, even if it contains some components of facts available. It therefore is entirely appropriate for use in determining the rate for producers not investigated. On the other hand, it is reasonable to treat margins based *entirely* on facts available as not "individual margin[s]" for the producers in question, because they are based on secondary information, such as data from the petition. Thus, Article 6.10 provides a basis for distinguishing between margins based partially and entirely on the facts available. (1st US sub., ¶ 180 - ¶ 184.)

20. Japan's absurdly broad reading of Article 9.4 would produce untenable results. While most foreign respondents who cooperate in antidumping investigations receive margins based very substantially upon their own data, the use of facts available to fill gaps is quite common. NKK and

NSC provide perfect examples of companies that received margins based overwhelmingly upon their own data, but with a small element of facts available. Nothing in the Agreement requires that these margins be disregarded in determining the all-others rate, or that the margins be recalculated so that they somehow exclude facts available.

21. The third issue is the Department's **Treatment of Home Market Sales Through Related Parties.** Here Japan makes two arguments: first, that the Department must not reject home market sales to related parties on the basis of its 99.5 per cent test (Japan's 1st sub., ¶159); and second, that, even if the Department *could* reject home market sales to related parties, it could not replace them with the downstream home market sales by those related parties, but must substitute sales to third countries or constructed value (Japan's 1st sub., ¶ 162 - ¶164). Neither argument is sound.

22. First, **Commerce's rejection of certain sales to related parties in Japan** was consistent with the Agreement. The Department rejects sales to related parties as not in the ordinary course of trade because the prices between affiliated parties are inherently suspect. Article 2.1 of the Agreement provides that home market sales must be in the "ordinary course of trade," but does not define that term. Logically, however, sales in the "ordinary course of trade" are normal commercial sales, and a normal commercial sale is, first and foremost, a sale with a price negotiated at arm's length. Otherwise, affiliated entities could manipulate dumping margins by manipulating prices between them. Therefore, sales to related parties, for which the prices are not negotiated at arm's length, may be presumed to be outside the ordinary course of trade.

23. Commerce's 99.5 per cent test simply provides that the Department will make an exception to the normal rule of exclusion for non-arm's-length sales, where a producer's prices to a related party are, on average, virtually as high as the prices of sales to unrelated parties. If the related party passes the test, the Department uses *all* of that producer's sales to that related party, both above and below the 99.5 per cent threshold, in determining normal value. Overall, the effect of this rule is to increase the instances in which the Department bases normal value on home market sales, and to decrease the instances in which the Department must rely on downstream sales by related distributors.

24. If the Japanese producers thought that the sales that passed the 99.5 per cent test would distort the dumping margins because they had higher than normal prices, there was nothing to prevent them from arguing that they were outside the ordinary course of trade for some other reason. In fact, the Japanese producers never argued that their sales to related parties in the home market were outside the ordinary course of trade. Had they done so, the Department would have considered the argument, and there would have been a determination on the issue for this panel to review.

25. Second, **Commerce's use of downstream sales by related distributors,** in instances where sales to related distributors fail the 99.5 per cent test, is consistent with the Agreement. Article 2.1 defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Downstream sales of the like product to the first unrelated buyer for consumption in the home market plainly come within this definition. It is irrelevant that the Agreement explicitly refers to downstream sales in discussing export price, but does not explicitly mention them in discussing normal value. (1st US sub., ¶ 230 - ¶ 236.)

26. The fourth issue is Commerce's **Early Determination of Critical Circumstances**. In its investigation, the Department found critical circumstances for one out of three of the mandatory Japanese respondents. The US International Trade Commission, however, made a negative determination on the issue in its final determination of injury. Accordingly, no duties ever were, or will be, assessed on subject merchandise entered before the Department's preliminary dumping determination. (1st US sub., ¶ 239). Although Japan does not contest the Department's discretion to make an early determination of critical circumstances, *per se*, it nevertheless argues that the early determination violated the Agreement in three respects.

27. First, Japan argues that the Department violated Article 10.6 by basing its preliminary determination of critical circumstances on the preliminary determination of the US International Trade Commission that the imports posed a threat of injury (1st Japan sub., ¶ 201). Article 10.6, however, authorizes a finding of critical circumstances where an investigating authority finds that ". . . the importer should have been aware that the exporter practices dumping and that such dumping *would cause injury*." Article 3, footnote 9, states that "unless otherwise specified" the term "injury" includes "threat of material injury." Therefore, because Article 10.6 does not otherwise exclude "threat of material injury," its reference to "injury" includes threat of injury.

28. Second, Japan argues that the Department violated Article 10.7 of the Agreement because it did not have sufficient evidence that the conditions of Article 10.6 were satisfied (1st Japan sub., ¶ 201). Because "sufficient" is not defined, the term must be understood in context, and the context here is that of a *preliminary* determination of critical circumstances. Article 10.7 permits an administering authority, at any time after the initiation of an investigation, to take measures necessary to collect final duties retroactively. This indicates that "sufficient evidence" is sufficient for that time, not the same degree of evidence that would be sufficient for a final determination.

29. The Department had "sufficient evidence" of all three conditions specified in Article 10.6, at the time of its preliminary determination of critical circumstances. As we have explained in full in our written submission, the petition in this investigation contained far more than the "mere allegations" that Japan has described. The 700 pages of exhibits in the petition contain very substantial information on all of the relevant points.

30. Finally, Japan argues that the US statute is inconsistent with Articles 10.6 and 10.7 because it does not require explicit findings on every element specified in those articles for a finding of critical circumstances. (1st Japan sub., ¶ 208). This argument is invalid. A law is not inconsistent with a WTO Agreement merely because it does not explicitly repeat those obligations in domestic law. In order to be inconsistent with an international agreement, a domestic law must *require* actions that are inconsistent with the Agreement. (1st US sub. at ¶ 282). In any event, the Department made a finding on every element specified in Articles 10.6 and 10.7 in making its early critical circumstances finding in this case.

31. Thank you, Mr. Chairman and members of the Panel. Mr. Chairman, if I may depart from the prepared text once more. I did not intend to take the Panel's time today to address Japan's allegations of bias. However, in light of Japan's opening statement, I would like to make a few observations on this point. Of the four main issues regarding the Department of Commerce in this case, Japan has virtually admitted that three of these issues have nothing to do with the alleged bias. First, with respect to the facts available claim, the Department has applied facts available in literally hundreds of cases. Japan has provided no evidence that the application of facts available in this case was unusual or was related to the "Stand up for Steel" campaign. Notably, Japan has not alleged that the acceleration of this case prevented them from responding to the Department's questionnaires in any but a fully adequate manner. Second, regarding the all-others rate issue, there is nothing to differentiate this case from the multitude of other cases in which the Department has applied its all-others methodology. This methodology is standard procedure. Third, regarding the "99.5 percent" arms-length test, once again, this methodology involved nothing more than the Department's standard procedure. In fact, the only new aspects of this case were, first, its acceleration by twenty days, and second, the issuance of an early preliminary critical circumstances determination. The Department's decisions with regard to these two aspects of the case were well within the Agreement's provisions and the Department's discretion, given the context of the unprecedented import surge. In sum, we can only conclude that Japan feels that this is not a strong case and thus it needs to "juice it up" with the bias claims. If bias is to have an effect, the Panel should be able to put its finger on it, such as on a line of the computer program. I would like to urge the Panel to review the Department's exact calculations and methodology to find any so-called bias. Thank you, I will now turn over the opening

statement to Ms. Kimble, who will present the injury issues regarding the US International Trade Commission.

32. ***Ms. Kimble.*** Thank you, Mr. Chairman, and members of the Panel. I will now address Japan's allegations concerning the captive production provision of the US antidumping statute and the United States International Trade Commission's determination finding material injury due to dumped hot rolled steel. I will first discuss why Japan's contentions regarding the captive production provision misread the US statute and ignore provisions of the Antidumping Agreement. Then, I will show why Japan's arguments about the USITC's particular findings only reinforce the fact that the US authority conducted a thorough and objective evaluation of all relevant factors in keeping with the Agreement.

33. ***The captive production provision is consistent with the Anti-dumping Agreement.*** Both Japan and the United States agree on one important point -- a determination of injury that is consistent with the Antidumping Agreement must assess injury to the industry as a whole. The US statute directs the USITC to assess injury to the domestic industry, and defines the domestic industry as "producers as a whole of a domestic like product." The captive production provision is consistent with this statutory requirement and merely supplements it with an additional layer of analysis -- telling the USITC to focus primarily on the merchant market for particular factors when the USITC determines that certain threshold requirements are satisfied.

34. Congress expressly recognized in adopting the captive production provision that "focus primarily" on the merchant market did not mean to focus *exclusively*. The captive production provision instead contemplates a two-step approach -- first the USITC is to look at the data for the merchant market in particular as to certain factors, then it is to examine the data for the entire industry as to all factors.

35. Moreover, the threshold requirements for application of the captive production provision are designed to ensure that such a focus on the merchant market would be helpful to an appraisal of injury to the industry as a whole. The USITC first must determine that there is a significant amount of captive production *and* a significant amount of sales on the merchant market of the domestic like product. The statute thus limits application of the provision only to those circumstances where the merchant market is not inconsequential and an analysis of the merchant market, separate from total consumption, would be valuable to a consideration of injury to the domestic industry as a whole.

36. When there is a significant amount of captive production and significant sales on the merchant market, an analysis of the merchant market in particular is likely to shed light on certain factors listed in Article 3.4 of the Antidumping Agreement. In contrast, Japan's view that an authority may not focus either primarily or secondarily on the merchant market would militate against an adequate assessment of these factors. Most obviously affected are the Article 3.4 factors of output and sales. Sales only occur in the merchant market. Prohibiting an analysis which takes into account the merchant market, then, would have the effect of writing the requirement to examine sales out of the Agreement. Authorities only would be able to assess the impact of dumped imports on output. The US statute assures an adequate consideration of both output and sales while Japan's position, contrary to Article 3.4, would systematically require output to be decisive over sales when there is significant captive production.

37. Indeed, some factors in Article 3.4, such as capacity utilization and productivity, pertain only to output. As to those factors, the captive production provision does not apply at all. As to the factors where the captive production provision does apply, the statute explicitly requires that the analysis continue beyond an assessment of the merchant market to an assessment of the effects on the industry as a whole.

38. The two-step, segmented analysis called for by the captive production provision is similar to the type of analysis that a panel recently found consistent with the Antidumping Agreement. In *Mexico -- Antidumping Investigation of High Fructose Corn Syrup from the United States*, the panel determined that a finding of injury resting exclusively on an examination of only one segment of the market violates the Agreement. The decision stressed, however, that an examination of one, relevant segment of the market to determine the effect of subject imports on the industry as a whole may be a useful exercise in keeping with the Agreement. The captive production provision does not require an examination of one segment exclusively, the analysis criticized in *HFCS*, but requires the USITC to look primarily at the segment of the market most relevant to any consideration of the effects of dumped imports on the domestic industry as a whole -- the segment where competition with dumped imports occurs. The statute does not instruct the USITC to limit its analysis to that segment, however, and requires the USITC to make a material injury determination as to the industry as a whole. Such an approach is entirely in accord with Article 3.

39. ***The USITC's determination was based on objective evidence showing injury.*** In this case, the captive production provision was not outcome determinative. First, a dispositive majority of three Commissioners rendered a binding affirmative determination under US law without applying the provision. Second, even those Commissioners that applied the provision found that both trends in the merchant market and the overall industry trends showed that dumped imports were causing material injury. Therefore, even without applying the captive production provision, those Commissioners would have reached the same conclusion.

40. In keeping with Article 3.1, the USITC considered the volume, price, and impact of dumped imports on the domestic industry as a whole. In keeping with Article 3.2, the USITC found that the volume and share of consumption of dumped imports more than doubled in each year of the period of investigation while the domestic industry's market share declined significantly in both the merchant market and for the industry as a whole.

41. The USITC objectively considered all the required factors listed in Article 3 for both the merchant market and the entire industry in reaching its affirmative injury determination. The objective findings made by the USITC provide more than adequate support for an affirmative determination and address Japan's unfounded concerns with the decision rendered.

42. As to price effects, the USITC concluded that prices for both dumped imports and the domestic like product showed mixed trends until mid-1997, after which point they dropped steadily for the remainder of the period of investigation. The USITC found that prices declined much more than domestic producers' costs and that at the same time consumption increased. It identified no change that could explain this new price pattern other than the fact that beginning in 1997, the frequency of underselling by dumped imports also increased as their volumes surged. The USITC found that these trends established a causal relationship between the increasing dumped imports and the significant depression of US prices.

43. Finally, the USITC's analysis complied with Article 3.4 in its assessment of the negative impact that dumped imports were having on the domestic industry. Domestic producers ' market share declined at a time of growing consumption because dumped imports captured all the growth in the market in 1998. As a result, the domestic industry's appropriate capacity increases were immediately transformed into excess capacity. As the USITC found, these effects were reflected in significant deterioration of the domestic industry's financial performance.

44. Japan falsely portrays the USITC as using comparisons based only on two year changes in data. The USITC both analyzed trends over the entire three year period of investigation and performed an analysis based on the most recent period. The USITC has used this approach in many prior cases where it found that the most recent period was highly probative of the current state of the industry because of recent changes in the market conditions affecting the industry. As we noted in

our brief, this analytical approach has led the USITC to reach both affirmative and negative determinations in the past, and thus reflects neither a bias or a departure from past practice.

45. Further, analyzing trends within the period of investigation is entirely in keeping with the Antidumping Agreement. Trends for the latter part of the period of investigation obviously are particularly revealing about the *current* injury faced by the domestic industry -- the question that the USITC was charged with addressing. Examining data for the more recent years is in keeping with the direction in Articles 3.4 and 3.5 to examine all relevant economic factors and all relevant evidence before the authorities when conditions affecting the state of the industry changed over the course of the period of investigation.

46. Here, the behaviour of dumped imports and the domestic industry underwent great change in the last two years investigated. Although Japan claims that 1997 was a banner year, demand did not reach a record high until 1998. Yet, in spite of this record demand, US shipments and market share were at their lowest points in 1998. Accordingly, in keeping with Article 3.4, the USITC sought to explain why the domestic industry's performance declined in 1997 to 1998 when it should have improved and found that trends in dumped imports provided the answer. The USITC found, for example, evidence of increased underselling by dumped imports in the last period. The USITC had to consider this last two-year period in order to understand the nature of the important, and somewhat contradictory, economic trends borne out by the data for these last two years.

47. Contrary to Japan's argument, the USITC followed the requirement that it not attribute to dumped imports the effects of other causes. The GATT panel in *Norwegian Salmon* held it was not necessary to quantify other causes and the effects of other causes need not be isolated in order to satisfy that legal requirement. Rather, that panel held it sufficient that other factors did not entirely explain the evidence of injury found by the authority. Here, the USITC clearly examined other factors and found that they did not explain the indicators of injury which the evidence otherwise linked to dumped imports. The USITC properly did not attribute to dumped imports injury due to other factors, in keeping with Article 3.5.

48. The USITC identified the strike at General Motors as having an influence on domestic prices for hot rolled steel. However, it found that the strike could only partially explain the price declines that occurred in 1998 because, despite the strike, apparent consumption in the United States rose to record heights rather than falling. The USITC concluded that only the increased volume of dumped imports and an increase in underselling of those imports could explain this paradoxical trend.

49. Similarly, the decrease in demand for pipe and tube cannot establish that the USITC attributed to dumped imports the effects of other causes. Despite that decrease in one source of demand, overall demand rose in 1998. An increased volume of undersold dumped imports provides an explanation of why prices declined in the face of increasing demand. The fall in demand for one particular type of product which did not reduce overall demand does not.

50. The USITC recognized the effect on the domestic industry of intra-industry competition between integrated producers and minimills. It found, however, that dumped imports drew down prices for both integrated producers and minimills. The USITC found that more of minimills' output is devoted to sales in the merchant market than the output of integrated producers. Thus, the USITC also found that the minimills had a worse financial performance than integrated producers during the latter part of the period of investigation -- the time when dumped import volumes were the greatest. Analyzing the performance of an established and efficient minimill that was identified as a price leader, the USITC found that it experienced significant price declines while dumped import volumes were increasing and only stopped this trend when dumped imports exited the US market.

51. Finally, the USITC properly rejected attempts to blame nonsubject imports for the injury to the industry producing hot rolled steel in the United States. Nonsubject imports maintained a stable

presence in the US market while dumped imports more than doubled their market share in both the merchant market and the market as whole. There is no basis to conclude that the USITC incorrectly attributed to subject imports effects that were really due to the steady volume of nonsubject imports.

52. The captive production provision and the determination by the USITC are in keeping with the Antidumping Agreement. In fact, the captive production provision assures a full evaluation of the factors listed in the Agreement. The USITC's determination in this case objectively assessed the effects of dumped imports on the state of the domestic industry as a whole in finding that they caused material injury.

53. ***Mr. Hirsh.*** Mr. Chairman and members of the Panel, we have devoted our efforts today to demonstrating how each agency's actions, in the context of the facts of each specific issue, are consistent with the pertinent provisions of the Anti-dumping Agreement. It is on that basis – and not on the basis of vague allegations of conspiracy – that this Panel must judge the issues in this case. At this point, we would be pleased to entertain the questions of the Panel, as well as the questions of Japan. In turn, we look forward to posing questions to Japan. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-4

Closing Statement of the United States

(23 August 2000)

Thank you Mr. Chairman. This is Mr. McInerney from the Department of Commerce.

I would note at the outset that, in its closing statement, Japan has chosen not to address any of the specific substantive issues in this case, but instead has returned to its efforts to persuade the Panel that all of the Department's actions should be viewed as part of a conspiracy to treat Japan unfairly. Japan wants this Panel to regard the United States' repeated resort to its legitimate remedies under the WTO Agreement to redress repeated dumping by Japan as an abuse of antidumping measures. But it is no abuse to resort repeatedly to antidumping remedies in the face of repeated dumping. Every time that Japan has trouble in its own market, it seeks to export the problem to the United States. Repeated resort to WTO remedies in the face of such repeated dumping is perfectly legitimate and exactly what the Agreement provides for. This case does not involve a conspiracy. As Japan has acknowledged, it involves substantial dumping in massive quantities.

The AD Agreement is a set of agreed limitations on the exercise of AD remedies. The question before this Panel is whether any of the Department's specific methodologies or applications of which Japan complains in fact exceed those agreed limitations. I will now briefly turn to those specific issues.

First, with regard to facts available, we will await further submissions from Japan to see whether they have revised their absolute position on this issue, taken in their first written submission, that adverse inferences are never permitted. This interpretation would encourage exporters NOT to cooperate in AD investigations, rather than to cooperate, as so plainly intended by Article 6.8 and Annex II.

I would also encourage the Panel to recall that the Department's approach to applying facts available proceeds through three distinct steps: whether a resort to facts available is necessary, whether the selection of adverse facts available is justified, and, finally, if an adverse inference is to be employed, the selection of the specific adverse facts available. Japan has repeatedly collapsed these three steps, so as to imply that, if the last step -- selection of the specific adverse facts available -- was impermissible, the entire decision to resort to facts available was also impermissible. This is incorrect. I hope that the Panel will keep these distinctions in mind in considering this issue.

With regard to both the joint venture (CSI) and the two companies that did not submit conversion factors in a timely manner, there is a common thread - - passive resistance, rather than cooperation. These two concepts are worth pausing to consider. First, what is cooperation? The Oxford English Dictionary says (approximately) that cooperation is "acting together for a common purpose." How does this differ from passive resistance? I think the most obvious example with which we are all familiar is the difference between a good secretary and a bad secretary. A good secretary works with you to accomplish the same purpose, without having to be told in detail how each step in this process is to be accomplished. It is only necessary to tell her where you are going, and she helps you get there. A bad secretary does not outright refuse to cooperate. She does not want to get fired, just as an uncooperative respondent does not want to have facts available applied to it. Instead a bad secretary drags her feet - - needing to be prodded at each step, and requiring extremely

specific instructions. Occasionally, she will offer excuses along the line of "you didn't tell me you wanted a stamp on the envelope."

This is a subjective line, but I think we all know from our everyday experience what I am talking about. And the behaviour of the Japanese companies in this case with regard to the issues in dispute falls into the category of passive resistance, not cooperation. This is an especially effective strategy for them because they control all of the information necessary to conduct the investigations. Their approach was to limply go through the motions, with the Department of Commerce supposedly obliged to tell them at every stage not only what was required, but how to get it. The Panel is supposed to believe that KSC cannot make greater efforts to secure the cooperation of a JV of which it controls 50 per cent, and that NKK and NSC cannot calculate the weight of the steel they produce. Half-heartedly going through the motions to generate a few pieces of paper for the file is NOT cooperation. We all know the difference.

Finally, the Department's selection of facts available is not punitive. It is based on the reasonable inference that the information withheld is less favorable to the respondent than other information on the record. The Department's practice is only designed to give the respondent the incentive to cooperate, by placing it in a position where it will obtain a better result by cooperating. Even adverse facts available are only presumptively adverse. The Department cannot know whether the facts selected are actually adverse, because it does not know the true facts.

With regard to "all others rates," again, we are not entirely clear on Japan's position. Japan originally seemed to be saying that all portions of facts available must be removed from margins used to calculate the all-others rate. This position is untenable because it reads "margins" in Article 9.4 as "parts of margins." On the other hand, if Japan means that all margins that contain even a slight component of facts available must be excluded, then there very often will be NO all-others rate. This result is unacceptable.

The EC seemed to be searching for some middle ground, without any success. This is because Article 9.4 provides no such middle ground. In any event, the EC's 99 per cent facts available hypothetical is unrealistic. When a company's submission is mostly flawed, the Department throws out the whole response and resorts to full facts available. Such margins are not used to calculate the all-others rate.

A final element in some of the arguments we heard today was that companies that did not participate in the investigation should not be punished for the non-cooperation of the participants. We have two objections to this argument. First, as I have noted, we cannot be sure that the non-participants are really being punished, because we cannot know that the facts available selected are actually adverse. Second, to exclude all margins that are nominally based on facts available from all-others rates would reward non-participants for the non-cooperation of participants.

With regard to the 99.5 per cent test, I would first note that there is every reason to regard sales to related parties as presumptively outside the ordinary course of trade. This is a very fair reading of the Agreement and certainly cannot be considered to be inconsistent with the Agreement. I would also like to emphasize again that, if a reseller passes the 99.5 per cent test, all of that resellers' sales - - both above and below its average selling price - - are used.

Japan has attacked the Department's exception to that rule, on the basis that it imposes a floor, but not a ceiling on prices treated as being in the ordinary course of trade. But this is just what the cost-of-production test does - - it treats sales *below* COP as being outside the ordinary course of trade, but sales *above* COP as usable sales for the purpose of calculating normal value. This is consistent with the whole logic of dumping. Where dumping is occurring, it is precisely because

high-priced sales in the home market are, in fact, ordinary. Discarding such sales as aberrations would mask dumping.

The simple fact is that Japan does not want the United States to use its home-market sales, presumably because it has a protected home market that ensures high-prices in that market. This is what is behind Japan's desperate attempt to argue that related-party resales in the home market do not fall within Article 2.1's requirement for "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Japan would like to have all of its dumping margins in the United States calculated by comparing its export prices to the United States to its export prices to Canada - - an approach calculated to find no dumping.

Acceptance of Japan's argument that related-party resales in the home market may not be used to determine normal value would encourage foreign producers to manipulate normal value by making *all* their home-market sales through related parties. This would be easy to arrange, and would force investigating authorities to use third-country sales or constructed value in every case - - a result plainly not intended by the Agreement.

So, in reviewing this issue, I would urge the Panel to keep in mind not only the individual pieces of Japan's argument, but the overall design of that argument - - to force the Department to base normal value on prices to third countries or on constructed value, rather than on prices in Japan.

Finally, with regard to critical circumstances, I would like to point out that, during the course of this hearing, we seem to have heard in great depth and detail about every provision in Article 10 *except* Article 10.7, which is the provision pursuant to which the Department acted in making its preliminary determination of critical circumstances. This case is not about whether the United States could have collected final duties retroactively, for the simple reason that the United States did not collect such duties, and agrees that it cannot do so. It is about what effectively were preliminary measures taken to preserve the *option* of collecting such retroactive duties, if all of the conditions of Article 10.6 were met in the final determination.

I would like to thank the Panel again for its consideration. My colleague from the US International Trade Commission will now present the closing statement for the United States on the issues relating to injury.

I will now pick up on Mr. McInerney's issue-by-issue approach. I will look at two issues: whether the captive production provision is consistent with the Antidumping Agreement and whether the USITC's determination in this case was based on objective evidence.

The captive production provision permits a better understanding of the effects of dumped imports on the domestic industry because it directs the USITC to primarily focus on the merchant market, where competition occurs. This provision, despite Japan's argument to the contrary, requires the USITC to consider both the merchant market and the entire industry when making this assessment.

In this case, the captive production provision was not outcome-determinative because there was a 3-3 split among the Commissioners as to whether the provision applied, but all the Commissioners made an affirmative determination. In any event, those Commissioners that applied the provision properly analyzed the merchant market data because they looked at it in addition to the data for the industry as a whole. Looking at the market in this way, the USITC objectively considered the volume, price, and impact of those imports on the domestic industry over the period of investigation, ensuring not to attribute injury from other causes to those imports.

ANNEX D-5

Oral Statement of Canada as a Third Party

(23 August 2000)

I. INTRODUCTION

1 The Government of Canada appreciates this opportunity to provide its views to the panel on certain issues in this dispute. Canada reserved its right to participate as a third party in this proceeding because of our substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement. In this regard, Canada will confine its submissions to two issues: (i) the drawing of "adverse inferences" when recourse is had to the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii**)** the appropriate treatment to be accorded captive production in injury investigations.

II. LEGAL ARGUMENT: ISSUES ADDRESSED BY CANADA

(i) "Facts Available"

2. Turning to the issue of the United States' general practice regarding "facts available", Canada first wishes to clarify that it takes no position on the jurisdictional question of whether the Japanese claim is properly before this Panel. Canada's submissions are made in the event that the Panel decides that it does have jurisdiction over the claim.

3. As set out clearly in our written submission, Canada cannot support Japan's claim that the US "practice of applying adverse facts available in certain situations to punish respondents" is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement because neither Article 6.8 nor Annex II use the word "adverse".

4. In Canada's view, the wording of Article 6.8 makes clear that an investigating authority may have resort to the "facts available" provisions of the Anti-Dumping Agreement in circumstances where "any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation". There is a direct link between the factual circumstances of non-co-operation or impediment by the interested party and the use of "facts available". This direct link, Canada submits, means that the use of "facts available" is, to a large degree, predicated on actions by interested parties that are intended to hamper or have the effect of hampering an investigation by an investigating authority. Thus, Japan's interpretation of Article 6.8, which would encourage an interested party not to co-operate with investigating authorities, is clearly at odds with the wording of Article 6.8.

5. Canada further submits that Article 9.3 of the Anti-Dumping Agreement provides that anti-dumping duties may be imposed in an amount equal to the margin of dumping. Where an investigating authority has recourse to "facts available" as a result of an interested party's refusal to co-operate or its efforts to impede the investigation, the drawing of adverse inferences is appropriate so as to ensure that the imposition of duties under Article 9.3 is not frustrated by the non-co-operating party obtaining the benefit of a dumping margin that is lower than would otherwise have been the case had they cooperated or not sought to impede the investigation.

6. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-Dumping Agreement, including, in particular, paragraph 7 of Annex II. As the Panel knows, paragraph 7 provides, in part, that "[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, the situation could lead to a result which is less favourable to the party than if that party did cooperate". In other words, non-co-operation can lead to higher dumping margins.

7. Further, Canada submits that if an investigating authority is precluded from drawing adverse inferences when applying "facts available" in the face of non-co-operation or efforts to impede an investigation, the object and purpose of the Anti-Dumping Agreement would be frustrated to the extent that the Agreement provides that duties may be imposed as a result of an investigation conducted in a manner consistent with the requirements of the Agreement. If adverse inferences could not be drawn, an interested party who refuses to co-operate or attempts to impede an investigation would benefit from actions that the Anti-Dumping Agreement seeks to remedy. Canada submits that an approach to "facts available" that would clearly encourage non-cooperation, as opposed to cooperation, cannot be consistent with the Anti-Dumping Agreement.

(ii) Captive Production

8. Turning to the issue of captive production, Canada notes that as part of its final injury determination in this matter, the United States International Trade Commission (ITC) took into account section 771(c)(iv) of the *Tariff Act of 1930*, as amended. As the panel is aware, this provision provides that in investigations involving domestic producers who internally transfer significant production of like products, the ITC, when considering certain injury factors, will "focus primarily" on the domestic merchant (i.e. commercial) market for the goods involved in such investigations.

9. Japan submits that the use of the captive production provision in US law is inconsistent with Articles 3 and 4 of the Anti-Dumping Agreement because these provisions do not expressly allow for a "focus" on anything less that all domestic production. Japan, although apparently recognizing the existence of different segments within a domestic industry[1], submits that in particular, the definition of "domestic industry" in Article 4.1 of the Anti-Dumping Agreement precludes segmentation of internal transfers from the "merchant market". Canada cannot support the Japanese claim of inconsistency regarding the US captive production provision.

10. Canada first notes that Canadian practice with respect to investigations involving domestic producers who internally transfer significant production of like products is similar to that of the United States. [2]

11. In Canada's view, the purpose of providing an investigating authority with the ability to focus on sales to the merchant market in appropriate circumstances is because it is in the merchant market that the dumped imports being investigated compete directly against domestically produced like products. For example, in the flat-rolled steel sector, domestically produced hot-rolled steel may be sold and used as an end product or may be further processed into, for instance, cold-rolled or corrosion-resistant steel. Imported hot-rolled steel does not compete with domestically produced hot-rolled steel destined for further processing into, for example, cold-rolled steel or corrosion-resistant steel.

12. Canada submits that the Anti-Dumping Agreement contains no express provision with respect to how captive production or internal transfers should be considered by investigating authorities. That being said, the fact that like product is internally transferred for further processing into different goods

[1] See, for instance, First Submission of Japan at paragraph 36.

[2] While an analogous provision does not exist in Canada's anti-dumping legislation (The Special Import Measures Act (R.S.C. 1985, c. S-15, as amended) this practice has been developed by the Canadian International Trade Tribunal, the investigating authority that deals with injury investigations in Canada.

for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

13. Canada also submits that the Japanese position blurs the distinction between the concepts of "domestic industry" and "domestic market(s)". This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include "… an objective examination of the effect of the dumped imports on prices in the domestic market for like product …".

14. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products "in the domestic market for like products", i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, such as with hot-rolled steel, this will be the merchant market.

15. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again necessarily focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

16. Accordingly, for these reasons, failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Anti-Dumping Agreement its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

III. CONCLUSION

17. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with "facts available" and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

ANNEX D-6

Oral Statement of Chile as a Third Party

(23 August 2000)

Chile is taking part in this case because, like many other countries, it is concerned by the United States' regulations and practices with respect to investigations and the application of anti-dumping measures. What Japan has experienced in this case is a source of constant concern and constitutes a threat to Chilean exporters.

Chile is a country which depends primarily on its exports, and in spite of the diversity of destinations, the United States continues to be a very important market for Chilean exports, accounting for some 20 per cent of total export revenue in 1999. Because of the way in which the United States applies these measures, a considerable share of the burden of proof during the investigation process falls on the exporters, and in spite of the efforts and the resources invested in their defence, experience has shown that the system ultimately makes it very difficult to avoid being accused of dumping.

This Panel is a case in point. I shall focus my submission on the subjects we consider the most important, without necessarily following the same order as the other parties.

Captive production

The captive production provision in United States law is, in our view, entirely contrary to the provisions of the Anti-Dumping Agreement, which require that the determination of injury should be made on the basis of "total" domestic production, whatever its destination.

Irrespective of whether the application of the United States' domestic provision on captive production leads to an affirmative or negative determination of injury, what counts is that the relevant WTO provisions require the investigating authority to analyse injury with respect to total domestic production covering all of the domestic producers of like products, whether that production is sold or used for own consumption. In our view, Articles 3 and 4 of the Anti-Dumping Agreement, in particular Article 4, in no way permit that under certain conditions, the determination of injury should focus primarily on sales in the domestic market. The Agreement is very clear in this respect: it requires an examination of the domestic producers as a whole of like products.

To exclude captive production is to disregard an essential element: the rationality and behaviour of an industry in deciding to produce greater or lesser quantities for domestic sale or to produce goods with a higher value added, depending on market conditions. Failing to consider this element is tantamount to ignoring the effect of factors other than dumped imports on production decisions.

In our view, to give greater priority to production sold on the domestic market is contrary to Articles 3 and 4 of the Anti-Dumping Agreement.

Use of adverse facts available

In Chile's view, both the legislation and the practice of the United States with respect to the use of adverse facts available fall within the terms of reference of the Panel.

A first issue requiring clarification is whether or not there was any cooperation on the part of the respondent exporting enterprises, and more specifically, whether in this specific case there could truly have been cooperation, given the particular circumstance that there were two related enterprises which were opposed to each other (petitioner and respondent).

Irrespective of a company's percentage share in, or level of control over another company (Kawasaki had a 50 per cent stake in the affiliate), if one is the petitioner and the other is the respondent, there is a clear conflict of interest, and just because one company controls the other does not mean it can require it to supply information. As a matter of principle, companies with a conflict of interests can hardly be expected to cooperate. Thus, one cannot, in an investigation, accuse the respondent enterprise of failing to cooperate.

The analysis memorandum submitted by the United States as exhibit US/B-22 recognizes the conflict of interest between the two related companies (Kawasaki Steel Corporation and California Steel Industries), and points out that the way to avoid a conflict of interest between petitioners and respondents that are related would be for the related producer not to join the petition. However, in the case at issue this was not possible. The situation already existed, and the conflict of interest was no longer avoidable. Nor does it seem appropriate that the DOC should prescribe, as the only viable solution in such cases, something so drastic as the non-participation of the related petitioner in the petition.

Having recognized the conflict of interest, one would have hoped that the DOC's approach would have been to refrain from penalizing the exporting enterprise which, for such understandable reasons was unable to supply information. Accordingly, we consider the position adopted to be contrary to Article 6.13 and 6.8 and Annex II.

The second issue is that notwithstanding these considerations, once it is decided to use the facts available, it is wrong from every point of view to apply the most adverse facts. This United States legislation and practice violates Article 6.8 and Annex II of the Anti-Dumping Agreement which, while they permit an investigating authority to use other sources of information if there are parties which do not cooperate, nowhere specify that this must be the most adverse facts. The spirit of the provision is to enable the investigating authorities to fill in any gaps in their information, but in no case to "penalize" enterprises which do not supply information. We must bear in mind that anti-dumping measures are exceptional, and must not go beyond what is permitted under the relevant provisions or still less change the meaning and purpose of those provisions.

"All others" rate

Article 9.4 of the Anti-Dumping Agreement is quite clear as to how the margin of dumping should be calculated for exporters not included in the investigation: it clearly stipulates that *de minimis* and zero margins and margins from exporters who do not cooperate should be excluded from the weighted average. And yet the DOC, in its investigation, included in its calculation the margins of dumping of companies accused of not cooperating, thus violating the said provision of the Anti-Dumping Agreement.

Determination of critical circumstances

Regardless of the fact that the early determination of special circumstances by the DOC may not have affected Japan's exports, a view which Chile does not share since any determination, including an initiation determination, negatively affects exports, what is important is to determine whether the DOC properly considered the existence of dumping causing injury to the domestic industry, in conformity with the WTO. In this connection, we continue to believe that the DOC did not have sufficient evidence under Article 10.6 and 10.7 of the Anti-Dumping Agreement. The information from the petitioner or from press clippings does not, in our view, meet the standards established by the Agreement for reaching a conclusion that there was damage caused by dumping, since such information can hardly be considered as "positive evidence" or as representing an "objective examination" under Article 3.1 of the Anti-Dumping Agreement.

ANNEX D-7

Oral Statement of the European Communities as a Third Party

(23 August 2000)

1. On behalf of the EC, let me express first our appreciation for the opportunity to submit our views in this dispute.

2. In our Oral Statement, we will address four issues of legal interpretation raised by this dispute which, for systemic reasons, are of particular interest to the EC:

- first, the use of "adverse" inferences in applying the "facts available" provisions of Article 6.8 and Annex II;
- second, the consistency with Article 9.4 of the US practice to include only those dumping margins which are "entirely" based on "facts available" when calculating the dumping margin for non-investigated exporters;
- third, the consistency with Article 2 of the "99.5 per cent test" applied by the US authorities in order to determine whether domestic sales between related parties are "in the ordinary course of trade"; and
- finally, the treatment of "captive production" in injury determinations.

A. Choice of "facts available"

3. Japan contends that, when resorting to "facts available" in accordance with Article 6.8, the investigative authorities may not draw "adverse inferences".[1] According to Japan, "facts available" may be used only as "neutral gap fillers".[2]

4. The EC disagrees. Japan's contention has no basis on the Anti-dumping Agreement and, if upheld, would encourage systematic non-cooperation and, ultimately, render impossible the conduct of anti-dumping investigations.

5. Usually, when resorting to Article 6.8, investigative authorities are required to make a choice between different sets of "facts available". In doing so, they have a large measure of discretion. Of course, the facts must be pertinent and, to the extent possible, verified.[3] There is, however, no requirement in the Anti-dumping Agreement to the effect that the investigative authorities must choose always "facts available" which yield a "neutral" result, let alone those facts which lead to the lowest dumping margin.

6. To the contrary, Paragraph 7 of Annex II contemplates expressly that the use of "facts available" may lead to "a less favourable result". Furthermore, as demonstrated by the detailed

[1] Japan's First Written Submission, para. 57.
[2] Ibid., para. 58.
[3] Cf. Annex II, paragraph 7, second sentence.

textual analysis of Annex II made in the US submission[4], many of the other provisions in that Annex are premised on the notion that "facts available" may be "adverse" to the party concerned.

7. When selecting "facts available" the investigative authorities may take into account, among other circumstances, the degree of cooperation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive".[5] Indeed, strictly speaking, they are not even "adverse". They are just logical inferences, based on the assumed rationality of the exporter's behaviour: a rational exporter would cooperate, if it could expect to obtain a better result by doing so than on the basis of "facts available".

B. Use of dumping margins based "partially" on facts available in the "all- others" rate

8. Article 9.4 prohibits the use of any dumping margin "established under the circumstances referred to in paragraph 8 of Article 6", whether "entirely" or "partially". Thus, the EC agrees with Japan that, by excluding from the "all-others rate" only those dumping margins which are based "entirely" on facts available, US law is inconsistent with Article 9.4.

9. The US attempts to justify its practice by arguing that facts available "plugs" with a negligible impact on the dumping margin are used in many investigations.[6] The US definition of what constitutes a margin "partially" based on facts available, however, is by no means confined to such cases. The measures at issue show that the US authorities do not hesitate to include in the "all-others rate" margins which are based to a significant extent on facts available. Indeed, it seems that, under US law, a dumping margin which was 99 per cent based on facts available would still have to be included in the "all-others rate". In the EC's view, that would be clearly prohibited by Article 9.4.

10. The EC would agree, nevertheless, that Article 9.4 does not require to disregard the dumping margin in every instance where facts available have been used. Such a formalistic interpretation of Article 9.4 would often lead to a situation where no margins can be used in order to calculate the "all-others rate" in accordance with the method set out in that provision That result would be detrimental to the non-investigated exporters and contrary to the objective sought by Article 9.4.

11. The purpose of excluding the margins based on facts available is to avoid that non-investigated exporters may be affected adversely by the lack of cooperation of those exporters which have been given the opportunity to be investigated. That rationale, however, does not apply in those cases where, to borrow US terminology, the investigative authority limits itself to use a non-adverse "plug" in order to fill a gap in the information provided by a cooperative exporter. The EC, therefore, considers that Article 9.4, when read in light of its object and purpose, does not prevent the inclusion in the "all-others rate" of margins based on facts available, where resort to such facts is limited and no adverse inferences have been drawn.

12. While the EC is of the view that US law is inconsistent with Article 9.4, it concurs with the US that in Article 9.4 the term "margin" refers to each exporter's overall dumping margin, and not to the margins for individual transactions, models or sales channels.[7] Therefore, Japan's claim that the US authorities should have excluded from the "all-others rate" only those "portions" of each

[4] US First Written Submission, paras. 60-68.
[5] Japan's First Written Submission, paras. 58-59.
[6] US First Written Submission, para. 200.
[7] US First Written Submission, para. 191.

exporter's margin based on facts available[8] is clearly unfounded and should be rejected by the Panel. As argued by the US, that piecemeal approach would be unworkable and open to manipulation.[9]

C. The "99.5 per cent" test

13. Japan does not seem to dispute that sales between related parties may be disregarded as not being "in the ordinary course of trade" where they are not made at arm's length. Instead, Japan's complaint is directed against the "99.5 per cent" test applied by the US authorities in order to determine whether sales are at arm's length

14. In contrast, Korea has put forward the view that the Anti-dumping Agreement "only recognises one basis for disregarding sales as outside the ordinary course of trade"[10], that is, where the sales are made below cost. Korea's position is surprising as it appears to contradict its own anti-dumping law.[11] It is also incorrect.

15. The ordinary meaning of the expression sales not "in the ordinary course of trade" is by no means confined to sales below cost. It may encompass as well other categories of sales, including in particular sales between related parties where the price is affected by the relationship.

16. Article 2.3 acknowledges that, where the importer and the exporter are associated, the export price may be "unreliable". By the same token, domestic prices may be "unreliable" and, therefore, not "in the ordinary course of trade", where the seller is related to the buyer.

17. The terms "sale in the ordinary course of trade" are used also in Article VII.2 b) of GATT. The explanatory Note *Ad* paragraph 2 of Article VII confirms that the phrase "in the ordinary course of trade" may be construed as "excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration".[12]

18. Japan claims that the 99.5 per cent test violates both Article 2.1 and Article 2.4. The EC considers, nevertheless, that the issue raised by Japan is not addressed by Article 2.4. That Article governs exclusively the comparison between normal value and export price. The 99.5 per cent test is not applied at that stage, but instead at the previous stage of calculating the normal value.

19. Contrary to Korea's assertions, the first sentence of Article 2.4 does not impose "a general fairness requirement in the administration of antidumping proceedings".[13] By its own terms, that sentence applies only with respect to the "comparison" between the export price and the normal value. The calculation of the normal value precedes that comparison and is not subject to any general "fairness" requirement.

20. Therefore, the only issue before the Panel is whether the 99.5 per cent test applied by the US authorities may be considered as a "permissible" interpretation of the terms "in the ordinary course of trade" in Article 2.1.

21. In the EC's view, it is not. Of course, if the prices charged to related customers are lower than those charged to unrelated customers, that is an indication that the former may be affected by the

[8] Japan's First Written Submission, para. 140.
[9] US First Written Submission, paras. 201-202.
[10] Korea's Submission, para. 29.
[11] US First Written Submission, para. 206.
[12] See also Article 1.2 of the Agreement on Implementation of Article VII of the GATT 1994, which allows to disregard the transaction value of sales between related parties under certain circumstances.
[13] Korea's Submission, para. 8.

relationship.[14] But a mere 0.5 percentage point average price differential is simply too small to reach any definitive conclusion. The EC considers that it is unreasonable, and contrary to Article 2.1, for the US authorities to treat in all instances such a small differential as irrefutable evidence that sales are not made in the ordinary course of trade. This does not rule out the possibility, however, that in the case at hand the price differentials between related and unrelated customers may be large enough to justify the conclusion that sales to unrelated customers were not "in the ordinary course of trade" .

D. Treatment of Captive Production

22. We will conclude our Oral Statement by addressing briefly Japan's claim against the captive production provision in US law. In answering this claim, the US has provided a description of the EC practice.[15] That description is not entirely accurate. The EC, therefore, would request the Panel to disregard it.

23. The EC agrees with the US that, where a significant portion of domestic output of the like product is for captive use, it is not inconsistent with the Anti-dumping Agreement to focus the injury analysis on the "merchant" or "free" market. To the contrary, that focus is needed in order to avoid that the effects of dumped imports become obscured through the use of aggregate data. Captive production does not compete directly with dumped imports. Therefore, the immediate injurious effects of dumped imports take place in the free market and must be observed and assessed primarily in that market.

24. Japan's submission places considerable reliance on *Mexico – HFCS*[16]. That case, however, was concerned with a very different factual situation. In *Mexico - HFCS*, the same product was sold in two different markets: the industrial market and the household market. The Panel condemned Mexico for looking into the effects of dumped imports exclusively in one of those two markets. By contrast, in the case at hand, there is but one market: the "merchant" market. Therefore, the effects of dumped imports can be observed only in that market.

25. As a final comment, the EC would note that both Japan and the US appear to assume, on the basis of Article 4.1, that the existence of injury must be established always with respect to the whole of the domestic production. The EC would recall that Article 4.1 allows to consider as the "domestic industry" those producers who account for a "major proportion" of the total domestic production. The US, nevertheless, has not argued in this case that the domestic production for the "merchant market" constitutes a "major proportion" of its domestic production.

[14] Cf. Article 1.2(b) of the Agreement on Implementation of Article VII of the GATT 1994.

[15] US First Written Submission, paras. 44-47.

[16] Panel report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup from the United States, adopted on 28 January 2000, WT/DS132/R.

ANNEX D-8

Oral Statement of Korea as a Third Party

(23 August 2000)

On behalf of the Republic of Korea, I would like to thank the panel for this opportunity to make an oral statement. As a third party to this case, we would like to briefly address certain issues before the panel, which supplements the written submission made by Korea on 31 July 2000.

(Fair Comparison)

We would like to begin by drawing the panel's attention to the issue of the fair comparison requirement in the Anti-Dumping Agreement. As a preliminary matter, Korea wishes to respond to a point made by the EC in its oral statement at the first substantive meeting. EC referred to Korea's written submission and argued that the first sentence of Article 2.4 does not impose a general fairness requirement, since that sentence applies only with respect to the comparison between the export price and the normal value. Korea is of the view that fairness is a general principle of law, and the first sentence of Article 2.4 is a reflection of such a general principle. In this connection, Japan argued in its first written submission that administering authority should implement the Anti-Dumping Agreement in good faith, which is again a general principle of law as embodied in Article X.3 of the GATT of 1994.

Thus, Korea believes that fair comparison is an overarching, free-standing obligation which must be met and which governs all aspects of the determination of dumping. Article 2.4 of the Anti-Dumping Agreement states that "a fair comparison shall be made between the export price and the normal value." The requirement is unconditional, not limited to certain circumstances, and is fundamental to the Anti-Dumping Agreement. Any methodology for anti-dumping calculations and comparisons must respect this fundamental principle which has been set out as an independent, free-standing requirement of the Anti-Dumping Agreement. The question is whether the methodology employed by the US meets this test of "fairness".

Unfortunately, the US actions in this case did not meet the "fairness" requirement in many important instances on top of the fact that they were inconsistent with various articles in the Anti-Dumping Agreement, including Articles 2, 6 and 9 as well as Annex II. Korea wishes to elaborate this point through several specific examples.

First, the Commerce Department applied "facts available" against certain US sales made by Kawasaki Steel Company ("KSC") even though the information which was allegedly not provided to the Commerce Department could not be obtained by KSC because it related to transactions with CSI, one of the petitioners.

Let's be perfectly clear here -- it was CSI which withheld the necessary information. CSI's interests as a petitioner were antithetical to the interests of KSC, as CSI made clear by bringing and pursuing the petition and refusing to cooperate with KSC and the Commerce Department. KSC, on its part, made repeated efforts to obtain the necessary information. All these efforts were well

documented and reported to the Commerce Department. Given the situation, it was not “fair” to penalize KSC, while it was CSI which withheld the necessary information.

In this context, Korea wishes to refer to a point made by both Canada and the EC through their oral statements. Canada and the EC argued that Japan is wrong in interpreting Article 6.8 that the investigative authorities may not draw adverse inferences. Korea wishes to put aside for a moment the question of interpretation of Article 6.8. The more immediate question is the factual circumstance in which the DOC applied ‘facts available’ rule to the KSC’s sales to the CSI. It was CSI, and not KSC, that withheld necessary information. Given such a factual circumstance, it was not fair to impose punitive dumping margin on KSC. This point is not affected by any difference in interpretation of Article 6.8. Korea wishes to make the same point for the following example as well, which is DOC’s application of ‘facts available’ rule to the conversion factor.

The Commerce Department also applied adverse "facts available" to certain transactions by NKK Corporation and Nippon Steel Corporation on the ground that information on a minor adjustment factor was not provided. That minor deficiency, which was later corrected in time, was the basis for applying a very high margin from another sale by these companies to the sales with the alleged deficiency. The Commerce Department is very clear about the reason that it selected this margin. It had nothing to do with the comparability of these sales nor with any other efforts to assure a "fair comparison." The Commerce Department selected that margin to obtain a punitive result.

The Commerce Department’s actions were particularly unfair in view of the fact that both NKK and NSC submitted necessary information on the conversion factor after the Commerce Department’s preliminary decision but well within the specified period before verification. The Commerce Department simply refused to verify the additional information. Instead, it imposed punitive margins on relevant sales by NKK and NSC by unfairly applying “facts available”. Given the situation, it was not fair to penalize NKK and NSC irrespective of their best efforts.

Furthermore, the US "arm’s-length test," which it used for sales to affiliated parties, is fundamentally unfair. It is biased , because it includes only higher priced sales in the domestic market. According to the particular methodology employed by the US, the Commerce Department includes only the sales to an affiliated party if their weighted-average price is equal to 99.5 per cent or greater than the weighted-average price of sales to non-affiliated customers. The gap between the minimum price included and the weighted-average price of sales to non-affiliated customers is only 0.5 per cent. This level is below the *de minimis* level established to determine whether dumping is occurring. On the other hand, there is no maximum price over which transactions would not be included in the calculation of margin. This means that only higher priced sales, which are more likely to result in dumping margins, are included for comparison purposes. Thus, the US arm’s-length test is arbitrary, biased and cannot be sustained as a "fair comparison".

(New US policy on critical circumstances)

Apart from Korea’s general concern about “fairness” as a fundamental element of anti-dumping measures, there is one methodology employed by the US about which Korea is particularly concerned. That is with respect to the US decision on critical circumstances. The US improperly based a critical circumstances finding in this case on a mere threat of injury finding despite the fact that present injury is required by Article 10.

The Anti-Dumping Agreement provides for very limited circumstances under which duties can be applied retroactively. Article 10.2 and Article 10.6 provide those limited circumstances. In the case of Article 10.2, duties can be applied only back to the provisional duty period if a present injury determination has been made. In case of determination of threat to injury, duty can be imposed only from the date of the threat of injury as provided in Article 10.4. Article 10.6 allows the duties to

be applied during the provisional period **and** 90 days prior to that period in certain limited circumstances as defined in Article 10.6. In other words, the Article 10.6 remedy is additional to the provisional remedy as defined in Article 10.2. Thus, Article 10.2 and Article 10.6 must be read together in context to require that there must be an affirmative determination of actual present injury in order to make a critical circumstances finding.

The plain language of Article 10.6 also leads to such an interpretation. The only way for an importer to "know" that dumping is occurring and that it would cause injury is for injury to actually exist. This is not only what Korea believes but also used to be the view of the ITC of the US as well. Furthermore, the requirement for present injury is the only interpretation which comports with the limited object and purpose of additional retroactive duties as defined by Article 10.6 -- *i.e.*, to assure that the remedial effect of the final dumping duty is not undermined. When there is only a threat of injury, there is no question that final dumping duties alone will suffice to provide a remedial effect to prevent injury. The need for additional remedy as defined in Article 10.6 arises only in a present injury context when the final duties may be too late to serve their full remedial purpose.

From the above, it is clear that the Commerce Department issued critical circumstances determination in gross violation of the Anti-Dumping Agreement. The Commerce Department determination was also at variance with the International Trade Commission's decision, which found only threat of injury in the instant case. Furthermore, Commerce's action had the very real and intended effect of chilling trade, as was well described in the first submission of Japan.

The US Government recently announced, as part of its Steel Action Plan, that it intends to continue its new critical circumstances policy -- at least insofar as steel cases are concerned. Such a policy, if not properly sanctioned, would have a serious chilling effect upon the proper functioning of the rule-based multilateral trading system. The purpose of the Anti-Dumping Agreement is not to halt trade -- it is to investigate whether trade in question has been fair or not. For this reason, the problems raised by the critical circumstances decision of the US should be fully addressed by this Panel.

Thank you.

ANNEX D-9

Opening Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

INTRODUCTION

1. The right to impose anti-dumping measures is limited and does not allow a Member to run roughshod over its international obligations. The United States asks the Panel to convert the A-D Agreement from a set of international rules restricting imposition of anti-dumping measures into a weapon with which Authorities can penalize respondents. But, the Agreement is not a weapon to be wielded by Members. Rather, it is a carefully worded set of restrictions aimed at curbing domestic law abuses to the international trade system.

2. Here, the Panel first must ask whether the United States has respected the restrictions set forth in the treaty text. Second, the Panel must ask whether the United States has respected its obligation to interpret the treaty text in good faith. Analyzed appropriately, it is clear to us that United States has not respected its obligations.

I. SPECIFIC ANTI-DUMPING AGREEMENT CLAIMS

A. USDOC

1. Facts Available

3. Japan's claims against USDOC's use of adverse facts available involve not only the general practice itself, but also the manner in which that practice was applied in this case.

(b) USDOC Practice

4. I would like to clarify our position on the use of facts available. We have not asserted, as the United States claims, that the application of facts available can never turn out to be less favourable. Our claim is nothing more and nothing less than what a careful reading of Article 6.8, together with Annex II, yields.

5. What we have said is that facts available must be logical and reasonable. The most logical or reasonable facts available, in certain instances, may turn out to be adverse to a respondent. But, it is critically important to understand that Paragraph 7 of Annex II does not give the United States a license to punish. The goal of Paragraph 7 of Annex II is to find information that most closely approximates the truth to calculate the most accurate dumping margin given the information available. The many other detailed provisions in Annex II confirm this objective.

6. The United States tries to make its policy sound benign by suggesting that the adverse inferences they draw are always reasonable. Wishing to hide from the Panel the punitive nature of a policy whose stated purpose is to "provide an incentive to cooperate," the United States argues that it is always logical to speculate that any missing information is adverse to the respondent. We disagree.

The US practice has no textual basis and must stop. The United States improperly interprets Article 6.8 and Annex II, particularly Paragraph 7 of Annex II, to allow an authority to create incentives—quite strong incentives, in fact—to force a respondent to do exactly what the authority tells it to do, just like a bad boss commanding a faithful secretary. But, Paragraph 7 significantly restricts an authority's use of secondary data. Although the third sentence of Paragraph 7, in and of itself, may result in an incentive, it does not permit an authority to create its own incentives to force a respondent to comply with its instructions.

7. The Agreement contemplates that an authority will tailor its choice of facts available to the specific circumstances surrounding the missing information. USDOC makes no effort whatsoever to do this. Instead, USDOC purposefully homes in on an extremely high margin as the gap filler; the United States admits that USDOC does so to give respondents an incentive to cooperate.

8. In addition, Paragraph 7 does not permit an authority to punish a respondent with adverse facts available even to achieve a goal that is not related to the investigation. The US has confessed that it punished KSC, NSC and NKK with adverse facts available to create an incentive for future respondents to comply with US demands. Japan recognizes the difficulties faced by authorities in administering anti-dumping investigations, but Article 6.8 and Annex II do not permit the United States to sacrifice accurate margins, a basic goal of the A-D Agreement, by ignoring record evidence and drawing unreasonable inferences merely to send a warning to future respondents. In short, the US interpretation is impermissible; it is not supported by the text, object and context of the A-D Agreement.

(c) KSC

9. KSC's experience is a classic example of a facts available policy gone bad. First, USDOC did not demonstrate that the data it requested was necessary, as required by Article 6.8. CSI's resale data would have been necessary only if USDOC used constructed export price. But Article 2.3 does not require authorities to construct an export price; it only allows them to do so if the export price is "unreliable because of association or a compensatory arrangement." USDOC did not check the reliability of this sales data -- which is demonstrated by the fact that USDOC was unaware that KSC had provided the KSC-to-CSI sales data with its Section A response.

10. Second, USDOC did not establish that KSC withheld the requested data. USDOC ignored the fact that the company whose information USDOC demanded was a petitioner. As we explained in our second submission, USDOC has taken such peculiar facts into consideration in previous cases, but chose not to do so here. USDOC blindly treated KSC and CSI as a single company -- despite the two companies' obvious conflict of interest given that one was suing the other under the US anti-dumping law. The decision to apply an adverse inference is all the more inappropriate, as USDOC did not provide assistance to KSC in spite of the requirement of Article 6.13.

11. Third, even if USDOC had provided the requested guidance and still ultimately deemed KSC's situation to require the use of facts available, the selection of the second-highest dumping margin was neither reasonable nor logical. Such an adverse inference would assume that KSC was aware that CSI's resales would have led to a dumping margin as high as the one used by USDOC. This was clearly not the case, because KSC lacked access to CSI's data.

(d) NSC and NKK

12. USDOC's approach to NSC and NKK is just as troubling. First, it was clearly unnecessary to use facts available, because the data requested had already been provided for USDOC to verify. Second, the mistakes by the companies were unintentional. They did not malevolently withhold

disadvantageous data as the United States suggests. Rather, USDOC did not satisfy the Article 6.13 requirement to provide assistance.

13. Third, the selection of facts available was neither reasonable nor logical. The only interest for USDOC was to select a margin "that is sufficiently adverse so as to effectuate the statutory purposes of the facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner". In spite of the requirement of special circumspection stipulated in Paragraph 7 of Annex II, USDOC demonstrated no concern for using an estimate as close to reality as possible.

14. It is true that USDOC also mentioned in its final determination that it sought a margin "that is indicative of NSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." But this case shows how meaningless and hollow this standard formula is. In this case, USDOC had only to look at the data submitted by the companies to get the real dumping margin.

15. Indeed, NSC and NKK's situation is perhaps the best example of how USDOC's approach to adverse facts available is punitive. Even though USDOC had the companies' information, it chose to expunge it from the record and apply a rate that had no relevance to the transactions for which facts available were deemed necessary. USDOC did not apply an inference here, adverse or otherwise: when USDOC chose a margin or price that was as adverse as possible for NSC and NKK, it was not making an inference based on the companies' alleged non-cooperation, but rather punishing the companies for not turning over the information sooner.

16. At the very least, in order to be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The arbitrary application of adverse facts available in cases such as these must not be permitted.

2. All Others Rate

17. With respect to the all others rate, Article 9.4 prohibits their calculation based on margins tainted with facts available. Nothing in the provision suggests that this prohibition is limited to margins based on total facts available. The United States has failed to even respond to the fact that its proposal to so limit the provision was rejected during Uruguay Round negotiations. It also fails to explain why there should be any difference between a margin based entirely on facts available versus one based 90 per cent on facts available. Either way, the same policy considerations inherent in Article 9.4 apply: non-investigated exporters should not be affected by the behaviour of investigated companies during the course of an investigation.

18. The Panel should take note of the new argument on this issue set forth in the US Second Submission. They claim that because Article 9.4 is ambiguous, then multiple interpretations must apply. But, it is not for the United States to decide whether the Article is ambiguous. Further, it cannot be accepted that a proposal specifically rejected during negotiations is a permissible interpretation, simply because the Member that made the rejected proposal claims that the resulting provision is ambiguous. The European Commission agrees with Japan that the US law is inconsistent with Article 9.4. The United States is clearly taking its permissive interpretations theory too far.

3. Affiliated Sales In The Home Market

19. Japan has not argued that sales to affiliates can never be found to be outside the ordinary course of trade. Rather, Japan has argued that Article 2 of the Agreement does not permit the manner in which

the United States decides that such sales are outside the ordinary course of trade. Japan has further argued that the Agreement does not permit the replacement of such sales with an affiliates' resales.

20. In its second submission, the United States attempts to portray its 99.5 per cent test as benign. It says that the test must be fair because when sales to an affiliated customer fail the test, all of those sales are disregarded, not merely the low-priced ones. What the United States fails to mention is that the sales that pass the test are, on average, higher than the sales to all other customers. No effort is made by USDOC to discern whether these higher-priced sales are unreliable because of the relationship between seller and buyer. The United States says that it would exclude such sales if respondents were to prove that they were "aberrationally high." But, this just proves our point: low-priced sales are automatically excluded for being low priced; high-priced sales are excluded only if specifically requested and only if they are priced really high. The United States has not explained how it can justify such a low standard for excluding low-priced sales—a standard well below the two per cent de minimis standard--but such a high standard for excluding high-priced sales. Absent such an explanation, we are left to interpret that the motivation behind this lopsided policy is to exclude as many low-priced sales as possible in order to drive up the dumping margin. This does not comply with the fair comparison requirement of Article 2.4.

21. The United States also claims that it has the discretion under Article 2.1 to replace sales to affiliates with the affiliates' downstream sales. There is no such authority in the Agreement. Even if there were support for this practice, the United States now appears to admit that its use of downstream sales in the home market is different from its use of downstream sales in the export market. In the home market, the United States merely assumes downstream sales prices will be higher and therefore inflate the dumping margin; but in the US market -- when calculating constructed export price -- the United States goes to great lengths to make sure the price is as low as possible by deducting as much cost and profit as possible. The United States wants the Panel to believe that the Agreement permits the use of downstream sales in both markets, but that the adjustments made to those downstream prices can be lopsided in favor of higher dumping margins. Article 2.4 requires a fair comparison. This means symmetry on both sides of the equation. The United States has blatantly ignored this requirement.

22. The bottom line is this: if sales are going to be excluded for being outside the ordinary course of trade, then there must be a rational reason for doing so. The fact that sales are made between affiliates at relatively low prices is insufficient. Further, once the sales are excluded, there is no authority to replace them with the affiliates' resales. Even if there were, there is certainly no support for making adjustments on the export side that are not also made on the home market side. The US approach disregards the goal of Article 2 to ensure a fair comparison between export and home market prices.

4. Critical Circumstances

23. As for critical circumstances, Japan has demonstrated that US law and policy, both on their face and as applied in this case, are inconsistent with the AD Agreement. The United States has developed various excuses for its actions in this case, but its post hoc rationalizations cannot fix what is already damaged. What is clear from this case is:

- Article 10.6 requires that imports be dumped before applying retroactive provisional measures. No finding of dumping was made when the preliminary critical circumstances decision was made. The United States claims that no such determination is required. The United States apparently wants the Panel to believe that the word "dumped" in the chapeau to Article 10.6 and in Article 10.6(ii) is meaningless.

- Article 10.6 also requires a finding of injury. USITC had preliminarily found that imports posed only a threat of injury. Japan has explained in its written submissions that the

concept of injury under Article 10 is limited to current injury -- not threat of injury, not material retardation.

- Article 10.6 requires a finding that importers knew or should have known that the domestic industry would be injured by the increase in imports. Ignoring again the threat determination made by USITC, USDOC relied on vague press articles accompanying the petition. Vague articles cited in a petition do not constitute sufficient evidence of importer knowledge of injury. The few additional press articles found independently by USDOC were no more specific: none of them mentioned either Japan or hot-rolled steel specifically.

24. According to the United States, what petitioners say is inherently reliable -- unless and until respondents can prove otherwise. In the United States, respondents are guilty until proven innocent. The United States fails to recognize that the AD Agreement exists precisely to curb such abuses. This is why Article 10.6 requires that findings of dumping and injury already be made; this is also why all other findings made under Article 10.6 must be supported by sufficient evidence, not merely biased petition information.

25. The United States wants the Panel to conclude that, because retroactive duties were never actually collected in this case, the issue is moot. In other words, USDOC should be permitted to continue to make early critical circumstances determinations without sufficient evidence, because the USITC waits to gather sufficient evidence. But, actions that chill trade must not be tolerated; even if the actions eventually are corrected, trade still has been chilled. This is why the standards for applying retroactive duties in Article 10 of the AD Agreement use such strict language. The authority must collect sufficient evidence before it can shut down trade with the threat of retroactively imposed dumping duties.

B. USITC CLAIMS

1. Captive Production Provision On Its Face

26. Japan's argument that the captive production provision violates the A-D Agreement "on its face" is quite straightforward. The A-D Agreement requires authorities to evaluate the industry as a whole. The US statute, in contrast, picks two crucial factors -- market share and financial performance -- and forces the authorities to focus primarily on the merchant market segment for those two factors. To focus primarily on one narrow segment, without any balanced assessment of other segments and without any explicit effort to relate segments back to the industry as a whole, impermissibly distorts the analysis and, thus, violates Articles 3 and 4.

27. The United States has offered many defences for its statute, but the text of the relevant US statute itself contradicts the US claims. First, the United States once again claims the statute does not mandate WTO-inconsistent action. But the United States sidesteps the mandatory language "shall" in the statute. The United States also overlooks the recent Appellate Body decision in the 1916 Act case, in which the Appellate Body confirmed that subsequent interpretation of a statute cannot save the WTO inconsistency of mandatory legislation.

28. Second, the United States contorts the phrase "focus primarily" to mean consideration of other factors. But, the statute does not merely say to consider merchant market data; it says to focus primarily on such data. Moreover, although raised by the United States, the phrase "in determining" in the US statute actually reinforces Japan's argument. The dictionary defines "determine" as "be a deciding or the decisive factor in." Thus, the US statute says that in making the deciding or decisive evaluation of market share and financial performance, USITC must focus primarily on one segment.

29. Third, the United States argues the US statute somehow still permits proper evaluation of the industry as a whole, since there is other language that follows the analytic framework of considering the industry as a whole, as set forth in the A-D Agreement. This argument, however, ignores the history and structure of the US statute, that makes the primary focus on the merchant market, set out in subsection (iv) of the statute, take precedent over other statutory language. The United States cannot cite old and more general statutory language and overlook the newer and more specific language of the captive production provision. Congress added this new language to the statute for a reason -- to change the old method of analysis that the United States now tries to cite in its defence.

30. Fourth, the US statute does not require or permit USITC to relate its analysis of the merchant market segment to the industry as a whole, as required by the A-D Agreement. The statute does not require consideration of all segments. It simply makes no sense to think one can understand the whole without considering all of the parts that make up the whole.

31. Finally, the United States argues that in the hot-rolled steel case the Commissioners applying the captive production provision did relate its findings back to the industry as a whole. The merchant market analysis was just one step on the way to a proper analysis. This post hoc rationalization is without basis. Nowhere does USITC mention this approach in its determination, or say anything other than parallel recitation of certain market trends. It is not what the USITC could have said; it is what they actually did say that must govern in this proceeding.

2. Injury and Causation In The Hot-Rolled Steel Case

32. One of the central issues in the causation arguments related to the period of time being examined. The basic flaw in the USITC determination is the failure to consider and address those facts that undermine the authority's foregone conclusion. In 1998, even after the increase in imports, the domestic industry shipments and operating profits were higher than in 1996 before the import increase. It is hard to reconcile this simple fact with the claim that imports were causing material injury. The legal problem is that the USITC did not even try to address this fact.

33. Of course USITC considered the overall period when doing so reinforced its conclusions. The real issue, however, is how USITC addressed those factors for which the consideration of the full period undermined their desired conclusion. The answer, simply, is that USITC ignored the inconvenient facts.

34. The time period for the analysis and the captive production issue intertwine. Part of the reason several Commissioners wanted to focus primarily on the merchant market for financial performance was to avoid the inconvenient fact that operating profits were up in 1998 over 1996 levels for the industry as a whole. Focusing primarily on the merchant market provided legal justification -- at least under US law -- for essentially ignoring the overall trend in operating profits. Thus one of the central facts of this case -- one that respondents made a major part of their argument -- is not mentioned at all in the majority opinion. Not even mentioned. No matter how much post hoc rationalization the United States now offers, that rationalization cannot hide this basic omission. How can USITC be evaluating the overall trend in operating profits when it does not even mention it?

35. The United States now points to shreds of evidence in the determination. USITC mentioned cost of goods sold. USITC mentioned that the industry remained profitable over the period. But step back for a moment. Such cryptic references just underscore the failure to mention and directly address the main fact: that the industry overall made a higher operating margin with imports than without imports.

36. Nor does the extensive discussion of the 1997 to 1998 decline in operating profits somehow remedy this glaring omission. In 1997, even after imports increased, the domestic industry made

more money than in 1996. Remarkably, in 1998 this fact remained true -- even after another increase in imports, the domestic industry was still making more money than it did in 1996. USITC never addressed why consistent increases in operating profits justified a finding of material injury caused by imports.

37. This basic omission was compounded by USITC's inadequate consideration of alternative causes of any declines being experienced by the domestic industry. Having decided to make imports the scapegoat, USITC quickly brushed aside the alternative causes raised by respondents.

38. Under the Tokyo Round Antidumping Code, such casual treatment might have been permitted. But the A-D Agreement added new language that imposed higher obligations on authorities. The United States wants to overlook this new language, and thus clings to the old Atlantic Salmon panel report. But the new language in the AD Agreement plugs precisely the gap in the old treaty text identified by the Atlantic Salmon panel.

39. Moreover, the Wheat Gluten panel has already clarified what it viewed the language "not be attributed" as requiring. The United States tries to brush aside Wheat Gluten as a safeguards decision, but this key phrase is the same in both the anti-dumping and safeguards agreements. "Not be attributed" must be given meaning, and USITC did not do so in this case. Having found that each of these alternative causes did not entirely explain the problems, USITC then just assumed without serious analysis that imports must be the real problem. The AD Agreement requires more.

II. GATT ARTICLE X:3

40. The United States studiously has avoided responding to Japan's claim under Article X of GATT 1994. Thus, under established WTO rules, because Japan has made a prima facie demonstration of a US violation and the US has failed to respond adequately, the Panel should find in Japan's favour on this claim.

41. Article X:3 sets standards for the administration of domestic laws. Even when a domestic law is consistent with the A-D Agreement, an authority violates Article X:3 where, as here, it fails to administer the law in a uniform, impartial, or reasonable manner. As Japan has clarified, Japan's Article X:3 claims are independent of it's a-D Agreement claims and should be reviewed under Article 11 of the DSU.

42. The US answer to Panel Question 44 confirms Japan's claim. For example, the United States told the Panel: "No information was submitted to and accepted by the USITC after applicable deadlines in the investigation." However, the date the United States provides as the applicable deadline is the day the USITC closed the administrative record. The deadline for questionnaire responses was much earlier. The US answer, therefore, apart from being wrong, highlights the discriminatory manner in which the United States treats foreign versus domestic producers:

- For domestic producers, the deadline the US imposes is the closing of the administrative record.

- In contrast, for foreign producers, the day the administrative record closes is irrelevant. When NKK and NSC supplied data well before the closing of the factual record and in time for USDOC to verify and use it, USDOC nonetheless applied punitive adverse facts available.

43. In short, the US required respondents, but not petitioners, to meet questionnaire response deadlines. This is a clear example of non-uniform, partial and unreasonable action being taken by an

authority. It is precisely the kind of bias in the administration of domestic law that Article X:3 prohibits.

44. USDOC's failure to correct the error made in calculating NKK's preliminary dumping margin is another violation of Article X:3. USDOC failed to follow its own regulation for making corrections, thus subjecting NKK's shipments to inflated provisional measures upon which USDOC wrongly justified continuing critical circumstances. In responding to Japan's Question 30, the United States begs to be excused from this non-uniform application of a domestic law because USDOC merely made a mistake.

45. The irony is astounding. The United States asks the Panel both to accept USDOC's use of adverse facts available to punish NKK and NSC, and to treat USDOC's mistakes as mere oversights. The US position, therefore, is that mistakes made by the US Government and US producers must be tolerated; but mistakes made by foreign producers must not be tolerated.

46. These violations stem from USDOC's adversarial treatment of respondents. As Japan has demonstrated, the adversarial approach USDOC takes in its investigations violates GATT Article X:3. Unless the Panel takes firm action to address the US violations, the US abuses will multiply.

CONCLUSION

47. The United States hopes the Panel is too busy to focus on the texts of the Agreements and the US response to Japan's prima facie case. But, Japan is confident that, once the Panel focuses on the text of the Agreements, the specifics of Japan's claims and the inadequacies of the US replies, it will find that the US interpretations are impermissible. It will find that the US anti-dumping regime, on its face and as applied, violates the A- Agreement and Article X of GATT 1994.

48. As the Panel deliberates, we urge you to bear in mind Article 1 of the A-D Agreement. Article 1 explains clearly that anti-dumping measures shall only be applied when the investigation has been "conducted in accordance with the provisions of this Agreement." Japan has identified numerous ways in which the United States did not act "in accordance" with the A-D Agreement, and the Panel should not permit the US violations.

ANNEX D-10

Closing Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

49. At the outset, Japan takes issue with the US claim that we have abandoned or changed our position during the proceeding. Japan is confident that, by reviewing all of Japan's submissions in this proceeding, the Panel will clearly see the thrust of Japan's argument. Moreover, contrary to the US claim, it is Japan, and not the United States, that is respecting the results of the Uruguay Round negotiations, as expressed in the texts of the provisions relevant to this proceeding.

50. Japan is impressed with the level of attention the United States devoted this morning to injury and causation. Japan is not surprised; given the weakness of the US presentations to date, it needed to devote some time to USITC's misconduct. However, the US effort to rebut Japan's presentation is unsuccessful.

51. Japan asks the Panel also to note that the United States continues to repeat the mantras that:

(a) the AD Agreement contains only unclear provisions that admit many meanings—see for example the new US argument regarding Article 3.5 (para. 13); indeed the United States apparently has yet to find a clear provision in the Agreement

(b) due to the efforts of the US negotiators, the US law was enshrined in the A-D Agreement; and

(c) US law is consistent with the A-D Agreement simply because the US Congress says that it is.

52. So, in the view of the United States, this whole process has been unnecessary, because US law inherently complies with US WTO obligations. This cannot possibly be true. In addition to the violations shown by Japan, the DSB already has found the US anti-dumping law to be inconsistent with US WTO obligations in two separate proceedings—*US - Anti-Dumping Measure on Korean DRAMs* and *US Anti-Dumping Act of 1916*.

53. Turning now to the US assertions this morning, we note first that the US still has not rebutted Japan's *prima facie* case. Accordingly, I will address only some of the US points—causation, captive production, facts available and Article X of GATT 1994.

54. At the outset, we would like to remind the Panel that we are not here to decide whether or not to overturn *Wheat Gluten*. The United States would like to practice its arguments for *Wheat Gluten*. But, the Panel's focus, of course, is what the United States did in this case. The United States seems to think Japan's argument depends entirely on *Wheat Gluten*. It does not. Japan's argument stands whether or not the Panel agrees with *Wheat Gluten*, and whether or not the Appellate Body reverses *Wheat Gluten*. The USITC in this case was too quick to ignore unfavourable facts, too willing to gloss over contrary arguments, and too outcome driven in dismissing alternative causes. The United States assumes that a large USITC staff, a thick report, and some conclusory language insulates it from challenge. But the United States is wrong. The USITC may collect extensive data, but it is the way the USITC determination addresses that data that controls this issue.

55. To illustrate the defects of the USITC approach, we can find no better example than profits levels. The United States argues that it "examined" profit levels. First, the obligation at Article 3.4, is to "evaluate" the factors, not merely to examine them. Evaluating a factor means more than selecting favourable facts and ignoring unfavourable facts. At the outset of its investigation, the USITC decided that three years of data should be examined. Yet, once it collected the data, the USITC found that the data for 1997 and 1998 alone supported its desired conclusion, and that the data for 1996 could not logically be reconciled with its desired conclusion. So what did the USITC do? It simply ignored the data for 1996. Japan cannot imagine how any neutral decision maker could consider such selective consideration of facts to be "evaluation."

56. We note that the United States devoted more space to the captive production provision than any other single issue in its opening statement. The United States made this issue seem complicated because they had to do so. The US statute explicitly mandates an analytically impermissible approach. The statute forces the USITC to undertake an unbalanced and biased analysis that focuses primarily on one segment at the expense of others. The United States protests that other parts of the statute call for a WTO-consistent approach of considering the industry as a whole. But when one reads the US statute as a whole, the captive production provision trumps those other provisions. In normal cases, the statute might allow the proper approach. But in those cases where the special captive production provision applies, the flawed, unbalanced approach takes legal precedence and the USITC has no choice but to violate Articles 3 and 4.

57. I turn now to facts available. The US opening statement describes the US policy on facts available as benign and reasonable. But it is neither. The USDOC uses facts available as punishment – punishment to those companies involved in the current case—and as warning--to respondents in future cases--about the fate that awaits them.

58. Consider the three companies involved in this case. All three were punished. Why? KSC was not able to supply data from a petitioner, a company that was affirmatively attacking KSC in this proceeding. Not surprisingly, the United States ignored this crucial fact this morning. With respect to NSC and NKK, the United States protests that USDOC could not possibly know the motivation for the companies not providing the information in a timely manner. This claim is absurd. These two companies did everything USDOC asked. When the USDOC said jump, the companies asked "how high?" They did provide the information, and did so within the statutory deadlines. Yet USDOC looked at these facts and still inferred bad motives and applied adverse facts available. The United States argues that motives cannot be determined, but USDOC has no trouble assuming bad intentions; this is not surprising given the USDOC premise that all respondents are bad secretaries.

59. The United States has failed to rebut Japan's claim under Article X of GATT 1994, a claim which is quite important and which is independent from Japan's other claims. The United States tries to hide behind its bifurcated structure for administering its laws, and the different functions involved. But this rationalization does not work. A bifurcated structure does not allow a Member to administer its laws in biased and inconsistent ways. We agree that the USITC applies the law consistently to both US and non-US parties. If only the USDOC did the same. If USDOC adopted the USITC approach, KSC would not have been punished for not providing a petitioner's data. The Commissioners worked to get the information the USITC needed from the recalcitrant US producers, yet USDOC officials did nothing to get the information from CSI. Also, in contrast to USDOC's treatment of respondents NSC and NKK, the USITC accepted late data from the petitioners. In each instance, the different treatment, and the violation of Article X, could not be more obvious.

60. In closing, Japan urges the Panel to attend closely to the texts, identify the permissible interpretation of the relevant provisions and recognize the provisions for what they are—limitations on the discretion of authorities. Thank you for your attention to this most important matter.

ANNEX D-11

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

(27 September 2000)

1. ***Mr. Hirsh.*** Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. Again for the record, my name is Bruce Hirsh. I am a Legal Advisor with the Office of the US Trade Representative in Geneva. With me from my office in Washington is Associate General Counsel Dan Mullaney, who will begin our presentation today with a discussion of two procedural issues. James Toupin, Deputy General Counsel of the US International Trade Commission, will then present the issues concerning injury. Finally, John McInerney, Acting Chief Counsel for Import Administration at the US Department of Commerce, will present the issues concerning the anti-dumping calculations and critical circumstances.

2. ***Mr. Mullaney.*** Thank you, Mr. Chairman, and members of the Panel. With respect to the US **preliminary objection** to extra-record evidence, Japan argues that DSU Article 11 and Article 17.6(i) of the Anti-Dumping Agreement, taken together, require the panel to consider facts outside of the administrative records. This position is directly contrary to Article 17.5(ii) of the Anti-Dumping Agreement, which requires the Panel's examination to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." It is also contrary to several panel decisions under the Safeguards Agreement, which, in applying Article 11 of the DSU, specifically limited the panels' review to facts placed before the authorities.

3. Japan also claims that the Panel should take account of the statisticians' affidavit and attorneys' affidavits concerning alternate margin calculations because they are based on information on the record. This is incorrect. The calculation of a margin of dumping, for example, is a very complicated process that involves numerous decisions. Simply presenting an alternate dumping margin and asserting that it is based on a recalculation of record information is equivalent to submitting new information. The affidavit form of the information underscores this deficiency: in effect, the affiant is saying "you can't see this number in the record, but you should accept it as true, because I am swearing that it is true." The statisticians' affidavit is itself new evidence. If it is important evidence, the Japanese respondents should have submitted it for the record.

4. We will not repeat points we have already made on the special deferential **standard of review** specifically adopted by the negotiators for the Anti-Dumping Agreement. However, we note that Japan persists in suggesting that somehow Articles 31 and 32 of the Vienna Convention override the specific text of Article 17.6(ii). That article, however, reflects the negotiators' understanding that they had left enough issues ambiguous that they needed to make special provision for cases in which customary rules of treaty interpretation would not provide an unequivocal result. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. Thus, Japan's contention that the Convention requires, or even permits, a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation, would nullify the second sentence of Article 17.6(ii) of the Agreement.

5. I will now turn to my colleague, Mr. Toupin, of the US International Trade Commission, to present the injury issues.

6. ***Mr. Toupin.*** Thank you, Mr. Chairman and members of the Panel.

The Causation Standard under Article 3.5

7. At the outset, I would like to address the arguments that Japan now makes concerning the examination under Article 3.5 of other factors injuring the industry. The United States has demonstrated how the USITC's findings satisfy the standards for such an examination articulated by the panel in the *Atlantic Salmon* decision. I will not reiterate those arguments here, and invite any further questions that the Panel may have about those factual issues. Here, I will extend our remarks concerning why *Atlantic Salmon*, and not the unadopted panel decision in *Wheat Gluten*, provides relevant guidance for this Panel.

8. The first question for construing Article 3.5 of the Anti-Dumping Agreement is, what does it mean for dumped imports to be "causing injury" under the first sentence of the Article? As the United States has indicated in its Second Written Submission, the ordinary meaning of the word "cause" includes the possibility that a factor may be regarded as causing an effect if it assists in bringing forth that outcome.[1] This definition assumes that a factor may cause an outcome through its interaction with multiple other causal factors. Thus, the ordinary meaning of the term contradicts the *Wheat Gluten* panel's conclusion that an authority must determine the quantum of injury that imports "alone" cause.

9. This interpretation is reinforced by the second sentence of Article 3.5, which provides that demonstrating "cause" consists of a "demonstration of *a causal relationship* between the dumped imports and injury." The term "relationship" suggests that demonstrating causation consists of finding the connections between dumped imports and the industry's overall state, not of isolating a quantum of injury ascribable to imports alone. This view is consistent with the provision of Article 3.4 that an authority must evaluate all factors having a bearing on the state of the industry. Indeed, it is difficult to see how an authority could ever define the injury caused by imports alone in view of the factors that Article 3.4 states must be considered. The impact of dumped imports on such factors as productivity, return on investment, cash flow, inventories, employment, growth, wages, and ability to raise capital, will necessarily reflect the inextricable interaction of dumped imports with other factors.

10. It is in this context that the third sentence of Article 3.5, which requires an authority not to attribute injuries caused by other factors to dumped imports, must be interpreted. The third sentence recognizes that other factors may also have what the second sentence calls a "causal relationship" to the injured state of the industry. The third sentence requires an authority to examine such other factors sufficiently to assure that the determination of a causal relationship between dumped imports and injury is not based on effects explained instead by other causes.

11. Moreover, under Article 32 of the Vienna Convention, if the terms of a provision analyzed in context remain ambiguous, a tribunal may refer to the negotiating history to resolve ambiguity. The Tokyo Round Anti-Dumping Code, which the Anti-Dumping Agreement supersedes, and the *Atlantic Salmon* decision, adopted under that Code, were plainly part of that history. The first clause of the third sentence of Article 3.5 of the Anti-Dumping Agreement is drawn almost verbatim from the *Atlantic Salmon* decision' s description of the examination it regarded Article 3:4 of the Code as implicitly requiring. The second clause is close to identical to Article 3:4 of the prior Code. The last

[1] US Second Written Submission at ¶ 80.

sentence of Article 3.5, like footnote 5 in the prior Code, does not instruct an authority how to conduct the examination, but rather lists exemplary factors which may, but need not be, relevant.

12. Certainly, the documents underlying United States' implementation of the Agreement show that the United States, in agreeing to Article 3.5, reasonably understood it as adopting a requirement consistent with *Atlantic Salmon.* We attach as an exhibit the passage from the United States' Statement of Administrative Action that sets forth the United States' understanding.[2]

13. Finally, unlike the Safeguards Agreement, with which the *Wheat Gluten* panel was concerned, the Anti-Dumping Agreement provides that, when a provision admits of more than one interpretation, a panel is not to compel adoption of one of those interpretations. Article 17.6(ii) reflects that the negotiators of the Anti-Dumping Agreement knew that they were adopting provisions that did not in every case mandate one approach. Since the negotiators adopted language so close to that used in *Atlantic Salmon*, the United States must be regarded as choosing a permissible interpretation pursuant to Article 17.6(ii) when it construes Article 3.5 in accord with *Atlantic Salmon*.

14. The *Wheat Gluten* panel acknowledges that its requirement to determine what injury is due to imports alone might be impracticable, and explicitly declines to explain how its test might be met. This should have indicated to the *Wheat Gluten* panel that it was adopting an interpretation of the Safeguards Agreement that the negotiators of that Agreement could not have intended. Certainly the negotiators of the Anti-Dumping Agreement did not intend to impose such an impracticable test.

Examination of Relevant Factors and Evidence

15. As for Japan's argument that the USITC should have relied on certain data from 1996 to 1998, the USITC's determination reflects that it examined the relevant factors and evidence as required by the Agreement. Japan makes much of the fact that the USITC did not make an explicit finding stating that the industry's profits rose from 1996 to 1998, when the USITC relied on the decline in profits from 1997 to 1998. Japan, however, points to no requirement of the Agreement requiring such a finding. Article 3.4 requires the authority to conduct an "examination" of profits, but requires no particular finding. The USITC plainly examined profits. Article 3.5 requires an "examination of all relevant evidence", but does not state how that examination shall be reflected. Here, the USITC plainly examined the data from 1996 to 1998, since it explained why it rejected arguments that it should rely on a broader period than 1997 to 1998. Indeed, in doing so, it explained why, in the context of the economic conditions from 1996 to 1998, it did not regard 1997 as a banner year. There is no basis in the Agreement to find that the USITC was required to do more.

16. Japan argues -- concerning both the Anti-Dumping Agreement and Article X of the GATT -- that the USITC somehow impermissibly departed from a "rule" that it would rely on data over the entire period of its investigation. As our submissions demonstrate, there is no such rule. The USITC has in fact in numerous determinations -- reaching both affirmative and negative results -- relied on recent trends rather than on trends over the entire period. If it could not do so, the USITC would, when economic circumstances have changed over the period investigated, be forced to violate the requirement of Article 3.4 that it examine "all relevant economic factors".

17. These points are illustrated by the USITC's decision in *Elastic Rubber Thread from India*[3], on which Japan relies. In *Rubber Thread*, the USITC did indeed give weight to trends over the three-year period investigated rather than to trends in the final year. Its opinion, however, shows that it did not do so on the basis of any rule requiring reliance on three-year trends. It relied on those

[2] Statement of Administrative Action to Uruguay Round Trade Agreements Implementing Bill, H.R. 83-211, at 181-182, *attached as* **Exh. US/C-31**.

[3] USITC Inv. No. 731-TA-805 (Final).

trends only after finding that the downward trends in the last year were an "anomaly due to unanticipated high volumes in 1997, followed by a corresponding drop in 1998."[4] The USITC's reasoning, therefore, depended on its findings concerning the relevant economic factors. Here, the USITC found the relevant economic factors differed from those in *Rubber Thread*. Here, the USITC found the rise in demand and consumption not to be an anomaly, but rather to represent a persistent development in the relevant factors having a bearing on the state of the industry.

The captive production provision and analysis of market segments

18. Both the US law concerning captive production and the USITC's determination in this case accord with the Agreement's requirement to make a determination as to injury to the producers as a whole of the domestic like product. Japan has moved in its second written submission far from its original position in its arguments about the consistency of the US captive production provision, in itself, with the Anti-Dumping Agreement. Although the United States does not agree with much of Japan's characterization of that provision, even under Japan's portrayal of it, Japan cannot establish that the US statute violates the requirement that Members assure that their laws conform with their obligations under the Agreement.

19. In its first written submission, Japan stated that it was improper to consider, either primarily or secondarily, data for the merchant market sector.[5] Japan has now abandoned this position. Japan now acknowledges that "an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the Anti-Dumping Agreement."[6] Japan likewise agrees that the merchant market sector is the sector in which competition between the domestic industry and dumped imports is most direct.[7]

20. Similarly, Japan's First Written Submission stated that under the captive production provision "the USITC now *must* ignore the shielding effect of captive production," and the provision "makes it *impossible* for USITC to consider all relevant evidence."[8] Japan's position has become more nuanced, and the nuance is fundamental. In its Second Written Submission, Japan acknowledges that it is permissible for an authority to focus on the merchant market sector, but it argues that such an analysis must be explicitly related back to the industry as a whole and that the US provision "*requires* no such relating back." Likewise, rather than asserting that the USITC under the captive production provision must ignore other evidence, Japan now simply states that the provision "encourages USITC impermissibly to accentuate merchant market data in its determination."[9]

21. The United States disagrees with this interpretation of the captive production provision. However, even if Japan were correct in its statutory construction, its allegations would not establish that the US law on its face should be deemed to violate the Agreement. Japan admits that the provision does not *preclude* the USITC from relating back its findings on the merchant market sector to the whole industry. Moreover, if the statute only *encourages* the US authority to accentuate certain data, the statute cannot be said to *require* the USITC to ignore any evidence. Such a showing does not meet the traditional standard for finding legislation on its face to violate an Agreement. Under that standard, only "legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual

[4] *Rubber Thread*, at 14 & n.104.
[5] Japan First Written Submission at ¶ 45.
[6] Japan Second Written Submission at ¶ 219.
[7] Japan Second Written Submission at ¶ 186.
[8] Japan First Written Submission at ¶¶ 238-239 (emphases added).
[9] Japan Second Written Submission at ¶ 186.

application of such legislation ... could be challenged."[10] Japan is wrong in claiming that this established principle is no longer applicable or only relevant when a statute has not been applied.[11] The Appellate Body in *US – 1916 Act* specifically denied that the panel there made such a finding.[12] Similarly, the panel in the *Section 301* dispute stressed that it was not overturning the jurisprudence on the mandatory/discretionary distinction.[13]

22. In fact, as the United States has indicated, its anti-dumping statute does require that the authority make its determination with respect to the industry as a whole, and the captive production provision does not alter this requirement. Many aspects of the statute support this conclusion. The statute requires the USITC to make its determination as to the industry, which it defines as producers as a whole of the domestic like product. The requirement to "focus primarily" on the merchant market for certain factors assumes that, even for those factors, the USITC's analysis will proceed further. Moreover, the Statement of Administrative Action makes clear that, when the USITC considers those factors to which the captive production provision applies, it may "focus" on other evidence in addition to the merchant market sector. Likewise, the statute requires the USITC to consider other factors to which the provision does not apply. Further, the statute requires the USITC to consider "all relevant economic factors" and no one factor can "necessarily give decisive guidance." Thus the statute as a whole provides the USITC with discretion to consider all evidence and factors, and requires it to make a determination as to the industry as a whole.

23. Even if the US statute did not clearly mandate a determination as to the industry as a whole, when a statute that an authority administers is ambiguous, US courts defer to an authority's considered interpretation if that interpretation is reasonable. The Statement of Administrative Action expresses Congress' intent that the captive production provision would be consistent with the Anti-Dumping Agreement. Consequently, the authority applying that provision properly under US law resolves any ambiguities in the captive production provision and its relation to the statute in a manner consistent with the United States' obligation under the Agreement.

24. Indeed, it is Japan, not the United States, that forgets that the necessary inquiry pertains to the industry as a whole. Japan claims that the USITC should have made findings about a fall in the demand by pipe and tube manufacturers for hot rolled steel because two steel producers particularly depended on that demand.[14] The USITC, however, found that overall demand increased substantially and that the industry as a whole should have been able to take advantage of that growth in demand. The USITC concluded that imports prevented the industry as a whole from doing so. Japan has not shown how, in view of the overall growth in demand, the fact, if true, that two firms faced a fall in demand in a particular submarket is relevant to the assessment of injury to the industry as a whole.

25. Japan is reduced to arguing that this Panel should hold that the US Congress repealed the other provisions of the US statute that call on the USITC to make a determination as to the industry as a whole when it enacted the captive production provision -- even though Congress didn't say so.[15] Frankly, this argument demonstrates the implausibility of Japan's position. Japan is effectively asking this Panel to rewrite the US statute in order to make it violate the Anti-Dumping Agreement.

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[10] United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, Panel Report, adopted 4 October 1994, BISD 41S/131, at 118, quoted in United States -- Antidumping Act of 1916, AB-2000-5, AB-20006, at ¶ 88.

[11] Japan Second Written Submission at ¶ ¶ 175, 177.

[12] United States -- Antidumping Act of 1916, AB-2000-5, AB-2000-6, at ¶ 93.

[13] United States - Sections 301-310 of the Trade Act of 1974, adopted 27 Jan. 2000, WT/DS152/R at ¶ 6.9.

[14] Japan Second Written Submission at ¶ 267.

[15] Japan Second Written Submission at ¶ 193.

26. The sources concerning United States law that Japan cites, support, rather than conflict with, the United States' position here. As the US Supreme Court stated in the *Watt* case that Japan cites, "repeals by implication are not favoured ... The intention of the legislature to repeal must be 'clear and manifest.'"[16] Japan presents sections of a treatise on statutory construction as an exhibit[17] but pointedly omits the preceding section of the treatise that makes clear that US courts seek to read statutes as a whole to avoid finding different statutory provisions to be in conflict.[18] We attach that prior section as an exhibit. It is clear that a court would uphold the USITC in resolving any ambiguities to construe the captive production provision to accord with the statutory requirement to make a determination as to the industry as a whole.

27. The USITC's consideration in this case of the merchant market was consistent with the Agreement. As both Japan and the United States have advised the Panel, under US law only three Commissioners needed to vote in the affirmative in order to render an affirmative determination, and three Commissioners who voted in the affirmative found that the captive production provision did not apply. The obvious consequence of this fact is that, even if this Panel were to hold that the provision on its face violated the Agreement, such a ruling would not affect the validity of the USITC's determination. In its First Written Submission, Japan sought to avoid that consequence by arguing that, although Commissioner Bragg did not apply the captive production provision, her determination also erred because she made findings about the merchant market sector "in parallel" with findings about the industry as a whole.[19] Since Japan now agrees that making findings about a sector do not *per se* violate the Agreement, its Second Written Submission abandons this approach.

28. Instead, Japan now contends that Commissioner Bragg's determination is somehow "tainted" because, although she did not apply the provision, she allegedly "passively" joined the decision of three commissioners who did.[20] This argument does not rise to the level of a *prima facie* case. The face of the determination shows that the four Commissioners were co-authors of their joint views. Wherever Commissioner Bragg believed that her views differed from those of her colleagues, she specifically so noted. There is simply no evidence that she was in any way "passive."

29. In the determination at issue here, the Commission considered data on certain factors concerning "the particular sector in which the competition between the domestic industry and dumped imports is most direct,"[21] namely, the merchant market sector. It also made specific findings concerning the entire industry's data for those and other factors. Both sets of data supported an affirmative determination. The decisions that Japan cites for the proposition that an authority must relate its findings concerning a sector to the industry as a whole, concern determinations in which the authority did not in fact make findings about the industry as a whole, either in the entire determination or with respect to numerous required factors. Here, the USITC made findings on all relevant factors concerning the industry as a whole. The fact that it also made findings about the merchant market sector does not detract from the fact that its injury determination was based on data as to the industry as a whole.

30. Moreover, those findings necessarily account for trends in the non-merchant market sector. Here there were only two sectors accounting for all production, and the USITC analyzed, for each factor, data for one sector and for the industry as a whole. The difference in results for each factor

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[16] *Watt v. Alaska*, 451 US 259, 267, *quoting Morton v. Mancari*, 417 US 535, 549, *Posadas v. National City Bank*, 296 US 497, 503 (1936), *United States v. Borden Co.*, 308 US 188, 198 (1939), *Red Rock v. Henry*, 106 US 596, 602 (1883). *See* **Exh. JP-101**.

[17] **Exh. JP-101**, *including excerpt from* 2A *Sutherland Stat Const* § 46.06 (6th Ed. 2000).

[18] 2A Statutes and Statutory Construction § 46.05 (6th Ed. 2000), excerpts attached as **Exh. US/C-30**.

[19] Japan First Written Submission at ¶ 250.

[20] Japan Second Written Submission at ¶¶ 225-226.

[21] *Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R at ¶ 7.160.

necessarily reflected the impact on the industry as a whole of trends in the sector as to which the authority did not make separate findings.

31. The USITC here further made specific findings demonstrating the consequences for the industry as a whole of developments in the merchant market sector. For example, the USITC found that most performance indicators for the US industry as a whole declined because the US industry was prevented from participating in the growth of demand and consumption. The USITC found that the growth of the dumped imports' share of the merchant market sector at the expense of the domestic industry's share caused the US industry not to participate in the growth in demand. It also found that, as a result, capacity that the US industry brought on line to meet the growth in demand immediately became excess capacity.[22] Moreover, the USITC found that the decline in the industry's operating income at the end of the investigation coincided with the decline in its capacity utilization rates.[23] Through these and other findings, the USITC demonstrated the causal relationship between the effects of dumped imports on the industry's merchant market performance and injury to the industry as a whole.

32. In sum, the USITC's findings amply satisfy the standard that Japan has espoused. Japan itself quotes and approves prior panel authority stating that an analysis of the sector most exposed to import competition can sustain an injury determination if an authority *either* analyses all other sectors *or* demonstrates the relationship between events in the one segment and the industry as a whole.[24] Japan's contention that the USITC's determination was flawed unless it made specific findings concerning developments in the captive production sector has no basis in prior decisions or in the Agreement.

33. Finally, Japan complains at length that the USITC did not make findings in this case about the captive production sector in the same way as it did in its *1993 Flat Rolled Steel* determination. Suffice it to say here that the USITC in 1999 specifically recognized the effects of captive production.[25] The sole differences between the 1993 and 1999 determinations on this point seem to be that in 1999, the USITC spoke about relative "sensitivity" to imports rather than using the word "shielded"; in 1999, the USITC made its findings about the amount of captive production and the applicability of the provision in the section labelled captive production and made its finding on "sensitivity" in the next section of its opinion; and, as the facts had changed between 1993 and 1999, the USITC reached a different conclusion. With due respect to our Japanese colleagues, such differences cannot even plausibly suggest a violation.

34. Mr. McInerney will now address Japan's contentions about the United States' dumping calculations and critical circumstances.

35. ***Mr. McInerney.*** Thank you Mr. Chairman. With respect to the Department's **use of facts available,** Japan's second written submission emphasizes two points that are both wrong. First, Japan claims that adverse inferences are "punitive," and, therefore, improper. (Japan's 2d Sub. , ¶¶ 28 & 30.) This ignores the fact that, where a party has not submitted necessary information, adverse inferences are, in fact, the most reasonable and logical conclusion to be drawn about that missing information. This is precisely the point recognized by the Appellate Body in the *Canada - Civilian Aircraft* case. Japan's attempt to distinguish that case as using an adverse inference during the course of a WTO dispute settlement proceeding, rather than an anti-dumping investigation, disregards the fact that the rationale for both decisions was identical - - that the adverse inference was made both

[22] USITC Report at I-17.
[23] USITC Report at I-20.
[24] Japan Second Written Submission at ¶ 210 and n. 250, ¶ 221, *citing and quoting Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R, at ¶¶ 7.155, 7.160.
[25] USITC Report at 11, 19.

necessary and reasonable by the non-cooperation of the responding parties. In addition, Japan has yet to explain why its own authorities applied exactly this rationale in Japan's anti-dumping investigation of cotton yarn from Pakistan.

36. Second, Japan claims that, because the Japanese respondents were generally cooperative, this licensed them to refuse to cooperate with regard to certain selected categories of information. (Japan's 2d Sub., ¶ 24.) This position finds no support in the Agreement. It would amount to a 70 per cent or 80 per cent cooperation rule, under which respondents would have to cooperate only up to the threshold of "general cooperation," after which they would be free to withhold information. This would license respondents to manipulate the results of anti-dumping investigations by withholding selected categories of adverse information.

37. With regard to the **application of facts available to KSC**, Japan now tries to rationalize KSC's refusal to exercise its powers, as a fifty per cent owner of CSI, to obtain the necessary information by itemizing the ways in which KSC, CVRD, and CSI regularly ignored the CSI shareholders' agreement (Japan's second submission at ¶ 47). But the fact that KSC regularly ignored the shareholders' agreement does not prove that it had no power under that agreement - - only that KSC did not always choose to exercise that power. As the minutes of the CSI board meetings make clear (Exh. US/B–23/bis), the parties to the joint venture repeatedly raised, discussed, and made decisions on business matters, as provided for in the agreement. In this light, the fact that KSC never even *discussed* with CVRD the need to provide the requested CSI data, and never *challenged* the actions of CSI's president and CEO (who served at the pleasure of the board members representing KSC and CVRD) is glaring. *(See* US 1st submission, ¶ 90).

38. Finally, Japan's belated claim that CSI was *unable* to supply the requested information is based on one sentence in one letter from CSI. This new claim is not supported by the weight of the record evidence. Indeed, KSC itself characterized this statement by CSI as a refusal, not an inability, to provide the requested information. (US 2nd submission, ¶ 18; Exh. JP-93(a) and (c)). Accordingly, Commerce properly found that KSC failed to cooperate in providing the requested CSI data.

39. As facts available for the sales through CSI, Commerce reasonably chose a dumping margin calculated by comparing KSC's own sales to unaffiliated US customers to its sales of that same product in Japan. This selection of a dumping margin based upon KSC's product-specific, verified data represents a reasonable choice of adverse facts available. Yielding to KSC's attempt to force Commerce into using its transfer prices to CSI as a "plug" for facts available would give every respondent *carte blanche* to shelter dumped sales through its overseas affiliates.

40. With regard to **Commerce's application of facts available to NSC and NKK**, the Department was simply exercising its clear right under the Agreement to enforce reasonable deadlines. Japan's curious theory that any firm limits on the time in which information must be submitted, even after repeated extensions, are inimical to a "reasonable" understanding of "timeliness" has no support in the Agreement. Similarly baseless is Japan's theory that untimely information must be accepted if it is otherwise in compliance with the requirements of the Agreement. Paragraph 3 of Annex II requires that parties meet *all four* of the basic criteria listed in that paragraph in order for their information to be considered. One of these four conditions is that the information be "supplied in a timely fashion."

41. The weight conversion factors untimely submitted by NSC and NKK were not, as Japan claims, "corrections" (Japan' s 2d Sub., ¶ 93). They were categories of information that NSC and NKK had repeatedly claimed were not necessary and were impossible to submit, *at all*. Therefore, Commerce's rejection of this new information was perfectly consistent with its acceptance of various corrections of previously-submitted data very late in the investigation (Japan's 2d Sub., ¶ 94, fn.91). Nor did NSC and NKK's protestations of "good faith" compel the acceptance of their conversion

factors. It is impossible for investigating authorities to know a party's motivation for not submitting data when it is due, and the Agreement does not require the authorities to attempt to discern its motivation.

42. Finally, we must take issue with the claim that the facts available Commerce chose were not rationally related to the sales affected by the absence of the conversion factors. The Department used an adverse normal value for NKK's theoretical weight sales in Japan because the only element affected by the absence of the conversion factor was the normal value. As we have noted, this highly circumspect application of facts available had a minuscule effect upon NKK's margin. As for NSC, the Department's selection of margins from its actual-weight sales in the US market as facts available for the theoretical-weight sales of the same products in the US market was also reasonable.

43. With regard to **the "all-others" rate**, Japan is asking the Panel to re-write Article 9.4. Article 9.4 does not state that the all-others rate must exclude margins calculated in part by "*using*" facts available (Japan's 2d submission, at ¶ 117). Instead, Article 9.4 tells authorities to disregard margins which were "*established*" on the basis of the facts available. The most obvious interpretation is that such margins are "established" entirely on the basis of the facts available, for respondents that have generally failed to cooperate. Similarly, Article 9.4 does not require the exclusion of "portions" of margins based on facts available. It tells authorities to "disregard" *margins* established on the basis of the facts available, not to "recalculate" them without facts available.

44. The US reading of Article 9.4 – that a margin is only "established based on the facts available" when it is <u>not</u> a calculated margin, but is based <u>entirely</u> on the facts available – is a reasonable and permissible one. Indeed, Japan claims only that nothing in Article 9.4 "prevents" the Department from removing "portions" of margins using facts available and that its preferred approach "better reflects" Article 9.4 than the US interpretation. However, nothing in Article 9.4 <u>requires</u> the Department to follow Japan's preferred approach. If investigating authorities must disregard margins based only in part on the facts available, no margins would remain to calculate the all others rate in a great many cases, including this one.

45. Japan further argues that the Agreement makes clear that companies not individually investigated should not be affected by the behaviour of investigated companies. (Japan's 2d Sub., ¶ 117) Exactly the opposite is true. Article 9.4 expressly provides for the behaviour of the investigated companies to serve as a proxy for the companies not individually examined. In so providing, Article 9.4 avoids either unduly rewarding or penalizing the companies not investigated by eliminating the margins at both extremes - - the zero and *de minimis* margins and the presumably highest margins based entirely upon facts available. Reading Article 9.4 to require the exclusion of margins based even in part on the facts available would defeat its purpose of producing a reasonable average by eliminating the margins at each extreme of the range.

46. With regard to the **treatment of home market sales through affiliated parties,** Japan's "symmetry" argument concerning the Department's 99.5 per cent test ignores the fact that, although in the ordinary course of trade a company will sell at prices as high as the market will bear, a company normally will not sell *below* market prices. The reasonableness of the Department's "asymmetrical" approach to sales to affiliated parties in the home market is demonstrated by the fact that it is essentially the same as the margin calculation itself. The reason for this similarity is that the margin calculation and the arm's-length test have parallel objectives: the margin calculation discerns whether the sales in question (which are the export sales) have been sold below normal value in the home market; the arm's-length test determines whether the sales in question (which are the sales to the affiliate in the home market) are sold below average prices to unaffiliated parties. In each case, the group of sales is tested to determine whether it is priced *below*, not above, the applicable benchmark.

47. Japan's arguments against the **use of downstream sales in the home market** are also invalid. Article 2.1 defines dumping as selling at less than "the *comparable price, in the ordinary course of trade*, for the like product when destined *for consumption in the exporting country*" (emphasis supplied). A sale through a related party to an independent purchaser in the home market is just such a sale - - a sale of the like product, in the ordinary course of trade, destined for consumption in the exporting country. Accordingly, such sales are an appropriate basis for normal value. Article 2.2 calls for authorities to base normal value on constructed value or third country prices only "[w]hen there are **no** sales of the like product in the ordinary course of trade in the domestic market of the exporting country." (emphasis supplied).

48. By challenging the Department's practice of using perfectly valid home market downstream sales to unaffiliated parties, Japan is seeking to require investigating authorities to use either the prices of sales to related parties in the home market, which could easily be manipulated, or sources other than prices in Japan. This is not speculative - - NKK, for example, sold 93 per cent of its merchandise through affiliated trading companies at the time of the investigation (64 Fed. Reg. at 24339). If the Department were precluded from using such sales, it would be forced to base normal value either on constructed value or Japan's sales to third countries.

49. Finally, the United States disagrees with Japan's claim that the use of downstream sales violates the fair comparison requirement because the Department's level of trade adjustment does not address differences in price comparability due to resellers' costs and profits. First, the United States notes that this Panel's terms of reference do not include any challenge to Commerce's practice with regard to level of trade adjustments, either generally or in this investigation. Thus, Japan cannot now raise this issue. In any event, when the Department compares export sales to downstream home market sales at a different level of trade, the US statute (19 U.S.C. § 1677b(a)(7)) provides that "the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined." Such "price differences" would include the effects of both cost and profit.

50. With regard to Commerce's **Preliminary Determination of Critical Circumstances**, acceptance of Japan's claims would render Article 10.7 meaningless. Japan completely ignores the fact that the "sufficient evidence" required by Article 10.7 may be found at any time "after initiation." Japan provides no explanation for the lack of any other temporal restriction, but instead simply insists that the decision cannot, "as a practical matter," be made prior to a preliminary determination of dumping. Japan also continues to insist that petition exhibits are nothing more than "allegations," despite the obvious fact that the petition in this investigation contained very substantial evidence.

51. With respect to the injury requirement, Japan continues to ignore the express language of the Agreement, which provides that the term "injury" in Article 10.6 *includes* "threat of injury" because it does not specify otherwise. Moreover, Article 10.4 does not prevent a preliminary critical circumstances finding based upon "threat of injury." Article 10.4 merely states that, in accordance with Article 10.2, if there is a final determination of "threat of injury," an additional finding must be made in order to impose retroactive duties. This additional finding was not necessary in this investigation because the final determination was of *current injury*. The question presented under Article 10.4 is simply not present here.

52. Japan also argues that the Department's selection of the comparison periods for volume of imports and its determinations regarding knowledge of dumping and likely injury were arbitrary. However, the sequence of events fully supports the Department's determinations. *First*, importers became aware of potential investigations when the US industry declared in published interviews that it planned to bring anti-dumping actions; *second*, a surge in dumped imports followed the date of those interviews; and *third*, importers during and after the surge became aware of the massive

dumping and consequent threat. The critical circumstances provisions were intended to address precisely such surges in dumped imports.

53. Finally, Japan suggests that the United States is asking the Panel to look only at decisions made at the *end* of the investigation. This is not true. We ask that the Panel look at *this preliminary* decision. You will find ample supporting evidence to satisfy the requirements of Articles 10.6 and 10.7. Indeed, it is curious that, to support its arguments, Japan continuously refers the Panel to the *final* dumping margins - not the preliminary margins. It is *Japan* that would like the Panel to focus upon the decisions made at the *end* of the investigation.

54. With respect to **Article X**, Japan's claims are curious. Although couching its argument in terms of "due process" and "fairness," Japan is really trying to have Article X override provisions of the Anti-Dumping Agreement. Japan's claim is not about due process, in the sense of the *Shrimp-Turtle* decision it cites. There is no denying that the US investigation was open and transparent and allowed full opportunities for the submission of facts, views, and rebuttals. Rather, this dispute is about specific decisions fully consistent with and authorized by the Anti-Dumping Agreement that Japan does not like, and hopes to attack collaterally through Article X:3. The Panel should not permit such a collateral attack.

55. The differences between the Commerce Department and the US International Trade Commission with respect to information gathering and facts available are attributable to the different functions of these two agencies, not to any partiality, lack of uniformity, or unreasonableness. Indeed, the Commission's approach applies equally to information from all parties before it, whether they be US or non-US parties.

56. In deciding to accelerate the investigation, Commerce was reacting to an unprecedented surge in imports which more than justified its modest acceleration of the investigation. Japan has failed utterly to show that the acceleration prejudiced any of the Japanese respondents. Agencies must have the flexibility to respond to such special circumstances. The same may be said of Commerce's recent policy on critical circumstances. "Fundamental fairness" does not require that Commerce adhere rigidly to past approaches in the face of an unprecedented import surge.

57. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-12

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

(27 September 2000)

1. ***Mr. Toupin*.** Japan's contentions in this case as to injury are characterized by two trends. First, its legal theories have proved to be completely flexible.

2. In its first written submission, as to other factors causing injury, its claims concerned entirely whether the USITC's findings were sufficiently thorough, not whether the standard that the USITC stated in doing so was adequate. Beginning with its first oral statement, following the *Wheat Gluten* decision, Japan's argument now concerns entirely whether the USITC isolated injury due to imports and found that injury in itself material. The total absence of such a theory in Japan's original submission suggests that it, too, did not understand the Anti-Dumping Agreement as imposing such an analysis.

3. Similarly, in its original submission, Japan took the position that no analysis of segments was appropriate. Now, Japan has abandoned that position.

4. In brief, Japan has changed its position throughout this case, indicating that its positions here do not seek to vindicate a principled view of the Agreement. Rather, Japan evidently is prepared to take any position to seek to overturn the US action in this case. We are confident, however, that the Panel will not be misguided by Japan's opportunistic argumentation and will instead appreciate that it must base its decision on a principled interpretation of the provisions of the Agreement.

5. The second theme that underlies Japan's arguments is that the USITC did not make findings on issues on which the USITC did, in fact, make findings. The Panel should not be misguided by such arguments either.

6. Article 3, on which Japan relies, provides no specific form in which an examination should be reflected. Japan's real purpose on each point is not to establish that the USITC's determination violates any provision of the Agreement, but that the Panel should regard particular evidence as entitled to greater weight than the USITC gave it. Such is not the purpose of panel review under the standard of review.

7. We thank the Panel for its patience and attention to the detailed factual and legal arguments that have been made and look forward to the results of its deliberations.

8. ***Mr. McInerney*.** Japan has long opposed the application of any antidumping measures. Its announced position is that its producers should be able to dump in the US market and other foreign markets at will, with impunity.

9. In the Uruguay Round, Japan tried to obtain many changes to the Anti-Dumping Agreement which, collectively, would have made the application of antidumping measures impossible. But Japan did not succeed in this effort. The Uruguay Round Agreements made a number of important changes

in the Anti-Dumping Agreement, but these changes were not intended to, *and did not*, render the application of antidumping remedies impossible.

10. Japan is now pursuing a fall-back strategy - - of attempting to persuade dispute settlement panels to give Japan what it could not obtain from the Members through negotiation - - rendering the application of antidumping remedies impossible, by interpreting the Agreement as if the Members had agreed to that result.

11. In pursuit of this goal, Japan has made several claims before this Panel that strike at the heart of the process by which antidumping measures are implemented. The most prominent of these is Japan's wholesale attack on the facts available provisions, by proposing that an investigating authority may never make an adverse inference about information not submitted, even where that information has been deliberately withheld. Japan has admitted that this proposal is designed to strip Japanese respondents of any incentive to cooperate in antidumping investigations.

12. At this hearing, despite its position that the Agreement never permits an investigating authority to make an adverse inference, Japan has responded to a question from the panel by agreeing that an adverse inference could be reasonable in some circumstances. I don't know how an inference under the Agreement that can be reasonable in itself must nevertheless be based on an unreasonable interpretation of the Agreement.

13. As a fig leaf for this naked assault on the viability of antidumping remedies, Japan offers that, where a foreign producer has refused to supply an investigating authority with critical information, the investigating authority might, in attempting to reach a neutral result, use information that might coincidentally turn out to be adverse. The Panel is supposed to accept this absurd proposition as something to which the Members that actually employ antidumping remedies *conceivably* could have accepted in the Uruguay Round. The Members are alleged to have accepted that exporters would regard as a sufficient incentive to supply adverse information in an antidumping investigation the remote possibility that, in attempting to substitute purely neutral information for the missing data, an investigating authority might accidentally select some information that was unfavourable. This is just not credible.

14. But Japan has not "put all of its eggs in one basket," with respect to facts available. It has offered other arguments which are intended to look reasonable, when compared to its outright assault on the facts available rule. Such arguments should not be viewed in comparison to those that are more outrageous, but on their own merits. The seemingly small matter of NKK's weight conversion factor is a good example. This is a small adjustment that had a minuscule effect on NKK's margin. But by pressing this argument, along with the more outrageous claim, Japan hopes to carve some big holes in the facts available rules.

15. Japan has asked the Panel to rule that investigating authorities cannot enforce reasonable deadlines for the submission of information, and that non-cooperation confined to "small" matters must be excused. If the Panel goes along with this request, Japan will demand that these exceptions be applied to much larger quantities of information submitted late, or not at all, provided, of course, that the respondent companies have the sense to offer nominal cooperation.

16. Japan's arguments regarding the 99.5 per cent test are similar in approach to the matter of NKK's weight conversion factor, in that they invite the panel to begin dismantling the antidumping law piece-by-piece. Although *nominally* about the validity of the 99.5 per cent test itself, Japan's argument rapidly branches out to matters that would give Japanese exporters complete control over antidumping investigations. First, Japan proposes that an investigating authority should be required to accept transfer prices to affiliates as a basis for export price. If this proposition were accepted,

exporters would be in the enviable position of being able to make all of their export sales through related distributors, forcing investigating authorities to accept meaningless transfer prices as valid.

17. This strategy is complimented by a similar strategy on the home market side. Here Japan seeks to force investigating authorities to accept home market transfer prices or, in the alternative, skip over legitimate resales in the home market in favor of constructed value or third country prices. Put these two elements together, and Japan effectively could prevent investigating authorities from comparing a meaningful price in the export market to a meaningful price in Japan. Instead, exporters would be able to dictate which transactions must be used on both halves of the dumping equation. This would enable Japanese exporters to control the outcome of investigations, and therefore avoid the imposition of any antidumping remedies.

18. Now put it all together. Japan is trying to give to respondents control over what information must be submitted, when that information must be submitted, and how the entire dumping calculation must be set up. If Japan cannot obtain this all at once, it will try to get it in instalments from successive panels.

19. Japan should not be allowed either to demolish antidumping measures or to begin their piecemeal disassembly. Therefore, we trust that the Panel will consider each of Japan's arguments on its individual merits, and uphold each US practice that is based on a permissible interpretation of the language to which the Members agreed, as required by Article 17 of the Agreement.

20. Thank you for your careful attention to our arguments today and for your consideration in this proceeding.

ANNEX D-4

Closing Statement of the United States

(23 August 2000)

Thank you Mr. Chairman. This is Mr. McInerney from the Department of Commerce.

I would note at the outset that, in its closing statement, Japan has chosen not to address any of the specific substantive issues in this case, but instead has returned to its efforts to persuade the Panel that all of the Department's actions should be viewed as part of a conspiracy to treat Japan unfairly. Japan wants this Panel to regard the United States' repeated resort to its legitimate remedies under the WTO Agreement to redress repeated dumping by Japan as an abuse of antidumping measures. But it is no abuse to resort repeatedly to antidumping remedies in the face of repeated dumping. Every time that Japan has trouble in its own market, it seeks to export the problem to the United States. Repeated resort to WTO remedies in the face of such repeated dumping is perfectly legitimate and exactly what the Agreement provides for. This case does not involve a conspiracy. As Japan has acknowledged, it involves substantial dumping in massive quantities.

The AD Agreement is a set of agreed limitations on the exercise of AD remedies. The question before this Panel is whether any of the Department's specific methodologies or applications of which Japan complains in fact exceed those agreed limitations. I will now briefly turn to those specific issues.

First, with regard to facts available, we will await further submissions from Japan to see whether they have revised their absolute position on this issue, taken in their first written submission, that adverse inferences are never permitted. This interpretation would encourage exporters NOT to cooperate in AD investigations, rather than to cooperate, as so plainly intended by Article 6.8 and Annex II.

I would also encourage the Panel to recall that the Department's approach to applying facts available proceeds through three distinct steps: whether a resort to facts available is necessary, whether the selection of adverse facts available is justified, and, finally, if an adverse inference is to be employed, the selection of the specific adverse facts available. Japan has repeatedly collapsed these three steps, so as to imply that, if the last step -- selection of the specific adverse facts available -- was impermissible, the entire decision to resort to facts available was also impermissible. This is incorrect. I hope that the Panel will keep these distinctions in mind in considering this issue.

With regard to both the joint venture (CSI) and the two companies that did not submit conversion factors in a timely manner, there is a common thread - - passive resistance, rather than cooperation. These two concepts are worth pausing to consider. First, what is cooperation? The Oxford English Dictionary says (approximately) that cooperation is "acting together for a common purpose." How does this differ from passive resistance? I think the most obvious example with which we are all familiar is the difference between a good secretary and a bad secretary. A good secretary works with you to accomplish the same purpose, without having to be told in detail how each step in this process is to be accomplished. It is only necessary to tell her where you are going, and she helps you get there. A bad secretary does not outright refuse to cooperate. She does not want to get fired, just as an uncooperative respondent does not want to have facts available applied to it. Instead a bad secretary drags her feet - - needing to be prodded at each step, and requiring extremely

specific instructions. Occasionally, she will offer excuses along the line of "you didn't tell me you wanted a stamp on the envelope."

This is a subjective line, but I think we all know from our everyday experience what I am talking about. And the behaviour of the Japanese companies in this case with regard to the issues in dispute falls into the category of passive resistance, not cooperation. This is an especially effective strategy for them because they control all of the information necessary to conduct the investigations. Their approach was to limply go through the motions, with the Department of Commerce supposedly obliged to tell them at every stage not only what was required, but how to get it. The Panel is supposed to believe that KSC cannot make greater efforts to secure the cooperation of a JV of which it controls 50 per cent, and that NKK and NSC cannot calculate the weight of the steel they produce. Half-heartedly going through the motions to generate a few pieces of paper for the file is NOT cooperation. We all know the difference.

Finally, the Department's selection of facts available is not punitive. It is based on the reasonable inference that the information withheld is less favorable to the respondent than other information on the record. The Department's practice is only designed to give the respondent the incentive to cooperate, by placing it in a position where it will obtain a better result by cooperating. Even adverse facts available are only presumptively adverse. The Department cannot know whether the facts selected are actually adverse, because it does not know the true facts.

With regard to "all others rates," again, we are not entirely clear on Japan's position. Japan originally seemed to be saying that all portions of facts available must be removed from margins used to calculate the all-others rate. This position is untenable because it reads "margins" in Article 9.4 as "parts of margins." On the other hand, if Japan means that all margins that contain even a slight component of facts available must be excluded, then there very often will be NO all-others rate. This result is unacceptable.

The EC seemed to be searching for some middle ground, without any success. This is because Article 9.4 provides no such middle ground. In any event, the EC's 99 per cent facts available hypothetical is unrealistic. When a company's submission is mostly flawed, the Department throws out the whole response and resorts to full facts available. Such margins are not used to calculate the all-others rate.

A final element in some of the arguments we heard today was that companies that did not participate in the investigation should not be punished for the non-cooperation of the participants. We have two objections to this argument. First, as I have noted, we cannot be sure that the non-participants are really being punished, because we cannot know that the facts available selected are actually adverse. Second, to exclude all margins that are nominally based on facts available from all-others rates would reward non-participants for the non-cooperation of participants.

With regard to the 99.5 per cent test, I would first note that there is every reason to regard sales to related parties as presumptively outside the ordinary course of trade. This is a very fair reading of the Agreement and certainly cannot be considered to be inconsistent with the Agreement. I would also like to emphasize again that, if a reseller passes the 99.5 per cent test, all of that resellers' sales - - both above and below its average selling price - - are used.

Japan has attacked the Department's exception to that rule, on the basis that it imposes a floor, but not a ceiling on prices treated as being in the ordinary course of trade. But this is just what the cost-of-production test does - - it treats sales *below* COP as being outside the ordinary course of trade, but sales *above* COP as usable sales for the purpose of calculating normal value. This is consistent with the whole logic of dumping. Where dumping is occurring, it is precisely because

high-priced sales in the home market are, in fact, ordinary. Discarding such sales as aberrations would mask dumping.

The simple fact is that Japan does not want the United States to use its home-market sales, presumably because it has a protected home market that ensures high-prices in that market. This is what is behind Japan's desperate attempt to argue that related-party resales in the home market do not fall within Article 2.1's requirement for "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Japan would like to have all of its dumping margins in the United States calculated by comparing its export prices to the United States to its export prices to Canada - - an approach calculated to find no dumping.

Acceptance of Japan's argument that related-party resales in the home market may not be used to determine normal value would encourage foreign producers to manipulate normal value by making *all* their home-market sales through related parties. This would be easy to arrange, and would force investigating authorities to use third-country sales or constructed value in every case - - a result plainly not intended by the Agreement.

So, in reviewing this issue, I would urge the Panel to keep in mind not only the individual pieces of Japan's argument, but the overall design of that argument - - to force the Department to base normal value on prices to third countries or on constructed value, rather than on prices in Japan.

Finally, with regard to critical circumstances, I would like to point out that, during the course of this hearing, we seem to have heard in great depth and detail about every provision in Article 10 *except* Article 10.7, which is the provision pursuant to which the Department acted in making its preliminary determination of critical circumstances. This case is not about whether the United States could have collected final duties retroactively, for the simple reason that the United States did not collect such duties, and agrees that it cannot do so. It is about what effectively were preliminary measures taken to preserve the *option* of collecting such retroactive duties, if all of the conditions of Article 10.6 were met in the final determination.

I would like to thank the Panel again for its consideration. My colleague from the US International Trade Commission will now present the closing statement for the United States on the issues relating to injury.

I will now pick up on Mr. McInerney's issue-by-issue approach. I will look at two issues: whether the captive production provision is consistent with the Antidumping Agreement and whether the USITC's determination in this case was based on objective evidence.

The captive production provision permits a better understanding of the effects of dumped imports on the domestic industry because it directs the USITC to primarily focus on the merchant market, where competition occurs. This provision, despite Japan's argument to the contrary, requires the USITC to consider both the merchant market and the entire industry when making this assessment.

In this case, the captive production provision was not outcome-determinative because there was a 3-3 split among the Commissioners as to whether the provision applied, but all the Commissioners made an affirmative determination. In any event, those Commissioners that applied the provision properly analyzed the merchant market data because they looked at it in addition to the data for the industry as a whole. Looking at the market in this way, the USITC objectively considered the volume, price, and impact of those imports on the domestic industry over the period of investigation, ensuring not to attribute injury from other causes to those imports.

ANNEX D-5

Oral Statement of Canada as a Third Party

(23 August 2000)

IV. INTRODUCTION

1 The Government of Canada appreciates this opportunity to provide its views to the panel on certain issues in this dispute. Canada reserved its right to participate as a third party in this proceeding because of our substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement. In this regard, Canada will confine its submissions to two issues: (i) the drawing of "adverse inferences" when recourse is had to the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii**)** the appropriate treatment to be accorded captive production in injury investigations.

V. LEGAL ARGUMENT: ISSUES ADDRESSED BY CANADA

(i) "Facts Available"

2. Turning to the issue of the United States' general practice regarding "facts available", Canada first wishes to clarify that it takes no position on the jurisdictional question of whether the Japanese claim is properly before this Panel. Canada's submissions are made in the event that the Panel decides that it does have jurisdiction over the claim.

3. As set out clearly in our written submission, Canada cannot support Japan's claim that the US "practice of applying adverse facts available in certain situations to punish respondents" is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement because neither Article 6.8 nor Annex II use the word "adverse".

4. In Canada's view, the wording of Article 6.8 makes clear that an investigating authority may have resort to the "facts available" provisions of the Anti-Dumping Agreement in circumstances where "any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation". There is a direct link between the factual circumstances of non-co-operation or impediment by the interested party and the use of "facts available". This direct link, Canada submits, means that the use of "facts available" is, to a large degree, predicated on actions by interested parties that are intended to hamper or have the effect of hampering an investigation by an investigating authority. Thus, Japan's interpretation of Article 6.8, which would encourage an interested party not to co-operate with investigating authorities, is clearly at odds with the wording of Article 6.8.

5. Canada further submits that Article 9.3 of the Anti-Dumping Agreement provides that anti-dumping duties may be imposed in an amount equal to the margin of dumping. Where an investigating authority has recourse to "facts available" as a result of an interested party's refusal to co-operate or its efforts to impede the investigation, the drawing of adverse inferences is appropriate so as to ensure that the imposition of duties under Article 9.3 is not frustrated by the non-co-operating party obtaining the benefit of a dumping margin that is lower than would otherwise have been the case had they cooperated or not sought to impede the investigation.

6. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-Dumping Agreement, including, in particular, paragraph 7 of Annex II. As the Panel knows, paragraph 7 provides, in part, that "[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, the situation could lead to a result which is less favourable to the party than if that party did cooperate". In other words, non-co-operation can lead to higher dumping margins.

7. Further, Canada submits that if an investigating authority is precluded from drawing adverse inferences when applying "facts available" in the face of non-co-operation or efforts to impede an investigation, the object and purpose of the Anti-Dumping Agreement would be frustrated to the extent that the Agreement provides that duties may be imposed as a result of an investigation conducted in a manner consistent with the requirements of the Agreement. If adverse inferences could not be drawn, an interested party who refuses to co-operate or attempts to impede an investigation would benefit from actions that the Anti-Dumping Agreement seeks to remedy. Canada submits that an approach to "facts available" that would clearly encourage non-cooperation, as opposed to cooperation, cannot be consistent with the Anti-Dumping Agreement.

(ii) Captive Production

8. Turning to the issue of captive production, Canada notes that as part of its final injury determination in this matter, the United States International Trade Commission (ITC) took into account section 771(c)(iv) of the *Tariff Act of 1930*, as amended. As the panel is aware, this provision provides that in investigations involving domestic producers who internally transfer significant production of like products, the ITC, when considering certain injury factors, will "focus primarily" on the domestic merchant (i.e. commercial) market for the goods involved in such investigations.

9. Japan submits that the use of the captive production provision in US law is inconsistent with Articles 3 and 4 of the Anti-Dumping Agreement because these provisions do not expressly allow for a "focus" on anything less that all domestic production. Japan, although apparently recognizing the existence of different segments within a domestic industry[1], submits that in particular, the definition of "domestic industry" in Article 4.1 of the Anti-Dumping Agreement precludes segmentation of internal transfers from the "merchant market". Canada cannot support the Japanese claim of inconsistency regarding the US captive production provision.

10. Canada first notes that Canadian practice with respect to investigations involving domestic producers who internally transfer significant production of like products is similar to that of the United States. [2]

11. In Canada's view, the purpose of providing an investigating authority with the ability to focus on sales to the merchant market in appropriate circumstances is because it is in the merchant market that the dumped imports being investigated compete directly against domestically produced like products. For example, in the flat-rolled steel sector, domestically produced hot-rolled steel may be sold and used as an end product or may be further processed into, for instance, cold-rolled or corrosion-resistant steel. Imported hot-rolled steel does not compete with domestically produced hot-rolled steel destined for further processing into, for example, cold-rolled steel or corrosion-resistant steel.

12. Canada submits that the Anti-Dumping Agreement contains no express provision with respect to how captive production or internal transfers should be considered by investigating authorities. That being said, the fact that like product is internally transferred for further processing into different goods

[1] See, for instance, First Submission of Japan at paragraph 36.

[2] While an analogous provision does not exist in Canada's anti-dumping legislation (The Special Import Measures Act (R.S.C. 1985, c. S-15, as amended) this practice has been developed by the Canadian International Trade Tribunal, the investigating authority that deals with injury investigations in Canada.

for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

13. Canada also submits that the Japanese position blurs the distinction between the concepts of "domestic industry" and "domestic market(s)". This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include "… an objective examination of the effect of the dumped imports on prices in the domestic market for like product …".

14. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products "in the domestic market for like products", i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, such as with hot-rolled steel, this will be the merchant market.

15. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again necessarily focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

16. Accordingly, for these reasons, failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Anti-Dumping Agreement its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

VI. CONCLUSION

17. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with "facts available" and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

ANNEX D-6

Oral Statement of Chile as a Third Party

(23 August 2000)

Chile is taking part in this case because, like many other countries, it is concerned by the United States' regulations and practices with respect to investigations and the application of anti-dumping measures. What Japan has experienced in this case is a source of constant concern and constitutes a threat to Chilean exporters.

Chile is a country which depends primarily on its exports, and in spite of the diversity of destinations, the United States continues to be a very important market for Chilean exports, accounting for some 20 per cent of total export revenue in 1999. Because of the way in which the United States applies these measures, a considerable share of the burden of proof during the investigation process falls on the exporters, and in spite of the efforts and the resources invested in their defence, experience has shown that the system ultimately makes it very difficult to avoid being accused of dumping.

This Panel is a case in point. I shall focus my submission on the subjects we consider the most important, without necessarily following the same order as the other parties.

Captive production

The captive production provision in United States law is, in our view, entirely contrary to the provisions of the Anti-Dumping Agreement, which require that the determination of injury should be made on the basis of "total" domestic production, whatever its destination.

Irrespective of whether the application of the United States' domestic provision on captive production leads to an affirmative or negative determination of injury, what counts is that the relevant WTO provisions require the investigating authority to analyse injury with respect to total domestic production covering all of the domestic producers of like products, whether that production is sold or used for own consumption. In our view, Articles 3 and 4 of the Anti-Dumping Agreement, in particular Article 4, in no way permit that under certain conditions, the determination of injury should focus primarily on sales in the domestic market. The Agreement is very clear in this respect: it requires an examination of the domestic producers as a whole of like products.

To exclude captive production is to disregard an essential element: the rationality and behaviour of an industry in deciding to produce greater or lesser quantities for domestic sale or to produce goods with a higher value added, depending on market conditions. Failing to consider this element is tantamount to ignoring the effect of factors other than dumped imports on production decisions.

In our view, to give greater priority to production sold on the domestic market is contrary to Articles 3 and 4 of the Anti-Dumping Agreement.

Use of adverse facts available

In Chile's view, both the legislation and the practice of the United States with respect to the use of adverse facts available fall within the terms of reference of the Panel.

A first issue requiring clarification is whether or not there was any cooperation on the part of the respondent exporting enterprises, and more specifically, whether in this specific case there could truly have been cooperation, given the particular circumstance that there were two related enterprises which were opposed to each other (petitioner and respondent).

Irrespective of a company's percentage share in, or level of control over another company (Kawasaki had a 50 per cent stake in the affiliate), if one is the petitioner and the other is the respondent, there is a clear conflict of interest, and just because one company controls the other does not mean it can require it to supply information. As a matter of principle, companies with a conflict of interests can hardly be expected to cooperate. Thus, one cannot, in an investigation, accuse the respondent enterprise of failing to cooperate.

The analysis memorandum submitted by the United States as exhibit US/B-22 recognizes the conflict of interest between the two related companies (Kawasaki Steel Corporation and California Steel Industries), and points out that the way to avoid a conflict of interest between petitioners and respondents that are related would be for the related producer not to join the petition. However, in the case at issue this was not possible. The situation already existed, and the conflict of interest was no longer avoidable. Nor does it seem appropriate that the DOC should prescribe, as the only viable solution in such cases, something so drastic as the non-participation of the related petitioner in the petition.

Having recognized the conflict of interest, one would have hoped that the DOC's approach would have been to refrain from penalizing the exporting enterprise which, for such understandable reasons was unable to supply information. Accordingly, we consider the position adopted to be contrary to Article 6.13 and 6.8 and Annex II.

The second issue is that notwithstanding these considerations, once it is decided to use the facts available, it is wrong from every point of view to apply the most adverse facts. This United States legislation and practice violates Article 6.8 and Annex II of the Anti-Dumping Agreement which, while they permit an investigating authority to use other sources of information if there are parties which do not cooperate, nowhere specify that this must be the most adverse facts. The spirit of the provision is to enable the investigating authorities to fill in any gaps in their information, but in no case to "penalize" enterprises which do not supply information. We must bear in mind that anti-dumping measures are exceptional, and must not go beyond what is permitted under the relevant provisions or still less change the meaning and purpose of those provisions.

"All others" rate

Article 9.4 of the Anti-Dumping Agreement is quite clear as to how the margin of dumping should be calculated for exporters not included in the investigation: it clearly stipulates that *de minimis* and zero margins and margins from exporters who do not cooperate should be excluded from the weighted average. And yet the DOC, in its investigation, included in its calculation the margins of dumping of companies accused of not cooperating, thus violating the said provision of the Anti-Dumping Agreement.

Determination of critical circumstances

Regardless of the fact that the early determination of special circumstances by the DOC may not have affected Japan's exports, a view which Chile does not share since any determination, including an initiation determination, negatively affects exports, what is important is to determine whether the DOC properly considered the existence of dumping causing injury to the domestic industry, in conformity with the WTO. In this connection, we continue to believe that the DOC did not have sufficient evidence under Article 10.6 and 10.7 of the Anti-Dumping Agreement. The information from the petitioner or from press clippings does not, in our view, meet the standards established by the Agreement for reaching a conclusion that there was damage caused by dumping, since such information can hardly be considered as "positive evidence" or as representing an "objective examination" under Article 3.1 of the Anti-Dumping Agreement.

ANNEX D-7

Oral Statement of the European Communities as a Third Party

(23 August 2000)

1. On behalf of the EC, let me express first our appreciation for the opportunity to submit our views in this dispute.

2. In our Oral Statement, we will address four issues of legal interpretation raised by this dispute which, for systemic reasons, are of particular interest to the EC:

- first, the use of "adverse" inferences in applying the "facts available" provisions of Article 6.8 and Annex II;
- second, the consistency with Article 9.4 of the US practice to include only those dumping margins which are "entirely" based on "facts available" when calculating the dumping margin for non-investigated exporters;
- third, the consistency with Article 2 of the "99.5 per cent test" applied by the US authorities in order to determine whether domestic sales between related parties are "in the ordinary course of trade"; and
- finally, the treatment of "captive production" in injury determinations.

A. Choice of "facts available"

3. Japan contends that, when resorting to "facts available" in accordance with Article 6.8, the investigative authorities may not draw "adverse inferences".[1] According to Japan, "facts available" may be used only as "neutral gap fillers".[2]

4. The EC disagrees. Japan's contention has no basis on the Anti-dumping Agreement and, if upheld, would encourage systematic non-cooperation and, ultimately, render impossible the conduct of anti-dumping investigations.

5. Usually, when resorting to Article 6.8, investigative authorities are required to make a choice between different sets of "facts available". In doing so, they have a large measure of discretion. Of course, the facts must be pertinent and, to the extent possible, verified.[3] There is, however, no requirement in the Anti-dumping Agreement to the effect that the investigative authorities must choose always "facts available" which yield a "neutral" result, let alone those facts which lead to the lowest dumping margin.

6. To the contrary, Paragraph 7 of Annex II contemplates expressly that the use of "facts available" may lead to "a less favourable result". Furthermore, as demonstrated by the detailed

[1] Japan's First Written Submission, para. 57.
[2] Ibid., para. 58.
[3] Cf. Annex II, paragraph 7, second sentence.

textual analysis of Annex II made in the US submission[4], many of the other provisions in that Annex are premised on the notion that "facts available" may be "adverse" to the party concerned.

7. When selecting "facts available" the investigative authorities may take into account, among other circumstances, the degree of cooperation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive".[5] Indeed, strictly speaking, they are not even "adverse". They are just logical inferences, based on the assumed rationality of the exporter's behaviour: a rational exporter would cooperate, if it could expect to obtain a better result by doing so than on the basis of "facts available".

B. Use of dumping margins based "partially" on facts available in the "all- others" rate

8. Article 9.4 prohibits the use of any dumping margin "established under the circumstances referred to in paragraph 8 of Article 6", whether "entirely" or "partially". Thus, the EC agrees with Japan that, by excluding from the "all-others rate" only those dumping margins which are based "entirely" on facts available, US law is inconsistent with Article 9.4.

9. The US attempts to justify its practice by arguing that facts available "plugs" with a negligible impact on the dumping margin are used in many investigations.[6] The US definition of what constitutes a margin "partially" based on facts available, however, is by no means confined to such cases. The measures at issue show that the US authorities do not hesitate to include in the "all-others rate" margins which are based to a significant extent on facts available. Indeed, it seems that, under US law, a dumping margin which was 99 per cent based on facts available would still have to be included in the "all-others rate". In the EC's view, that would be clearly prohibited by Article 9.4.

10. The EC would agree, nevertheless, that Article 9.4 does not require to disregard the dumping margin in every instance where facts available have been used. Such a formalistic interpretation of Article 9.4 would often lead to a situation where no margins can be used in order to calculate the "all-others rate" in accordance with the method set out in that provision That result would be detrimental to the non-investigated exporters and contrary to the objective sought by Article 9.4.

11. The purpose of excluding the margins based on facts available is to avoid that non-investigated exporters may be affected adversely by the lack of cooperation of those exporters which have been given the opportunity to be investigated. That rationale, however, does not apply in those cases where, to borrow US terminology, the investigative authority limits itself to use a non-adverse "plug" in order to fill a gap in the information provided by a cooperative exporter. The EC, therefore, considers that Article 9.4, when read in light of its object and purpose, does not prevent the inclusion in the "all-others rate" of margins based on facts available, where resort to such facts is limited and no adverse inferences have been drawn.

12. While the EC is of the view that US law is inconsistent with Article 9.4, it concurs with the US that in Article 9.4 the term "margin" refers to each exporter's overall dumping margin, and not to the margins for individual transactions, models or sales channels.[7] Therefore, Japan's claim that the US authorities should have excluded from the "all-others rate" only those "portions" of each

[4] US First Written Submission, paras. 60-68.
[5] Japan's First Written Submission, paras. 58-59.
[6] US First Written Submission, para. 200.
[7] US First Written Submission, para. 191.

exporter's margin based on facts available[8] is clearly unfounded and should be rejected by the Panel. As argued by the US, that piecemeal approach would be unworkable and open to manipulation.[9]

C. The "99.5 per cent" test

13. Japan does not seem to dispute that sales between related parties may be disregarded as not being "in the ordinary course of trade" where they are not made at arm's length. Instead, Japan's complaint is directed against the "99.5 per cent" test applied by the US authorities in order to determine whether sales are at arm's length

14. In contrast, Korea has put forward the view that the Anti-dumping Agreement "only recognises one basis for disregarding sales as outside the ordinary course of trade"[10], that is, where the sales are made below cost. Korea's position is surprising as it appears to contradict its own anti-dumping law.[11] It is also incorrect.

15. The ordinary meaning of the expression sales not "in the ordinary course of trade" is by no means confined to sales below cost. It may encompass as well other categories of sales, including in particular sales between related parties where the price is affected by the relationship.

16. Article 2.3 acknowledges that, where the importer and the exporter are associated, the export price may be "unreliable". By the same token, domestic prices may be "unreliable" and, therefore, not "in the ordinary course of trade", where the seller is related to the buyer.

17. The terms "sale in the ordinary course of trade" are used also in Article VII.2 b) of GATT. The explanatory Note *Ad* paragraph 2 of Article VII confirms that the phrase "in the ordinary course of trade" may be construed as "excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration".[12]

18. Japan claims that the 99.5 per cent test violates both Article 2.1 and Article 2.4. The EC considers, nevertheless, that the issue raised by Japan is not addressed by Article 2.4. That Article governs exclusively the comparison between normal value and export price. The 99.5 per cent test is not applied at that stage, but instead at the previous stage of calculating the normal value.

19. Contrary to Korea's assertions, the first sentence of Article 2.4 does not impose "a general fairness requirement in the administration of antidumping proceedings".[13] By its own terms, that sentence applies only with respect to the "comparison" between the export price and the normal value. The calculation of the normal value precedes that comparison and is not subject to any general "fairness" requirement.

20. Therefore, the only issue before the Panel is whether the 99.5 per cent test applied by the US authorities may be considered as a "permissible" interpretation of the terms "in the ordinary course of trade" in Article 2.1.

21. In the EC's view, it is not. Of course, if the prices charged to related customers are lower than those charged to unrelated customers, that is an indication that the former may be affected by the

[8] Japan's First Written Submission, para. 140.
[9] US First Written Submission, paras. 201-202.
[10] Korea's Submission, para. 29.
[11] US First Written Submission, para. 206.
[12] See also Article 1.2 of the Agreement on Implementation of Article VII of the GATT 1994, which allows to disregard the transaction value of sales between related parties under certain circumstances.
[13] Korea's Submission, para. 8.

relationship.[14] But a mere 0.5 percentage point average price differential is simply too small to reach any definitive conclusion. The EC considers that it is unreasonable, and contrary to Article 2.1, for the US authorities to treat in all instances such a small differential as irrefutable evidence that sales are not made in the ordinary course of trade. This does not rule out the possibility, however, that in the case at hand the price differentials between related and unrelated customers may be large enough to justify the conclusion that sales to unrelated customers were not "in the ordinary course of trade" .

D. Treatment of Captive Production

22. We will conclude our Oral Statement by addressing briefly Japan's claim against the captive production provision in US law. In answering this claim, the US has provided a description of the EC practice.[15] That description is not entirely accurate. The EC, therefore, would request the Panel to disregard it.

23. The EC agrees with the US that, where a significant portion of domestic output of the like product is for captive use, it is not inconsistent with the Anti-dumping Agreement to focus the injury analysis on the "merchant" or "free" market. To the contrary, that focus is needed in order to avoid that the effects of dumped imports become obscured through the use of aggregate data. Captive production does not compete directly with dumped imports. Therefore, the immediate injurious effects of dumped imports take place in the free market and must be observed and assessed primarily in that market.

24. Japan's submission places considerable reliance on *Mexico – HFCS*[16]. That case, however, was concerned with a very different factual situation. In *Mexico - HFCS*, the same product was sold in two different markets: the industrial market and the household market. The Panel condemned Mexico for looking into the effects of dumped imports exclusively in one of those two markets. By contrast, in the case at hand, there is but one market: the "merchant" market. Therefore, the effects of dumped imports can be observed only in that market.

25. As a final comment, the EC would note that both Japan and the US appear to assume, on the basis of Article 4.1, that the existence of injury must be established always with respect to the whole of the domestic production. The EC would recall that Article 4.1 allows to consider as the "domestic industry" those producers who account for a "major proportion" of the total domestic production. The US, nevertheless, has not argued in this case that the domestic production for the "merchant market" constitutes a "major proportion" of its domestic production.

[14] Cf. Article 1.2(b) of the Agreement on Implementation of Article VII of the GATT 1994.

[15] US First Written Submission, paras. 44-47.

[16] Panel report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup from the United States, adopted on 28 January 2000, WT/DS132/R.

ANNEX D-8

Oral Statement of Korea as a Third Party

(23 August 2000)

On behalf of the Republic of Korea, I would like to thank the panel for this opportunity to make an oral statement. As a third party to this case, we would like to briefly address certain issues before the panel, which supplements the written submission made by Korea on 31 July 2000.

(Fair Comparison)

We would like to begin by drawing the panel's attention to the issue of the fair comparison requirement in the Anti-Dumping Agreement. As a preliminary matter, Korea wishes to respond to a point made by the EC in its oral statement at the first substantive meeting. EC referred to Korea's written submission and argued that the first sentence of Article 2.4 does not impose a general fairness requirement, since that sentence applies only with respect to the comparison between the export price and the normal value. Korea is of the view that fairness is a general principle of law, and the first sentence of Article 2.4 is a reflection of such a general principle. In this connection, Japan argued in its first written submission that administering authority should implement the Anti-Dumping Agreement in good faith, which is again a general principle of law as embodied in Article X.3 of the GATT of 1994.

Thus, Korea believes that fair comparison is an overarching, free-standing obligation which must be met and which governs all aspects of the determination of dumping. Article 2.4 of the Anti-Dumping Agreement states that "a fair comparison shall be made between the export price and the normal value." The requirement is unconditional, not limited to certain circumstances, and is fundamental to the Anti-Dumping Agreement. Any methodology for anti-dumping calculations and comparisons must respect this fundamental principle which has been set out as an independent, free-standing requirement of the Anti-Dumping Agreement. The question is whether the methodology employed by the US meets this test of "fairness".

Unfortunately, the US actions in this case did not meet the "fairness" requirement in many important instances on top of the fact that they were inconsistent with various articles in the Anti-Dumping Agreement, including Articles 2, 6 and 9 as well as Annex II. Korea wishes to elaborate this point through several specific examples.

First, the Commerce Department applied "facts available" against certain US sales made by Kawasaki Steel Company ("KSC") even though the information which was allegedly not provided to the Commerce Department could not be obtained by KSC because it related to transactions with CSI, one of the petitioners.

Let's be perfectly clear here -- it was CSI which withheld the necessary information. CSI's interests as a petitioner were antithetical to the interests of KSC, as CSI made clear by bringing and pursuing the petition and refusing to cooperate with KSC and the Commerce Department. KSC, on its part, made repeated efforts to obtain the necessary information. All these efforts were well

documented and reported to the Commerce Department. Given the situation, it was not “fair” to penalize KSC, while it was CSI which withheld the necessary information.

In this context, Korea wishes to refer to a point made by both Canada and the EC through their oral statements. Canada and the EC argued that Japan is wrong in interpreting Article 6.8 that the investigative authorities may not draw adverse inferences. Korea wishes to put aside for a moment the question of interpretation of Article 6.8. The more immediate question is the factual circumstance in which the DOC applied ‘facts available’ rule to the KSC’s sales to the CSI. It was CSI, and not KSC, that withheld necessary information. Given such a factual circumstance, it was not fair to impose punitive dumping margin on KSC. This point is not affected by any difference in interpretation of Article 6.8. Korea wishes to make the same point for the following example as well, which is DOC’s application of ‘facts available’ rule to the conversion factor.

The Commerce Department also applied adverse "facts available" to certain transactions by NKK Corporation and Nippon Steel Corporation on the ground that information on a minor adjustment factor was not provided. That minor deficiency, which was later corrected in time, was the basis for applying a very high margin from another sale by these companies to the sales with the alleged deficiency. The Commerce Department is very clear about the reason that it selected this margin. It had nothing to do with the comparability of these sales nor with any other efforts to assure a "fair comparison." The Commerce Department selected that margin to obtain a punitive result.

The Commerce Department’s actions were particularly unfair in view of the fact that both NKK and NSC submitted necessary information on the conversion factor after the Commerce Department’s preliminary decision but well within the specified period before verification. The Commerce Department simply refused to verify the additional information. Instead, it imposed punitive margins on relevant sales by NKK and NSC by unfairly applying “facts available”. Given the situation, it was not fair to penalize NKK and NSC irrespective of their best efforts.

Furthermore, the US "arm’s-length test," which it used for sales to affiliated parties, is fundamentally unfair. It is biased , because it includes only higher priced sales in the domestic market. According to the particular methodology employed by the US, the Commerce Department includes only the sales to an affiliated party if their weighted-average price is equal to 99.5 per cent or greater than the weighted-average price of sales to non-affiliated customers. The gap between the minimum price included and the weighted-average price of sales to non-affiliated customers is only 0.5 per cent. This level is below the *de minimis* level established to determine whether dumping is occurring. On the other hand, there is no maximum price over which transactions would not be included in the calculation of margin. This means that only higher priced sales, which are more likely to result in dumping margins, are included for comparison purposes. Thus, the US arm’s-length test is arbitrary, biased and cannot be sustained as a "fair comparison".

(New US policy on critical circumstances)

Apart from Korea’s general concern about “fairness” as a fundamental element of anti-dumping measures, there is one methodology employed by the US about which Korea is particularly concerned. That is with respect to the US decision on critical circumstances. The US improperly based a critical circumstances finding in this case on a mere threat of injury finding despite the fact that present injury is required by Article 10.

The Anti-Dumping Agreement provides for very limited circumstances under which duties can be applied retroactively. Article 10.2 and Article 10.6 provide those limited circumstances. In the case of Article 10.2, duties can be applied only back to the provisional duty period if a present injury determination has been made. In case of determination of threat to injury, duty can be imposed only from the date of the threat of injury as provided in Article 10.4. Article 10.6 allows the duties to

be applied during the provisional period **and** 90 days prior to that period in certain limited circumstances as defined in Article 10.6. In other words, the Article 10.6 remedy is additional to the provisional remedy as defined in Article 10.2. Thus, Article 10.2 and Article 10.6 must be read together in context to require that there must be an affirmative determination of actual present injury in order to make a critical circumstances finding.

The plain language of Article 10.6 also leads to such an interpretation. The only way for an importer to "know" that dumping is occurring and that it would cause injury is for injury to actually exist. This is not only what Korea believes but also used to be the view of the ITC of the US as well. Furthermore, the requirement for present injury is the only interpretation which comports with the limited object and purpose of additional retroactive duties as defined by Article 10.6 -- *i.e.*, to assure that the remedial effect of the final dumping duty is not undermined. When there is only a threat of injury, there is no question that final dumping duties alone will suffice to provide a remedial effect to prevent injury. The need for additional remedy as defined in Article 10.6 arises only in a present injury context when the final duties may be too late to serve their full remedial purpose.

From the above, it is clear that the Commerce Department issued critical circumstances determination in gross violation of the Anti-Dumping Agreement. The Commerce Department determination was also at variance with the International Trade Commission's decision, which found only threat of injury in the instant case. Furthermore, Commerce's action had the very real and intended effect of chilling trade, as was well described in the first submission of Japan.

The US Government recently announced, as part of its Steel Action Plan, that it intends to continue its new critical circumstances policy -- at least insofar as steel cases are concerned. Such a policy, if not properly sanctioned, would have a serious chilling effect upon the proper functioning of the rule-based multilateral trading system. The purpose of the Anti-Dumping Agreement is not to halt trade -- it is to investigate whether trade in question has been fair or not. For this reason, the problems raised by the critical circumstances decision of the US should be fully addressed by this Panel.

Thank you.

ANNEX D-9

Opening Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

INTRODUCTION

61. The right to impose anti-dumping measures is limited and does not allow a Member to run roughshod over its international obligations. The United States asks the Panel to convert the A-D Agreement from a set of international rules restricting imposition of anti-dumping measures into a weapon with which Authorities can penalize respondents. But, the Agreement is not a weapon to be wielded by Members. Rather, it is a carefully worded set of restrictions aimed at curbing domestic law abuses to the international trade system.

62. Here, the Panel first must ask whether the United States has respected the restrictions set forth in the treaty text. Second, the Panel must ask whether the United States has respected its obligation to interpret the treaty text in good faith. Analyzed appropriately, it is clear to us that United States has not respected its obligations.

I. SPECIFIC ANTI-DUMPING AGREEMENT CLAIMS

A. USDOC

1. Facts Available

63. Japan's claims against USDOC's use of adverse facts available involve not only the general practice itself, but also the manner in which that practice was applied in this case.

(a) USDOC Practice

64. I would like to clarify our position on the use of facts available. We have not asserted, as the United States claims, that the application of facts available can never turn out to be less favourable. Our claim is nothing more and nothing less than what a careful reading of Article 6.8, together with Annex II, yields.

65. What we have said is that facts available must be logical and reasonable. The most logical or reasonable facts available, in certain instances, may turn out to be adverse to a respondent. But, it is critically important to understand that Paragraph 7 of Annex II does not give the United States a license to punish. The goal of Paragraph 7 of Annex II is to find information that most closely approximates the truth to calculate the most accurate dumping margin given the information available. The many other detailed provisions in Annex II confirm this objective.

66. The United States tries to make its policy sound benign by suggesting that the adverse inferences they draw are always reasonable. Wishing to hide from the Panel the punitive nature of a policy whose stated purpose is to "provide an incentive to cooperate," the United States argues that it is always logical to speculate that any missing information is adverse to the respondent. We disagree.

The US practice has no textual basis and must stop. The United States improperly interprets Article 6.8 and Annex II, particularly Paragraph 7 of Annex II, to allow an authority to create incentives—quite strong incentives, in fact—to force a respondent to do exactly what the authority tells it to do, just like a bad boss commanding a faithful secretary. But, Paragraph 7 significantly restricts an authority's use of secondary data. Although the third sentence of Paragraph 7, in and of itself, may result in an incentive, it does not permit an authority to create its own incentives to force a respondent to comply with its instructions.

67. The Agreement contemplates that an authority will tailor its choice of facts available to the specific circumstances surrounding the missing information. USDOC makes no effort whatsoever to do this. Instead, USDOC purposefully homes in on an extremely high margin as the gap filler; the United States admits that USDOC does so to give respondents an incentive to cooperate.

68. In addition, Paragraph 7 does not permit an authority to punish a respondent with adverse facts available even to achieve a goal that is not related to the investigation. The US has confessed that it punished KSC, NSC and NKK with adverse facts available to create an incentive for future respondents to comply with US demands. Japan recognizes the difficulties faced by authorities in administering anti-dumping investigations, but Article 6.8 and Annex II do not permit the United States to sacrifice accurate margins, a basic goal of the A-D Agreement, by ignoring record evidence and drawing unreasonable inferences merely to send a warning to future respondents. In short, the US interpretation is impermissible; it is not supported by the text, object and context of the A-D Agreement.

(b) KSC

69. KSC's experience is a classic example of a facts available policy gone bad. First, USDOC did not demonstrate that the data it requested was necessary, as required by Article 6.8. CSI's resale data would have been necessary only if USDOC used constructed export price. But Article 2.3 does not require authorities to construct an export price; it only allows them to do so if the export price is "unreliable because of association or a compensatory arrangement." USDOC did not check the reliability of this sales data -- which is demonstrated by the fact that USDOC was unaware that KSC had provided the KSC-to-CSI sales data with its Section A response.

70. Second, USDOC did not establish that KSC withheld the requested data. USDOC ignored the fact that the company whose information USDOC demanded was a petitioner. As we explained in our second submission, USDOC has taken such peculiar facts into consideration in previous cases, but chose not to do so here. USDOC blindly treated KSC and CSI as a single company -- despite the two companies' obvious conflict of interest given that one was suing the other under the US anti-dumping law. The decision to apply an adverse inference is all the more inappropriate, as USDOC did not provide assistance to KSC in spite of the requirement of Article 6.13.

71. Third, even if USDOC had provided the requested guidance and still ultimately deemed KSC's situation to require the use of facts available, the selection of the second-highest dumping margin was neither reasonable nor logical. Such an adverse inference would assume that KSC was aware that CSI's resales would have led to a dumping margin as high as the one used by USDOC. This was clearly not the case, because KSC lacked access to CSI's data.

(c) NSC and NKK

72. USDOC's approach to NSC and NKK is just as troubling. First, it was clearly unnecessary to use facts available, because the data requested had already been provided for USDOC to verify. Second, the mistakes by the companies were unintentional. They did not malevolently withhold

disadvantageous data as the United States suggests. Rather, USDOC did not satisfy the Article 6.13 requirement to provide assistance.

73. Third, the selection of facts available was neither reasonable nor logical. The only interest for USDOC was to select a margin "that is sufficiently adverse so as to effectuate the statutory purposes of the facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner". In spite of the requirement of special circumspection stipulated in Paragraph 7 of Annex II, USDOC demonstrated no concern for using an estimate as close to reality as possible.

74. It is true that USDOC also mentioned in its final determination that it sought a margin "that is indicative of NSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." But this case shows how meaningless and hollow this standard formula is. In this case, USDOC had only to look at the data submitted by the companies to get the real dumping margin.

75. Indeed, NSC and NKK's situation is perhaps the best example of how USDOC's approach to adverse facts available is punitive. Even though USDOC had the companies' information, it chose to expunge it from the record and apply a rate that had no relevance to the transactions for which facts available were deemed necessary. USDOC did not apply an inference here, adverse or otherwise: when USDOC chose a margin or price that was as adverse as possible for NSC and NKK, it was not making an inference based on the companies' alleged non-cooperation, but rather punishing the companies for not turning over the information sooner.

76. At the very least, in order to be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The arbitrary application of adverse facts available in cases such as these must not be permitted.

2. All Others Rate

77. With respect to the all others rate, Article 9.4 prohibits their calculation based on margins tainted with facts available. Nothing in the provision suggests that this prohibition is limited to margins based on total facts available. The United States has failed to even respond to the fact that its proposal to so limit the provision was rejected during Uruguay Round negotiations. It also fails to explain why there should be any difference between a margin based entirely on facts available versus one based 90 per cent on facts available. Either way, the same policy considerations inherent in Article 9.4 apply: non-investigated exporters should not be affected by the behaviour of investigated companies during the course of an investigation.

78. The Panel should take note of the new argument on this issue set forth in the US Second Submission. They claim that because Article 9.4 is ambiguous, then multiple interpretations must apply. But, it is not for the United States to decide whether the Article is ambiguous. Further, it cannot be accepted that a proposal specifically rejected during negotiations is a permissible interpretation, simply because the Member that made the rejected proposal claims that the resulting provision is ambiguous. The European Commission agrees with Japan that the US law is inconsistent with Article 9.4. The United States is clearly taking its permissive interpretations theory too far.

3. Affiliated Sales In The Home Market

79. Japan has not argued that sales to affiliates can never be found to be outside the ordinary course of trade. Rather, Japan has argued that Article 2 of the Agreement does not permit the manner

in which the United States decides that such sales are outside the ordinary course of trade. Japan has further argued that the Agreement does not permit the replacement of such sales with an affiliates' resales.

80. In its second submission, the United States attempts to portray its 99.5 per cent test as benign. It says that the test must be fair because when sales to an affiliated customer fail the test, all of those sales are disregarded, not merely the low-priced ones. What the United States fails to mention is that the sales that pass the test are, on average, higher than the sales to all other customers. No effort is made by USDOC to discern whether these higher-priced sales are unreliable because of the relationship between seller and buyer. The United States says that it would exclude such sales if respondents were to prove that they were "aberrationally high." But, this just proves our point: low-priced sales are automatically excluded for being low priced; high-priced sales are excluded only if specifically requested and only if they are priced really high. The United States has not explained how it can justify such a low standard for excluding low-priced sales—a standard well below the two per cent de minimis standard--but such a high standard for excluding high-priced sales. Absent such an explanation, we are left to interpret that the motivation behind this lopsided policy is to exclude as many low-priced sales as possible in order to drive up the dumping margin. This does not comply with the fair comparison requirement of Article 2.4.

81. The United States also claims that it has the discretion under Article 2.1 to replace sales to affiliates with the affiliates' downstream sales. There is no such authority in the Agreement. Even if there were support for this practice, the United States now appears to admit that its use of downstream sales in the home market is different from its use of downstream sales in the export market. In the home market, the United States merely assumes downstream sales prices will be higher and therefore inflate the dumping margin; but in the US market -- when calculating constructed export price -- the United States goes to great lengths to make sure the price is as low as possible by deducting as much cost and profit as possible. The United States wants the Panel to believe that the Agreement permits the use of downstream sales in both markets, but that the adjustments made to those downstream prices can be lopsided in favor of higher dumping margins. Article 2.4 requires a fair comparison. This means symmetry on both sides of the equation. The United States has blatantly ignored this requirement.

82. The bottom line is this: if sales are going to be excluded for being outside the ordinary course of trade, then there must be a rational reason for doing so. The fact that sales are made between affiliates at relatively low prices is insufficient. Further, once the sales are excluded, there is no authority to replace them with the affiliates' resales. Even if there were, there is certainly no support for making adjustments on the export side that are not also made on the home market side. The US approach disregards the goal of Article 2 to ensure a fair comparison between export and home market prices.

4. Critical Circumstances

83. As for critical circumstances, Japan has demonstrated that US law and policy, both on their face and as applied in this case, are inconsistent with the AD Agreement. The United States has developed various excuses for its actions in this case, but its post hoc rationalizations cannot fix what is already damaged. What is clear from this case is:

- Article 10.6 requires that imports be dumped before applying retroactive provisional measures. No finding of dumping was made when the preliminary critical circumstances decision was made. The United States claims that no such determination is required. The United States apparently wants the Panel to believe that the word "dumped" in the chapeau to Article 10.6 and in Article 10.6(ii) is meaningless.

- Article 10.6 also requires a finding of injury. USITC had preliminarily found that imports posed only a threat of injury. Japan has explained in its written submissions that the concept of injury under Article 10 is limited to current injury -- not threat of injury, not material retardation.

- Article 10.6 requires a finding that importers knew or should have known that the domestic industry would be injured by the increase in imports. Ignoring again the threat determination made by USITC, USDOC relied on vague press articles accompanying the petition. Vague articles cited in a petition do not constitute sufficient evidence of importer knowledge of injury. The few additional press articles found independently by USDOC were no more specific: none of them mentioned either Japan or hot-rolled steel specifically.

84. According to the United States, what petitioners say is inherently reliable -- unless and until respondents can prove otherwise. In the United States, respondents are guilty until proven innocent. The United States fails to recognize that the AD Agreement exists precisely to curb such abuses. This is why Article 10.6 requires that findings of dumping and injury already be made; this is also why all other findings made under Article 10.6 must be supported by sufficient evidence, not merely biased petition information.

85. The United States wants the Panel to conclude that, because retroactive duties were never actually collected in this case, the issue is moot. In other words, USDOC should be permitted to continue to make early critical circumstances determinations without sufficient evidence, because the USITC waits to gather sufficient evidence. But, actions that chill trade must not be tolerated; even if the actions eventually are corrected, trade still has been chilled. This is why the standards for applying retroactive duties in Article 10 of the AD Agreement use such strict language. The authority must collect sufficient evidence before it can shut down trade with the threat of retroactively imposed dumping duties.

B. USITC CLAIMS

1. Captive Production Provision On Its Face

86. Japan's argument that the captive production provision violates the A-D Agreement "on its face" is quite straightforward. The A-D Agreement requires authorities to evaluate the industry as a whole. The US statute, in contrast, picks two crucial factors -- market share and financial performance -- and forces the authorities to focus primarily on the merchant market segment for those two factors. To focus primarily on one narrow segment, without any balanced assessment of other segments and without any explicit effort to relate segments back to the industry as a whole, impermissibly distorts the analysis and, thus, violates Articles 3 and 4.

87. The United States has offered many defences for its statute, but the text of the relevant US statute itself contradicts the US claims. First, the United States once again claims the statute does not mandate WTO-inconsistent action. But the United States sidesteps the mandatory language "shall" in the statute. The United States also overlooks the recent Appellate Body decision in the 1916 Act case, in which the Appellate Body confirmed that subsequent interpretation of a statute cannot save the WTO inconsistency of mandatory legislation.

88. Second, the United States contorts the phrase "focus primarily" to mean consideration of other factors. But, the statute does not merely say to consider merchant market data; it says to focus primarily on such data. Moreover, although raised by the United States, the phrase "in determining" in the US statute actually reinforces Japan's argument. The dictionary defines "determine" as "be a

deciding or the decisive factor in." Thus, the US statute says that in making the deciding or decisive evaluation of market share and financial performance, USITC must focus primarily on one segment.

89. Third, the United States argues the US statute somehow still permits proper evaluation of the industry as a whole, since there is other language that follows the analytic framework of considering the industry as a whole, as set forth in the A-D Agreement. This argument, however, ignores the history and structure of the US statute, that makes the primary focus on the merchant market, set out in subsection (iv) of the statute, take precedent over other statutory language. The United States cannot cite old and more general statutory language and overlook the newer and more specific language of the captive production provision. Congress added this new language to the statute for a reason -- to change the old method of analysis that the United States now tries to cite in its defence.

90. Fourth, the US statute does not require or permit USITC to relate its analysis of the merchant market segment to the industry as a whole, as required by the A-D Agreement. The statute does not require consideration of all segments. It simply makes no sense to think one can understand the whole without considering all of the parts that make up the whole.

91. Finally, the United States argues that in the hot-rolled steel case the Commissioners applying the captive production provision did relate its findings back to the industry as a whole. The merchant market analysis was just one step on the way to a proper analysis. This post hoc rationalization is without basis. Nowhere does USITC mention this approach in its determination, or say anything other than parallel recitation of certain market trends. It is not what the USITC could have said; it is what they actually did say that must govern in this proceeding.

2. Injury and Causation In The Hot-Rolled Steel Case

92. One of the central issues in the causation arguments related to the period of time being examined. The basic flaw in the USITC determination is the failure to consider and address those facts that undermine the authority's foregone conclusion. In 1998, even after the increase in imports, the domestic industry shipments and operating profits were higher than in 1996 before the import increase. It is hard to reconcile this simple fact with the claim that imports were causing material injury. The legal problem is that the USITC did not even try to address this fact.

93. Of course USITC considered the overall period when doing so reinforced its conclusions. The real issue, however, is how USITC addressed those factors for which the consideration of the full period undermined their desired conclusion. The answer, simply, is that USITC ignored the inconvenient facts.

94. The time period for the analysis and the captive production issue intertwine. Part of the reason several Commissioners wanted to focus primarily on the merchant market for financial performance was to avoid the inconvenient fact that operating profits were up in 1998 over 1996 levels for the industry as a whole. Focusing primarily on the merchant market provided legal justification -- at least under US law -- for essentially ignoring the overall trend in operating profits. Thus one of the central facts of this case -- one that respondents made a major part of their argument -- is not mentioned at all in the majority opinion. Not even mentioned. No matter how much post hoc rationalization the United States now offers, that rationalization cannot hide this basic omission. How can USITC be evaluating the overall trend in operating profits when it does not even mention it?

95. The United States now points to shreds of evidence in the determination. USITC mentioned cost of goods sold. USITC mentioned that the industry remained profitable over the period. But step back for a moment. Such cryptic references just underscore the failure to mention and directly address the main fact: that the industry overall made a higher operating margin with imports than without imports.

96. Nor does the extensive discussion of the 1997 to 1998 decline in operating profits somehow remedy this glaring omission. In 1997, even after imports increased, the domestic industry made more money than in 1996. Remarkably, in 1998 this fact remained true -- even after another increase in imports, the domestic industry was still making more money than it did in 1996. USITC never addressed why consistent increases in operating profits justified a finding of material injury caused by imports.

97. This basic omission was compounded by USITC's inadequate consideration of alternative causes of any declines being experienced by the domestic industry. Having decided to make imports the scapegoat, USITC quickly brushed aside the alternative causes raised by respondents.

98. Under the Tokyo Round Antidumping Code, such casual treatment might have been permitted. But the A-D Agreement added new language that imposed higher obligations on authorities. The United States wants to overlook this new language, and thus clings to the old Atlantic Salmon panel report. But the new language in the AD Agreement plugs precisely the gap in the old treaty text identified by the Atlantic Salmon panel.

99. Moreover, the Wheat Gluten panel has already clarified what it viewed the language "not be attributed" as requiring. The United States tries to brush aside Wheat Gluten as a safeguards decision, but this key phrase is the same in both the anti-dumping and safeguards agreements. "Not be attributed" must be given meaning, and USITC did not do so in this case. Having found that each of these alternative causes did not entirely explain the problems, USITC then just assumed without serious analysis that imports must be the real problem. The AD Agreement requires more.

II. GATT ARTICLE X:3

100. The United States studiously has avoided responding to Japan's claim under Article X of GATT 1994. Thus, under established WTO rules, because Japan has made a prima facie demonstration of a US violation and the US has failed to respond adequately, the Panel should find in Japan's favour on this claim.

101. Article X:3 sets standards for the administration of domestic laws. Even when a domestic law is consistent with the A-D Agreement, an authority violates Article X:3 where, as here, it fails to administer the law in a uniform, impartial, or reasonable manner. As Japan has clarified, Japan's Article X:3 claims are independent of it's a-D Agreement claims and should be reviewed under Article 11 of the DSU.

102. The US answer to Panel Question 44 confirms Japan's claim. For example, the United States told the Panel: "No information was submitted to and accepted by the USITC after applicable deadlines in the investigation." However, the date the United States provides as the applicable deadline is the day the USITC closed the administrative record. The deadline for questionnaire responses was much earlier. The US answer, therefore, apart from being wrong, highlights the discriminatory manner in which the United States treats foreign versus domestic producers:

- For domestic producers, the deadline the US imposes is the closing of the administrative record.

- In contrast, for foreign producers, the day the administrative record closes is irrelevant. When NKK and NSC supplied data well before the closing of the factual record and in time for USDOC to verify and use it, USDOC nonetheless applied punitive adverse facts available.

103. In short, the US required respondents, but not petitioners, to meet questionnaire response deadlines. This is a clear example of non-uniform, partial and unreasonable action being taken by an authority. It is precisely the kind of bias in the administration of domestic law that Article X:3 prohibits.

104. USDOC's failure to correct the error made in calculating NKK's preliminary dumping margin is another violation of Article X:3. USDOC failed to follow its own regulation for making corrections, thus subjecting NKK's shipments to inflated provisional measures upon which USDOC wrongly justified continuing critical circumstances. In responding to Japan's Question 30, the United States begs to be excused from this non-uniform application of a domestic law because USDOC merely made a mistake.

105. The irony is astounding. The United States asks the Panel both to accept USDOC's use of adverse facts available to punish NKK and NSC, and to treat USDOC's mistakes as mere oversights. The US position, therefore, is that mistakes made by the US Government and US producers must be tolerated; but mistakes made by foreign producers must not be tolerated.

106. These violations stem from USDOC's adversarial treatment of respondents. As Japan has demonstrated, the adversarial approach USDOC takes in its investigations violates GATT Article X:3. Unless the Panel takes firm action to address the US violations, the US abuses will multiply.

CONCLUSION

107. The United States hopes the Panel is too busy to focus on the texts of the Agreements and the US response to Japan's prima facie case. But, Japan is confident that, once the Panel focuses on the text of the Agreements, the specifics of Japan's claims and the inadequacies of the US replies, it will find that the US interpretations are impermissible. It will find that the US anti-dumping regime, on its face and as applied, violates the A- Agreement and Article X of GATT 1994.

108. As the Panel deliberates, we urge you to bear in mind Article 1 of the A-D Agreement. Article 1 explains clearly that anti-dumping measures shall only be applied when the investigation has been "conducted in accordance with the provisions of this Agreement." Japan has identified numerous ways in which the United States did not act "in accordance" with the A-D Agreement, and the Panel should not permit the US violations.

ANNEX D-10

Closing Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

109. At the outset, Japan takes issue with the US claim that we have abandoned or changed our position during the proceeding. Japan is confident that, by reviewing all of Japan's submissions in this proceeding, the Panel will clearly see the thrust of Japan's argument. Moreover, contrary to the US claim, it is Japan, and not the United States, that is respecting the results of the Uruguay Round negotiations, as expressed in the texts of the provisions relevant to this proceeding.

110. Japan is impressed with the level of attention the United States devoted this morning to injury and causation. Japan is not surprised; given the weakness of the US presentations to date, it needed to devote some time to USITC's misconduct. However, the US effort to rebut Japan's presentation is unsuccessful.

111. Japan asks the Panel also to note that the United States continues to repeat the mantras that:

(a) the AD Agreement contains only unclear provisions that admit many meanings—see for example the new US argument regarding Article 3.5 (para. 13); indeed the United States apparently has yet to find a clear provision in the Agreement

(b) due to the efforts of the US negotiators, the US law was enshrined in the A-D Agreement; and

(c) US law is consistent with the A-D Agreement simply because the US Congress says that it is.

112. So, in the view of the United States, this whole process has been unnecessary, because US law inherently complies with US WTO obligations. This cannot possibly be true. In addition to the violations shown by Japan, the DSB already has found the US anti-dumping law to be inconsistent with US WTO obligations in two separate proceedings—*US - Anti-Dumping Measure on Korean DRAMs* and *US Anti-Dumping Act of 1916*.

113. Turning now to the US assertions this morning, we note first that the US still has not rebutted Japan's *prima facie* case. Accordingly, I will address only some of the US points—causation, captive production, facts available and Article X of GATT 1994.

114. At the outset, we would like to remind the Panel that we are not here to decide whether or not to overturn *Wheat Gluten*. The United States would like to practice its arguments for *Wheat Gluten*. But, the Panel's focus, of course, is what the United States did in this case. The United States seems to think Japan's argument depends entirely on *Wheat Gluten*. It does not. Japan's argument stands whether or not the Panel agrees with *Wheat Gluten*, and whether or not the Appellate Body reverses *Wheat Gluten*. The USITC in this case was too quick to ignore unfavourable facts, too willing to gloss over contrary arguments, and too outcome driven in dismissing alternative causes. The United States assumes that a large USITC staff, a thick report, and some conclusory language insulates it from challenge. But the United States is wrong. The USITC may collect extensive data, but it is the way the USITC determination addresses that data that controls this issue.

115. To illustrate the defects of the USITC approach, we can find no better example than profits levels. The United States argues that it "examined" profit levels. First, the obligation at Article 3.4, is to "evaluate" the factors, not merely to examine them. Evaluating a factor means more than selecting favourable facts and ignoring unfavourable facts. At the outset of its investigation, the USITC decided that three years of data should be examined. Yet, once it collected the data, the USITC found that the data for 1997 and 1998 alone supported its desired conclusion, and that the data for 1996 could not logically be reconciled with its desired conclusion. So what did the USITC do? It simply ignored the data for 1996. Japan cannot imagine how any neutral decision maker could consider such selective consideration of facts to be "evaluation."

116. We note that the United States devoted more space to the captive production provision than any other single issue in its opening statement. The United States made this issue seem complicated because they had to do so. The US statute explicitly mandates an analytically impermissible approach. The statute forces the USITC to undertake an unbalanced and biased analysis that focuses primarily on one segment at the expense of others. The United States protests that other parts of the statute call for a WTO-consistent approach of considering the industry as a whole. But when one reads the US statute as a whole, the captive production provision trumps those other provisions. In normal cases, the statute might allow the proper approach. But in those cases where the special captive production provision applies, the flawed, unbalanced approach takes legal precedence and the USITC has no choice but to violate Articles 3 and 4.

117. I turn now to facts available. The US opening statement describes the US policy on facts available as benign and reasonable. But it is neither. The USDOC uses facts available as punishment – punishment to those companies involved in the current case—and as warning--to respondents in future cases--about the fate that awaits them.

118. Consider the three companies involved in this case. All three were punished. Why? KSC was not able to supply data from a petitioner, a company that was affirmatively attacking KSC in this proceeding. Not surprisingly, the United States ignored this crucial fact this morning. With respect to NSC and NKK, the United States protests that USDOC could not possibly know the motivation for the companies not providing the information in a timely manner. This claim is absurd. These two companies did everything USDOC asked. When the USDOC said jump, the companies asked "how high?" They did provide the information, and did so within the statutory deadlines. Yet USDOC looked at these facts and still inferred bad motives and applied adverse facts available. The United States argues that motives cannot be determined, but USDOC has no trouble assuming bad intentions; this is not surprising given the USDOC premise that all respondents are bad secretaries.

119. The United States has failed to rebut Japan's claim under Article X of GATT 1994, a claim which is quite important and which is independent from Japan's other claims. The United States tries to hide behind its bifurcated structure for administering its laws, and the different functions involved. But this rationalization does not work. A bifurcated structure does not allow a Member to administer its laws in biased and inconsistent ways. We agree that the USITC applies the law consistently to both US and non-US parties. If only the USDOC did the same. If USDOC adopted the USITC approach, KSC would not have been punished for not providing a petitioner's data. The Commissioners worked to get the information the USITC needed from the recalcitrant US producers, yet USDOC officials did nothing to get the information from CSI. Also, in contrast to USDOC's treatment of respondents NSC and NKK, the USITC accepted late data from the petitioners. In each instance, the different treatment, and the violation of Article X, could not be more obvious.

120. In closing, Japan urges the Panel to attend closely to the texts, identify the permissible interpretation of the relevant provisions and recognize the provisions for what they are—limitations on the discretion of authorities. Thank you for your attention to this most important matter.

ANNEX D-11

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

(27 September 2000)

1. ***Mr. Hirsh.*** Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. Again for the record, my name is Bruce Hirsh. I am a Legal Advisor with the Office of the US Trade Representative in Geneva. With me from my office in Washington is Associate General Counsel Dan Mullaney, who will begin our presentation today with a discussion of two procedural issues. James Toupin, Deputy General Counsel of the US International Trade Commission, will then present the issues concerning injury. Finally, John McInerney, Acting Chief Counsel for Import Administration at the US Department of Commerce, will present the issues concerning the anti-dumping calculations and critical circumstances.

2. ***Mr. Mullaney.*** Thank you, Mr. Chairman, and members of the Panel. With respect to the US **preliminary objection** to extra-record evidence, Japan argues that DSU Article 11 and Article 17.6(i) of the Anti-Dumping Agreement, taken together, require the panel to consider facts outside of the administrative records. This position is directly contrary to Article 17.5(ii) of the Anti-Dumping Agreement, which requires the Panel's examination to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." It is also contrary to several panel decisions under the Safeguards Agreement, which, in applying Article 11 of the DSU, specifically limited the panels' review to facts placed before the authorities.

3. Japan also claims that the Panel should take account of the statisticians' affidavit and attorneys' affidavits concerning alternate margin calculations because they are based on information on the record. This is incorrect. The calculation of a margin of dumping, for example, is a very complicated process that involves numerous decisions. Simply presenting an alternate dumping margin and asserting that it is based on a recalculation of record information is equivalent to submitting new information. The affidavit form of the information underscores this deficiency: in effect, the affiant is saying "you can't see this number in the record, but you should accept it as true, because I am swearing that it is true." The statisticians' affidavit is itself new evidence. If it is important evidence, the Japanese respondents should have submitted it for the record.

4. We will not repeat points we have already made on the special deferential **standard of review** specifically adopted by the negotiators for the Anti-Dumping Agreement. However, we note that Japan persists in suggesting that somehow Articles 31 and 32 of the Vienna Convention override the specific text of Article 17.6(ii). That article, however, reflects the negotiators' understanding that they had left enough issues ambiguous that they needed to make special provision for cases in which customary rules of treaty interpretation would not provide an unequivocal result. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. Thus, Japan's contention that the Convention requires, or even permits, a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation, would nullify the second sentence of Article 17.6(ii) of the Agreement.

5. I will now turn to my colleague, Mr. Toupin, of the US International Trade Commission, to present the injury issues.

6. ***Mr. Toupin*.** Thank you, Mr. Chairman and members of the Panel.

The Causation Standard under Article 3.5

7. At the outset, I would like to address the arguments that Japan now makes concerning the examination under Article 3.5 of other factors injuring the industry. The United States has demonstrated how the USITC's findings satisfy the standards for such an examination articulated by the panel in the *Atlantic Salmon* decision. I will not reiterate those arguments here, and invite any further questions that the Panel may have about those factual issues. Here, I will extend our remarks concerning why *Atlantic Salmon*, and not the unadopted panel decision in *Wheat Gluten*, provides relevant guidance for this Panel.

8. The first question for construing Article 3.5 of the Anti-Dumping Agreement is, what does it mean for dumped imports to be "causing injury" under the first sentence of the Article? As the United States has indicated in its Second Written Submission, the ordinary meaning of the word "cause" includes the possibility that a factor may be regarded as causing an effect if it assists in bringing forth that outcome.[1] This definition assumes that a factor may cause an outcome through its interaction with multiple other causal factors. Thus, the ordinary meaning of the term contradicts the *Wheat Gluten* panel's conclusion that an authority must determine the quantum of injury that imports "alone" cause.

9. This interpretation is reinforced by the second sentence of Article 3.5, which provides that demonstrating "cause" consists of a "demonstration of *a causal relationship* between the dumped imports and injury." The term "relationship" suggests that demonstrating causation consists of finding the connections between dumped imports and the industry's overall state, not of isolating a quantum of injury ascribable to imports alone. This view is consistent with the provision of Article 3.4 that an authority must evaluate all factors having a bearing on the state of the industry. Indeed, it is difficult to see how an authority could ever define the injury caused by imports alone in view of the factors that Article 3.4 states must be considered. The impact of dumped imports on such factors as productivity, return on investment, cash flow, inventories, employment, growth, wages, and ability to raise capital, will necessarily reflect the inextricable interaction of dumped imports with other factors.

10. It is in this context that the third sentence of Article 3.5, which requires an authority not to attribute injuries caused by other factors to dumped imports, must be interpreted. The third sentence recognizes that other factors may also have what the second sentence calls a "causal relationship" to the injured state of the industry. The third sentence requires an authority to examine such other factors sufficiently to assure that the determination of a causal relationship between dumped imports and injury is not based on effects explained instead by other causes.

11. Moreover, under Article 32 of the Vienna Convention, if the terms of a provision analyzed in context remain ambiguous, a tribunal may refer to the negotiating history to resolve ambiguity. The Tokyo Round Anti-Dumping Code, which the Anti-Dumping Agreement supersedes, and the *Atlantic Salmon* decision, adopted under that Code, were plainly part of that history. The first clause of the third sentence of Article 3.5 of the Anti-Dumping Agreement is drawn almost verbatim from the *Atlantic Salmon* decision' s description of the examination it regarded Article 3:4 of the Code as implicitly requiring. The second clause is close to identical to Article 3:4 of the prior Code. The last

[1] US Second Written Submission at ¶ 80.

sentence of Article 3.5, like footnote 5 in the prior Code, does not instruct an authority how to conduct the examination, but rather lists exemplary factors which may, but need not be, relevant.

12. Certainly, the documents underlying United States' implementation of the Agreement show that the United States, in agreeing to Article 3.5, reasonably understood it as adopting a requirement consistent with *Atlantic Salmon.* We attach as an exhibit the passage from the United States' Statement of Administrative Action that sets forth the United States' understanding.[2]

13. Finally, unlike the Safeguards Agreement, with which the *Wheat Gluten* panel was concerned, the Anti-Dumping Agreement provides that, when a provision admits of more than one interpretation, a panel is not to compel adoption of one of those interpretations. Article 17.6(ii) reflects that the negotiators of the Anti-Dumping Agreement knew that they were adopting provisions that did not in every case mandate one approach. Since the negotiators adopted language so close to that used in *Atlantic Salmon*, the United States must be regarded as choosing a permissible interpretation pursuant to Article 17.6(ii) when it construes Article 3.5 in accord with *Atlantic Salmon*.

14. The *Wheat Gluten* panel acknowledges that its requirement to determine what injury is due to imports alone might be impracticable, and explicitly declines to explain how its test might be met. This should have indicated to the *Wheat Gluten* panel that it was adopting an interpretation of the Safeguards Agreement that the negotiators of that Agreement could not have intended. Certainly the negotiators of the Anti-Dumping Agreement did not intend to impose such an impracticable test.

Examination of Relevant Factors and Evidence

15. As for Japan's argument that the USITC should have relied on certain data from 1996 to 1998, the USITC's determination reflects that it examined the relevant factors and evidence as required by the Agreement. Japan makes much of the fact that the USITC did not make an explicit finding stating that the industry's profits rose from 1996 to 1998, when the USITC relied on the decline in profits from 1997 to 1998. Japan, however, points to no requirement of the Agreement requiring such a finding. Article 3.4 requires the authority to conduct an "examination" of profits, but requires no particular finding. The USITC plainly examined profits. Article 3.5 requires an "examination of all relevant evidence", but does not state how that examination shall be reflected. Here, the USITC plainly examined the data from 1996 to 1998, since it explained why it rejected arguments that it should rely on a broader period than 1997 to 1998. Indeed, in doing so, it explained why, in the context of the economic conditions from 1996 to 1998, it did not regard 1997 as a banner year. There is no basis in the Agreement to find that the USITC was required to do more.

16. Japan argues -- concerning both the Anti-Dumping Agreement and Article X of the GATT -- that the USITC somehow impermissibly departed from a "rule" that it would rely on data over the entire period of its investigation. As our submissions demonstrate, there is no such rule. The USITC has in fact in numerous determinations -- reaching both affirmative and negative results -- relied on recent trends rather than on trends over the entire period. If it could not do so, the USITC would, when economic circumstances have changed over the period investigated, be forced to violate the requirement of Article 3.4 that it examine "all relevant economic factors".

17. These points are illustrated by the USITC's decision in *Elastic Rubber Thread from India*[3], on which Japan relies. In *Rubber Thread*, the USITC did indeed give weight to trends over the three-year period investigated rather than to trends in the final year. Its opinion, however, shows that it did not do so on the basis of any rule requiring reliance on three-year trends. It relied on those

[2] Statement of Administrative Action to Uruguay Round Trade Agreements Implementing Bill, H.R. 83-211, at 181-182, *attached as* **Exh. US/C-31**.

[3] USITC Inv. No. 731-TA-805 (Final).

trends only after finding that the downward trends in the last year were an "anomaly due to unanticipated high volumes in 1997, followed by a corresponding drop in 1998."[4] The USITC's reasoning, therefore, depended on its findings concerning the relevant economic factors. Here, the USITC found the relevant economic factors differed from those in *Rubber Thread*. Here, the USITC found the rise in demand and consumption not to be an anomaly, but rather to represent a persistent development in the relevant factors having a bearing on the state of the industry.

The captive production provision and analysis of market segments

18. Both the US law concerning captive production and the USITC's determination in this case accord with the Agreement's requirement to make a determination as to injury to the producers as a whole of the domestic like product. Japan has moved in its second written submission far from its original position in its arguments about the consistency of the US captive production provision, in itself, with the Anti-Dumping Agreement. Although the United States does not agree with much of Japan's characterization of that provision, even under Japan's portrayal of it, Japan cannot establish that the US statute violates the requirement that Members assure that their laws conform with their obligations under the Agreement.

19. In its first written submission, Japan stated that it was improper to consider, either primarily or secondarily, data for the merchant market sector.[5] Japan has now abandoned this position. Japan now acknowledges that "an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the Anti-Dumping Agreement."[6] Japan likewise agrees that the merchant market sector is the sector in which competition between the domestic industry and dumped imports is most direct.[7]

20. Similarly, Japan's First Written Submission stated that under the captive production provision "the USITC now *must* ignore the shielding effect of captive production," and the provision "makes it *impossible* for USITC to consider all relevant evidence."[8] Japan's position has become more nuanced, and the nuance is fundamental. In its Second Written Submission, Japan acknowledges that it is permissible for an authority to focus on the merchant market sector, but it argues that such an analysis must be explicitly related back to the industry as a whole and that the US provision "*requires* no such relating back." Likewise, rather than asserting that the USITC under the captive production provision must ignore other evidence, Japan now simply states that the provision "encourages USITC impermissibly to accentuate merchant market data in its determination."[9]

21. The United States disagrees with this interpretation of the captive production provision. However, even if Japan were correct in its statutory construction, its allegations would not establish that the US law on its face should be deemed to violate the Agreement. Japan admits that the provision does not *preclude* the USITC from relating back its findings on the merchant market sector to the whole industry. Moreover, if the statute only *encourages* the US authority to accentuate certain data, the statute cannot be said to *require* the USITC to ignore any evidence. Such a showing does not meet the traditional standard for finding legislation on its face to violate an Agreement. Under that standard, only "legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual

[4] *Rubber Thread*, at 14 & n.104.
[5] Japan First Written Submission at ¶ 45.
[6] Japan Second Written Submission at ¶ 219.
[7] Japan Second Written Submission at ¶ 186.
[8] Japan First Written Submission at ¶¶ 238-239 (emphases added).
[9] Japan Second Written Submission at ¶ 186.

application of such legislation ... could be challenged."[10] Japan is wrong in claiming that this established principle is no longer applicable or only relevant when a statute has not been applied.[11] The Appellate Body in *US – 1916 Act* specifically denied that the panel there made such a finding.[12] Similarly, the panel in the *Section 301* dispute stressed that it was not overturning the jurisprudence on the mandatory/discretionary distinction.[13]

22. In fact, as the United States has indicated, its anti-dumping statute does require that the authority make its determination with respect to the industry as a whole, and the captive production provision does not alter this requirement. Many aspects of the statute support this conclusion. The statute requires the USITC to make its determination as to the industry, which it defines as producers as a whole of the domestic like product. The requirement to "focus primarily" on the merchant market for certain factors assumes that, even for those factors, the USITC's analysis will proceed further. Moreover, the Statement of Administrative Action makes clear that, when the USITC considers those factors to which the captive production provision applies, it may "focus" on other evidence in addition to the merchant market sector. Likewise, the statute requires the USITC to consider other factors to which the provision does not apply. Further, the statute requires the USITC to consider "all relevant economic factors" and no one factor can "necessarily give decisive guidance." Thus the statute as a whole provides the USITC with discretion to consider all evidence and factors, and requires it to make a determination as to the industry as a whole.

23. Even if the US statute did not clearly mandate a determination as to the industry as a whole, when a statute that an authority administers is ambiguous, US courts defer to an authority's considered interpretation if that interpretation is reasonable. The Statement of Administrative Action expresses Congress' intent that the captive production provision would be consistent with the Anti-Dumping Agreement. Consequently, the authority applying that provision properly under US law resolves any ambiguities in the captive production provision and its relation to the statute in a manner consistent with the United States' obligation under the Agreement.

24. Indeed, it is Japan, not the United States, that forgets that the necessary inquiry pertains to the industry as a whole. Japan claims that the USITC should have made findings about a fall in the demand by pipe and tube manufacturers for hot rolled steel because two steel producers particularly depended on that demand.[14] The USITC, however, found that overall demand increased substantially and that the industry as a whole should have been able to take advantage of that growth in demand. The USITC concluded that imports prevented the industry as a whole from doing so. Japan has not shown how, in view of the overall growth in demand, the fact, if true, that two firms faced a fall in demand in a particular submarket is relevant to the assessment of injury to the industry as a whole.

25. Japan is reduced to arguing that this Panel should hold that the US Congress repealed the other provisions of the US statute that call on the USITC to make a determination as to the industry as a whole when it enacted the captive production provision -- even though Congress didn't say so.[15] Frankly, this argument demonstrates the implausibility of Japan's position. Japan is effectively asking this Panel to rewrite the US statute in order to make it violate the Anti-Dumping Agreement.

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[10] United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, Panel Report, adopted 4 October 1994, BISD 41S/131, at 118, quoted in United States -- Antidumping Act of 1916, AB-2000-5, AB-20006, at ¶ 88.

[11] Japan Second Written Submission at ¶ ¶ 175, 177.

[12] United States -- Antidumping Act of 1916, AB-2000-5, AB-2000-6, at ¶ 93.

[13] United States - Sections 301-310 of the Trade Act of 1974, adopted 27 Jan. 2000, WT/DS152/R at ¶ 6.9.

[14] Japan Second Written Submission at ¶ 267.

[15] Japan Second Written Submission at ¶ 193.

26. The sources concerning United States law that Japan cites, support, rather than conflict with, the United States' position here. As the US Supreme Court stated in the *Watt* case that Japan cites, "repeals by implication are not favoured ... The intention of the legislature to repeal must be 'clear and manifest.'"[16] Japan presents sections of a treatise on statutory construction as an exhibit[17] but pointedly omits the preceding section of the treatise that makes clear that US courts seek to read statutes as a whole to avoid finding different statutory provisions to be in conflict.[18] We attach that prior section as an exhibit. It is clear that a court would uphold the USITC in resolving any ambiguities to construe the captive production provision to accord with the statutory requirement to make a determination as to the industry as a whole.

27. The USITC's consideration in this case of the merchant market was consistent with the Agreement. As both Japan and the United States have advised the Panel, under US law only three Commissioners needed to vote in the affirmative in order to render an affirmative determination, and three Commissioners who voted in the affirmative found that the captive production provision did not apply. The obvious consequence of this fact is that, even if this Panel were to hold that the provision on its face violated the Agreement, such a ruling would not affect the validity of the USITC's determination. In its First Written Submission, Japan sought to avoid that consequence by arguing that, although Commissioner Bragg did not apply the captive production provision, her determination also erred because she made findings about the merchant market sector "in parallel" with findings about the industry as a whole.[19] Since Japan now agrees that making findings about a sector do not *per se* violate the Agreement, its Second Written Submission abandons this approach.

28. Instead, Japan now contends that Commissioner Bragg's determination is somehow "tainted" because, although she did not apply the provision, she allegedly "passively" joined the decision of three commissioners who did.[20] This argument does not rise to the level of a *prima facie* case. The face of the determination shows that the four Commissioners were co-authors of their joint views. Wherever Commissioner Bragg believed that her views differed from those of her colleagues, she specifically so noted. There is simply no evidence that she was in any way "passive."

29. In the determination at issue here, the Commission considered data on certain factors concerning "the particular sector in which the competition between the domestic industry and dumped imports is most direct,"[21] namely, the merchant market sector. It also made specific findings concerning the entire industry's data for those and other factors. Both sets of data supported an affirmative determination. The decisions that Japan cites for the proposition that an authority must relate its findings concerning a sector to the industry as a whole, concern determinations in which the authority did not in fact make findings about the industry as a whole, either in the entire determination or with respect to numerous required factors. Here, the USITC made findings on all relevant factors concerning the industry as a whole. The fact that it also made findings about the merchant market sector does not detract from the fact that its injury determination was based on data as to the industry as a whole.

30. Moreover, those findings necessarily account for trends in the non-merchant market sector. Here there were only two sectors accounting for all production, and the USITC analyzed, for each factor, data for one sector and for the industry as a whole. The difference in results for each factor

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[16] *Watt v. Alaska*, 451 US 259, 267, *quoting Morton v. Mancari*, 417 US 535, 549, *Posadas v. National City Bank*, 296 US 497, 503 (1936), *United States v. Borden Co.*, 308 US 188, 198 (1939), *Red Rock v. Henry*, 106 US 596, 602 (1883). *See* **Exh. JP-101**.

[17] **Exh. JP-101**, *including excerpt from* 2A *Sutherland Stat Const* § 46.06 (6th Ed. 2000).

[18] 2A Statutes and Statutory Construction § 46.05 (6th Ed. 2000), excerpts attached as **Exh. US/C-30**.

[19] Japan First Written Submission at ¶ 250.

[20] Japan Second Written Submission at ¶¶ 225-226.

[21] *Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R at ¶ 7.160.

necessarily reflected the impact on the industry as a whole of trends in the sector as to which the authority did not make separate findings.

31. The USITC here further made specific findings demonstrating the consequences for the industry as a whole of developments in the merchant market sector. For example, the USITC found that most performance indicators for the US industry as a whole declined because the US industry was prevented from participating in the growth of demand and consumption. The USITC found that the growth of the dumped imports' share of the merchant market sector at the expense of the domestic industry's share caused the US industry not to participate in the growth in demand. It also found that, as a result, capacity that the US industry brought on line to meet the growth in demand immediately became excess capacity.[22] Moreover, the USITC found that the decline in the industry's operating income at the end of the investigation coincided with the decline in its capacity utilization rates.[23] Through these and other findings, the USITC demonstrated the causal relationship between the effects of dumped imports on the industry's merchant market performance and injury to the industry as a whole.

32. In sum, the USITC's findings amply satisfy the standard that Japan has espoused. Japan itself quotes and approves prior panel authority stating that an analysis of the sector most exposed to import competition can sustain an injury determination if an authority *either* analyses all other sectors *or* demonstrates the relationship between events in the one segment and the industry as a whole.[24] Japan's contention that the USITC's determination was flawed unless it made specific findings concerning developments in the captive production sector has no basis in prior decisions or in the Agreement.

33. Finally, Japan complains at length that the USITC did not make findings in this case about the captive production sector in the same way as it did in its *1993 Flat Rolled Steel* determination. Suffice it to say here that the USITC in 1999 specifically recognized the effects of captive production.[25] The sole differences between the 1993 and 1999 determinations on this point seem to be that in 1999, the USITC spoke about relative "sensitivity" to imports rather than using the word "shielded"; in 1999, the USITC made its findings about the amount of captive production and the applicability of the provision in the section labelled captive production and made its finding on "sensitivity" in the next section of its opinion; and, as the facts had changed between 1993 and 1999, the USITC reached a different conclusion. With due respect to our Japanese colleagues, such differences cannot even plausibly suggest a violation.

34. Mr. McInerney will now address Japan's contentions about the United States' dumping calculations and critical circumstances.

35. ***Mr. McInerney.*** Thank you Mr. Chairman. With respect to the Department's **use of facts available,** Japan's second written submission emphasizes two points that are both wrong. First, Japan claims that adverse inferences are "punitive," and, therefore, improper. (Japan's 2d Sub. , ¶¶ 28 & 30.) This ignores the fact that, where a party has not submitted necessary information, adverse inferences are, in fact, the most reasonable and logical conclusion to be drawn about that missing information. This is precisely the point recognized by the Appellate Body in the *Canada - Civilian Aircraft* case. Japan's attempt to distinguish that case as using an adverse inference during the course of a WTO dispute settlement proceeding, rather than an anti-dumping investigation, disregards the fact that the rationale for both decisions was identical - - that the adverse inference was made both

[22] USITC Report at I-17.
[23] USITC Report at I-20.
[24] Japan Second Written Submission at ¶ 210 and n. 250, ¶ 221, *citing and quoting Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R, at ¶¶ 7.155, 7.160.
[25] USITC Report at 11, 19.

necessary and reasonable by the non-cooperation of the responding parties. In addition, Japan has yet to explain why its own authorities applied exactly this rationale in Japan's anti-dumping investigation of cotton yarn from Pakistan.

36. Second, Japan claims that, because the Japanese respondents were generally cooperative, this licensed them to refuse to cooperate with regard to certain selected categories of information. (Japan's 2d Sub., ¶ 24.) This position finds no support in the Agreement. It would amount to a 70 per cent or 80 per cent cooperation rule, under which respondents would have to cooperate only up to the threshold of "general cooperation," after which they would be free to withhold information. This would license respondents to manipulate the results of anti-dumping investigations by withholding selected categories of adverse information.

37. With regard to the **application of facts available to KSC**, Japan now tries to rationalize KSC's refusal to exercise its powers, as a fifty per cent owner of CSI, to obtain the necessary information by itemizing the ways in which KSC, CVRD, and CSI regularly ignored the CSI shareholders' agreement (Japan's second submission at ¶ 47). But the fact that KSC regularly ignored the shareholders' agreement does not prove that it had no power under that agreement - - only that KSC did not always choose to exercise that power. As the minutes of the CSI board meetings make clear (Exh. US/B–23/bis), the parties to the joint venture repeatedly raised, discussed, and made decisions on business matters, as provided for in the agreement. In this light, the fact that KSC never even *discussed* with CVRD the need to provide the requested CSI data, and never *challenged* the actions of CSI's president and CEO (who served at the pleasure of the board members representing KSC and CVRD) is glaring. *(See* US 1st submission, ¶ 90).

38. Finally, Japan's belated claim that CSI was *unable* to supply the requested information is based on one sentence in one letter from CSI. This new claim is not supported by the weight of the record evidence. Indeed, KSC itself characterized this statement by CSI as a refusal, not an inability, to provide the requested information. (US 2nd submission, ¶ 18; Exh. JP-93(a) and (c)). Accordingly, Commerce properly found that KSC failed to cooperate in providing the requested CSI data.

39. As facts available for the sales through CSI, Commerce reasonably chose a dumping margin calculated by comparing KSC's own sales to unaffiliated US customers to its sales of that same product in Japan. This selection of a dumping margin based upon KSC's product-specific, verified data represents a reasonable choice of adverse facts available. Yielding to KSC's attempt to force Commerce into using its transfer prices to CSI as a "plug" for facts available would give every respondent *carte blanche* to shelter dumped sales through its overseas affiliates.

40. With regard to **Commerce's application of facts available to NSC and NKK**, the Department was simply exercising its clear right under the Agreement to enforce reasonable deadlines. Japan's curious theory that any firm limits on the time in which information must be submitted, even after repeated extensions, are inimical to a "reasonable" understanding of "timeliness" has no support in the Agreement. Similarly baseless is Japan's theory that untimely information must be accepted if it is otherwise in compliance with the requirements of the Agreement. Paragraph 3 of Annex II requires that parties meet *all four* of the basic criteria listed in that paragraph in order for their information to be considered. One of these four conditions is that the information be "supplied in a timely fashion."

41. The weight conversion factors untimely submitted by NSC and NKK were not, as Japan claims, "corrections" (Japan' s 2d Sub., ¶ 93). They were categories of information that NSC and NKK had repeatedly claimed were not necessary and were impossible to submit, *at all*. Therefore, Commerce's rejection of this new information was perfectly consistent with its acceptance of various corrections of previously-submitted data very late in the investigation (Japan's 2d Sub., ¶ 94, fn.91). Nor did NSC and NKK's protestations of "good faith" compel the acceptance of their conversion

factors. It is impossible for investigating authorities to know a party's motivation for not submitting data when it is due, and the Agreement does not require the authorities to attempt to discern its motivation.

42. Finally, we must take issue with the claim that the facts available Commerce chose were not rationally related to the sales affected by the absence of the conversion factors. The Department used an adverse normal value for NKK's theoretical weight sales in Japan because the only element affected by the absence of the conversion factor was the normal value. As we have noted, this highly circumspect application of facts available had a minuscule effect upon NKK's margin. As for NSC, the Department's selection of margins from its actual-weight sales in the US market as facts available for the theoretical-weight sales of the same products in the US market was also reasonable.

43. With regard to **the "all-others" rate**, Japan is asking the Panel to re-write Article 9.4. Article 9.4 does not state that the all-others rate must exclude margins calculated in part by "*using*" facts available (Japan's 2d submission, at ¶ 117). Instead, Article 9.4 tells authorities to disregard margins which were "*established*" on the basis of the facts available. The most obvious interpretation is that such margins are "established" entirely on the basis of the facts available, for respondents that have generally failed to cooperate. Similarly, Article 9.4 does not require the exclusion of "portions" of margins based on facts available. It tells authorities to "disregard" *margins* established on the basis of the facts available, not to "recalculate" them without facts available.

44. The US reading of Article 9.4 – that a margin is only "established based on the facts available" when it is <u>not</u> a calculated margin, but is based <u>entirely</u> on the facts available – is a reasonable and permissible one. Indeed, Japan claims only that nothing in Article 9.4 "prevents" the Department from removing "portions" of margins using facts available and that its preferred approach "better reflects" Article 9.4 than the US interpretation. However, nothing in Article 9.4 <u>requires</u> the Department to follow Japan's preferred approach. If investigating authorities must disregard margins based only in part on the facts available, no margins would remain to calculate the all others rate in a great many cases, including this one.

45. Japan further argues that the Agreement makes clear that companies not individually investigated should not be affected by the behaviour of investigated companies. (Japan's 2d Sub., ¶ 117) Exactly the opposite is true. Article 9.4 expressly provides for the behaviour of the investigated companies to serve as a proxy for the companies not individually examined. In so providing, Article 9.4 avoids either unduly rewarding or penalizing the companies not investigated by eliminating the margins at both extremes - - the zero and *de minimis* margins and the presumably highest margins based entirely upon facts available. Reading Article 9.4 to require the exclusion of margins based even in part on the facts available would defeat its purpose of producing a reasonable average by eliminating the margins at each extreme of the range.

46. With regard to the **treatment of home market sales through affiliated parties,** Japan's "symmetry" argument concerning the Department's 99.5 per cent test ignores the fact that, although in the ordinary course of trade a company will sell at prices as high as the market will bear, a company normally will not sell *below* market prices. The reasonableness of the Department's "asymmetrical" approach to sales to affiliated parties in the home market is demonstrated by the fact that it is essentially the same as the margin calculation itself. The reason for this similarity is that the margin calculation and the arm's-length test have parallel objectives: the margin calculation discerns whether the sales in question (which are the export sales) have been sold below normal value in the home market; the arm's-length test determines whether the sales in question (which are the sales to the affiliate in the home market) are sold below average prices to unaffiliated parties. In each case, the group of sales is tested to determine whether it is priced *below*, not above, the applicable benchmark.

47. Japan's arguments against the **use of downstream sales in the home market** are also invalid. Article 2.1 defines dumping as selling at less than "the *comparable price, in the ordinary course of trade*, for the like product when destined *for consumption in the exporting country*" (emphasis supplied). A sale through a related party to an independent purchaser in the home market is just such a sale - - a sale of the like product, in the ordinary course of trade, destined for consumption in the exporting country. Accordingly, such sales are an appropriate basis for normal value. Article 2.2 calls for authorities to base normal value on constructed value or third country prices only "[w]hen there are **no** sales of the like product in the ordinary course of trade in the domestic market of the exporting country." (emphasis supplied).

48. By challenging the Department's practice of using perfectly valid home market downstream sales to unaffiliated parties, Japan is seeking to require investigating authorities to use either the prices of sales to related parties in the home market, which could easily be manipulated, or sources other than prices in Japan. This is not speculative - - NKK, for example, sold 93 per cent of its merchandise through affiliated trading companies at the time of the investigation (64 Fed. Reg. at 24339). If the Department were precluded from using such sales, it would be forced to base normal value either on constructed value or Japan's sales to third countries.

49. Finally, the United States disagrees with Japan's claim that the use of downstream sales violates the fair comparison requirement because the Department's level of trade adjustment does not address differences in price comparability due to resellers' costs and profits. First, the United States notes that this Panel's terms of reference do not include any challenge to Commerce's practice with regard to level of trade adjustments, either generally or in this investigation. Thus, Japan cannot now raise this issue. In any event, when the Department compares export sales to downstream home market sales at a different level of trade, the US statute (19 U.S.C. § 1677b(a)(7)) provides that "the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined." Such "price differences" would include the effects of both cost and profit.

50. With regard to Commerce's **Preliminary Determination of Critical Circumstances**, acceptance of Japan's claims would render Article 10.7 meaningless. Japan completely ignores the fact that the "sufficient evidence" required by Article 10.7 may be found at any time "after initiation." Japan provides no explanation for the lack of any other temporal restriction, but instead simply insists that the decision cannot, "as a practical matter," be made prior to a preliminary determination of dumping. Japan also continues to insist that petition exhibits are nothing more than "allegations," despite the obvious fact that the petition in this investigation contained very substantial evidence.

51. With respect to the injury requirement, Japan continues to ignore the express language of the Agreement, which provides that the term "injury" in Article 10.6 *includes* "threat of injury" because it does not specify otherwise. Moreover, Article 10.4 does not prevent a preliminary critical circumstances finding based upon "threat of injury." Article 10.4 merely states that, in accordance with Article 10.2, if there is a final determination of "threat of injury," an additional finding must be made in order to impose retroactive duties. This additional finding was not necessary in this investigation because the final determination was of *current injury*. The question presented under Article 10.4 is simply not present here.

52. Japan also argues that the Department's selection of the comparison periods for volume of imports and its determinations regarding knowledge of dumping and likely injury were arbitrary. However, the sequence of events fully supports the Department's determinations. *First*, importers became aware of potential investigations when the US industry declared in published interviews that it planned to bring anti-dumping actions; *second*, a surge in dumped imports followed the date of those interviews; and *third*, importers during and after the surge became aware of the massive

dumping and consequent threat. The critical circumstances provisions were intended to address precisely such surges in dumped imports.

53. Finally, Japan suggests that the United States is asking the Panel to look only at decisions made at the *end* of the investigation. This is not true. We ask that the Panel look at *this preliminary* decision. You will find ample supporting evidence to satisfy the requirements of Articles 10.6 and 10.7. Indeed, it is curious that, to support its arguments, Japan continuously refers the Panel to the *final* dumping margins - not the preliminary margins. It is *Japan* that would like the Panel to focus upon the decisions made at the *end* of the investigation.

54. With respect to **Article X**, Japan's claims are curious. Although couching its argument in terms of "due process" and "fairness," Japan is really trying to have Article X override provisions of the Anti-Dumping Agreement. Japan's claim is not about due process, in the sense of the *Shrimp-Turtle* decision it cites. There is no denying that the US investigation was open and transparent and allowed full opportunities for the submission of facts, views, and rebuttals. Rather, this dispute is about specific decisions fully consistent with and authorized by the Anti-Dumping Agreement that Japan does not like, and hopes to attack collaterally through Article X:3. The Panel should not permit such a collateral attack.

55. The differences between the Commerce Department and the US International Trade Commission with respect to information gathering and facts available are attributable to the different functions of these two agencies, not to any partiality, lack of uniformity, or unreasonableness. Indeed, the Commission's approach applies equally to information from all parties before it, whether they be US or non-US parties.

56. In deciding to accelerate the investigation, Commerce was reacting to an unprecedented surge in imports which more than justified its modest acceleration of the investigation. Japan has failed utterly to show that the acceleration prejudiced any of the Japanese respondents. Agencies must have the flexibility to respond to such special circumstances. The same may be said of Commerce's recent policy on critical circumstances. "Fundamental fairness" does not require that Commerce adhere rigidly to past approaches in the face of an unprecedented import surge.

57. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-12

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

(27 September 2000)

1. ***Mr. Toupin*.** Japan's contentions in this case as to injury are characterized by two trends. First, its legal theories have proved to be completely flexible.

2. In its first written submission, as to other factors causing injury, its claims concerned entirely whether the USITC's findings were sufficiently thorough, not whether the standard that the USITC stated in doing so was adequate. Beginning with its first oral statement, following the *Wheat Gluten* decision, Japan's argument now concerns entirely whether the USITC isolated injury due to imports and found that injury in itself material. The total absence of such a theory in Japan's original submission suggests that it, too, did not understand the Anti-Dumping Agreement as imposing such an analysis.

3. Similarly, in its original submission, Japan took the position that no analysis of segments was appropriate. Now, Japan has abandoned that position.

4. In brief, Japan has changed its position throughout this case, indicating that its positions here do not seek to vindicate a principled view of the Agreement. Rather, Japan evidently is prepared to take any position to seek to overturn the US action in this case. We are confident, however, that the Panel will not be misguided by Japan's opportunistic argumentation and will instead appreciate that it must base its decision on a principled interpretation of the provisions of the Agreement.

5. The second theme that underlies Japan's arguments is that the USITC did not make findings on issues on which the USITC did, in fact, make findings. The Panel should not be misguided by such arguments either.

6. Article 3, on which Japan relies, provides no specific form in which an examination should be reflected. Japan's real purpose on each point is not to establish that the USITC's determination violates any provision of the Agreement, but that the Panel should regard particular evidence as entitled to greater weight than the USITC gave it. Such is not the purpose of panel review under the standard of review.

7. We thank the Panel for its patience and attention to the detailed factual and legal arguments that have been made and look forward to the results of its deliberations.

8. ***Mr. McInerney*.** Japan has long opposed the application of any antidumping measures. Its announced position is that its producers should be able to dump in the US market and other foreign markets at will, with impunity.

9. In the Uruguay Round, Japan tried to obtain many changes to the Anti-Dumping Agreement which, collectively, would have made the application of antidumping measures impossible. But Japan did not succeed in this effort. The Uruguay Round Agreements made a number of important changes

in the Anti-Dumping Agreement, but these changes were not intended to, *and did not*, render the application of antidumping remedies impossible.

10. Japan is now pursuing a fall-back strategy - - of attempting to persuade dispute settlement panels to give Japan what it could not obtain from the Members through negotiation - - rendering the application of antidumping remedies impossible, by interpreting the Agreement as if the Members had agreed to that result.

11. In pursuit of this goal, Japan has made several claims before this Panel that strike at the heart of the process by which antidumping measures are implemented. The most prominent of these is Japan's wholesale attack on the facts available provisions, by proposing that an investigating authority may never make an adverse inference about information not submitted, even where that information has been deliberately withheld. Japan has admitted that this proposal is designed to strip Japanese respondents of any incentive to cooperate in antidumping investigations.

12. At this hearing, despite its position that the Agreement never permits an investigating authority to make an adverse inference, Japan has responded to a question from the panel by agreeing that an adverse inference could be reasonable in some circumstances. I don't know how an inference under the Agreement that can be reasonable in itself must nevertheless be based on an unreasonable interpretation of the Agreement.

13. As a fig leaf for this naked assault on the viability of antidumping remedies, Japan offers that, where a foreign producer has refused to supply an investigating authority with critical information, the investigating authority might, in attempting to reach a neutral result, use information that might coincidentally turn out to be adverse. The Panel is supposed to accept this absurd proposition as something to which the Members that actually employ antidumping remedies *conceivably* could have accepted in the Uruguay Round. The Members are alleged to have accepted that exporters would regard as a sufficient incentive to supply adverse information in an antidumping investigation the remote possibility that, in attempting to substitute purely neutral information for the missing data, an investigating authority might accidentally select some information that was unfavourable. This is just not credible.

14. But Japan has not "put all of its eggs in one basket," with respect to facts available. It has offered other arguments which are intended to look reasonable, when compared to its outright assault on the facts available rule. Such arguments should not be viewed in comparison to those that are more outrageous, but on their own merits. The seemingly small matter of NKK's weight conversion factor is a good example. This is a small adjustment that had a minuscule effect on NKK's margin. But by pressing this argument, along with the more outrageous claim, Japan hopes to carve some big holes in the facts available rules.

15. Japan has asked the Panel to rule that investigating authorities cannot enforce reasonable deadlines for the submission of information, and that non-cooperation confined to "small" matters must be excused. If the Panel goes along with this request, Japan will demand that these exceptions be applied to much larger quantities of information submitted late, or not at all, provided, of course, that the respondent companies have the sense to offer nominal cooperation.

16. Japan's arguments regarding the 99.5 per cent test are similar in approach to the matter of NKK's weight conversion factor, in that they invite the panel to begin dismantling the antidumping law piece-by-piece. Although *nominally* about the validity of the 99.5 per cent test itself, Japan's argument rapidly branches out to matters that would give Japanese exporters complete control over antidumping investigations. First, Japan proposes that an investigating authority should be required to accept transfer prices to affiliates as a basis for export price. If this proposition were accepted,

exporters would be in the enviable position of being able to make all of their export sales through related distributors, forcing investigating authorities to accept meaningless transfer prices as valid.

17. This strategy is complimented by a similar strategy on the home market side. Here Japan seeks to force investigating authorities to accept home market transfer prices or, in the alternative, skip over legitimate resales in the home market in favor of constructed value or third country prices. Put these two elements together, and Japan effectively could prevent investigating authorities from comparing a meaningful price in the export market to a meaningful price in Japan. Instead, exporters would be able to dictate which transactions must be used on both halves of the dumping equation. This would enable Japanese exporters to control the outcome of investigations, and therefore avoid the imposition of any antidumping remedies.

18. Now put it all together. Japan is trying to give to respondents control over what information must be submitted, when that information must be submitted, and how the entire dumping calculation must be set up. If Japan cannot obtain this all at once, it will try to get it in instalments from successive panels.

19. Japan should not be allowed either to demolish antidumping measures or to begin their piecemeal disassembly. Therefore, we trust that the Panel will consider each of Japan's arguments on its individual merits, and uphold each US practice that is based on a permissible interpretation of the language to which the Members agreed, as required by Article 17 of the Agreement.

20. Thank you for your careful attention to our arguments today and for your consideration in this proceeding.

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ANNEX E

Questions and Answers

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ANNEX E-1

Japan's Answers to Questions from the Panel

(6 September 2000)

Question 1: **What is Japan's view of "in conformity with appropriate domestic procedures" – if the US concluded that the evidence was not appropriately received under its procedures, on what basis may the Panel consider it? Is Japan making a claim that the US authorities improperly excluded evidence that should have been included in the administrative record under appropriate domestic procedures? What violation of the Anti-Dumping Agreement (hereinafter "AD Agreement") is asserted in this regard?**

Answer

1. The quote to which the Panel refers is from Article 17.5(ii) of the AD Agreement, a provision that applies only with respect to claims brought under the AD Agreement, not claims brought under GATT 1994 Article X. Therefore, to the extent the Panel is considering any of Japan's GATT 1994 Article X claims, the quote to which the Panel refers is irrelevant.

2. As for claims brought under the AD Agreement, it is for the Panel to decide, not the United States, whether evidence was made available "in conformity with appropriate domestic procedures" pursuant to Article 17.5(ii). After all, 17.6 (i) indicates that the Panel's job is to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. Japan believes that certain pieces of evidence to which the United States now objects were either (a) made available in conformity with appropriate domestic procedures, but later inappropriately removed from the record by USDOC, or (b) never placed on the record due to inappropriate domestic procedures.

3. First, NKK's and NSC's weight conversion factors are properly before the Panel because these companies corrected their previously submitted information within "a reasonable time" thus permitting USDOC to use them "in the investigation without undue difficulties," as stipulated by paragraphs 1 and 3 of Annex II. More importantly for purposes of Article 17.5(ii), the information was actually filed in accordance with a specific USDOC regulation allowing for submission of new factual information seven days before verification. This regulation is an "appropriate domestic procedure," recognizing that respondents often discover errors or new information during their preparations for verification. NKK and NSC submitted the disputed weight conversion factors in reliance on this long-standing domestic procedure. USDOC, however, ignored the procedure and excluded the correction, thus failing to establish the facts properly, ultimately leading to the inappropriate application of adverse facts available.

4. The evidence the United States seeks to exclude, therefore, is crucial to the Panel's analysis of Japan's argument that the USDOC overreacted and improperly excluded this evidence in its effort to apply adverse facts available. The Panel cannot properly evaluate the USDOC use of "facts available" without understanding what information was excluded. Importantly, Article 17.5 (ii) does not refer only to information accepted by the authorities. The drafters wisely recognized that information might be offered to authorities, but then inappropriately rejected. An authority cannot be

permitted to exclude evidence inappropriately, and then take advantage of the incomplete administrative record to defend itself in the examination of its action by a WTO panel.

5. Second, Article 17.5(ii) also recognizes that some domestic procedures for establishing the administrative record may not have been "appropriate." Japan provided certain evidence in its First Submission precisely because such information was never placed on the administrative record. The evidence is necessary to show that the US (a) acted in bad faith by conducting a biased and non-objective investigation and/or (b) failed to establish the facts properly. If an authority has acted in bad faith, it is no wonder that evidence of such acts is not on the administrative record. It stands to reason, therefore, that if a party is to establish its case that an authority has acted in bad faith, then the Panel must consider non-record evidence. Likewise, if an authority has failed to establish the facts properly, then it is quite possible that it improperly excluded facts from the record. The Panel must be made aware of such facts to determine whether the authority has failed in its obligations.

6. Article 17.5 must not be interpreted, as the United States suggests, to prevent the Panel from determining the consistency of US actions with WTO obligations by considering all of the relevant facts. Otherwise, a member could refuse to accept a responding company's factual submissions, secure in the knowledge that a panel would examine only record evidence.

7. Japan's submission of 10 August 2000 details why each specific piece of evidence to which the United States objects is relevant to the Panel's review.

8. The context in which Japan has made a specific claim with regard to excluded evidence is also in the context of its argument under Article 6.1 of the AD Agreement that the Department did not give NSC and NKK ample opportunity to submit relevant evidence.[1] However, the exclusion of certain other evidence is one way among many in which USDOC has improperly established the facts and/or evaluated facts in a biased and non-objective manner, thereby leading to several of the other claims Japan has made in this review.

Question 2: Could Japan list the exhibits challenged by the US which Japan claims were submitted to the US authorities but were subsequently rejected and not put on the administrative record?

Answer

9. This question concerns NKK's and NSC's submissions of weight conversion factors, which were submitted by respondent companies prior to closing of the USDOC administrative record, but subsequently expunged from the record by USDOC.[2] Japan referred to the inappropriate exclusion of this information in:

- **Exhibit JP-28** -- affidavit of Daniel L. Porter, Counsel to NKK
- **Exhibit JP-46** -- affidavit of Daniel J. Plaine, Counsel to NSC

None of the other exhibits in Japan's First Submission actually contains the information expunged from the record by USDOC, largely because Japan tried to minimize the extent of the proprietary information supplied in this panel review. Japan did, however, provide exhibits showing where information was redacted, as follows:

[1] Japan's First Submission, paras. 117-119.

[2] **Exhibits JP-29(f)** and **JP-45(i)** contain USDOC's letters of 12 April 1999 to NSC and NKK, respectively, formally rejecting the companies' conversion factor information and requiring them to resubmit the letters excluding the rejected information.

- **Exhibit JP-29(d)** contains the public redacted version of NSC's 23 February 1999 submission of the weight conversion factor and explanation of why the factor had not been submitted previously. This version was supplied after USDOC requested NSC to remove the weight conversion factor from the letter.

- **Exhibit JP-29(e)** contains the public redacted version of NSC's 2 March 1999 submission of backup data to its weight conversion factor. Again, this version was filed after USDOC demanded that NSC remove certain information from the letter, including the actual weight data used to derive the conversion factor.

- **Exhibit JP-45(g)** contains the public version of NKK's 23 February 1999 submission of the weight conversion factor, including an explanation of how the factor was calculated. Although this is the original version filed, before USDOC demanded exclusion of the conversion factor information, the public version of the submission does not contain the conversion factor that was ultimately excluded.

Upon request of the Panel, Japan offers to provide the original confidential versions of these submissions, which contain the information ultimately excluded by USDOC. The documents already provided, however, should provide enough information for the Panel to understand the information at issue.

Question 3: **Could Japan explain where in its request for establishment of a panel, it requested the panel to examine the USDOC general practice of applying adverse facts available as a separate "measure" that is before the Panel? The claim in section E "Conformity" challenges the "above detailed laws, regulations, and administrative rulings" as being not in conformity. Could Japan indicate where the "general practice" of facts available is "detailed above"? Does Japan believe there is any other reason why the Panel should consider this practice, if it were not mentioned in the request?**

Answer

10. The USDOC general practice of applying "adverse facts available" is reflected in a series of administrative rulings, or final determinations, made by USDOC. USDOC applied that general practice in the hot-rolled steel case, as reflected in its final determination. That final determination, which is one of the rulings being challenged in this dispute, thus reflected the specific decision to apply adverse facts available in this case as well as the general policy on adverse facts available. The United States has argued that it did not take any exceptional steps in this case, thereby essentially acknowledging that it applied a long standing general practice with respect to "facts available."

11. Japan's claim is that the US practice of applying adverse facts available is contrary to US obligations under Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement. As this claim is set out in Section E of Japan's panel request for establishment of a panel, it is within the Panel's terms of reference. The reference to Section E to "the above-detailed laws, regulations, and administrative rulings of general application" was not intended to and does not have the narrow focus implicit in the Panel's question. Rather, it refers broadly to US anti-dumping laws, regulations, and practices, which certainly include the US practice of applying adverse facts available. In this regard, although the United States insists on reading Section A and Section E in the Japanese panel request in isolation, they must be read together. Japan did not include language about bringing practices into conformity in each of the substantive requests because Japan believed the general request at the end of the panel request -- which clearly referenced the earlier discussion of specific substantive issues -- was clear and unambiguous enough.

12. Even if the Panel believes that Japan could have been more clear in its request, the United States still has not demonstrated any concrete prejudice to its ability to defend its interests with respect to this issue. Further, what we are really talking about here is whether the Panel should adopt a ruling that is limited to the facts of this case or to future cases as well. Given that the United States admits to having applied in the hot-rolled steel case its routine practice with respect to facts available, any ruling in favour of Japan on this topic should be applied not merely with respect to this case, but all future cases as well. Either way, however, Japan has made the same arguments both as regards the practice in general and as applied in this case.[3]

13. We refer the Panel once again to Japan's 10 August 2000 submission on this topic.

Question 4: Japan suggests that the US should have looked at the "overall level of cooperation" in determining whether to apply facts available to KSC, NSC, and NKK. Could Japan explain where in Article 6.8 AD Agreement it finds that this provision provides for the use of facts available based on the degree of cooperation. Assume, for purposes of argument, that Article 6.8 does not limit the use of facts available based on the degree of cooperation. Could Article 6.8 of the AD Agreement be understood to indicate that where necessary facts are not available, the determination can be made without "filling in the gap", but simply on the basis of the facts otherwise available. Japan seems to suggest that "facts available" should only be used to "fill in gaps" in the information provided to the investigating authority. Please comment.

Answer

14. The Panel seems to misunderstand Japan's point. We have never suggested that a party's level of cooperation should affect whether to *apply* facts available.

15. Article 6.8 does not directly address the level of cooperation provided by a party. Instead, Article 6.8 merely gives the authority for resorting to facts available, assuming the circumstances identified in Article 6.8 exist. However, both the application and choice of facts available is specifically restrained in Article 6.8 by its reference to Annex II. Annex II provides a roadmap for (a) determining whether to apply facts available at all (paragraphs 1, 3, and 5) and (b) circumscribing the sources on which an authority may rely for facts available (Paragraph 7). Once it is determined that an authority has no choice but to apply facts available, Paragraph 7 indicates that the authority must take special care in choosing the facts available. As a general matter Paragraph 7 calls on the authority to find information that most closely approximates reality. This is why Paragraph 7 calls on the authority to use "special circumspection" in choosing the facts available, and to "check the information from other independent sources." This is where Japan finds support for the notion that the whole purpose of the facts available provisions of the AD Agreement is to fill gaps caused by missing information.

16. The final sentence of Paragraph 7 does not change this overriding purpose. Rather, it provides justification for not *rewarding* a non-cooperative party for its failure to cooperate. In doing so, however, the sentence makes quite clear that only when a party *withholds* information might a less favourable result occur.

17. We reiterate, however, that by no means does the last sentence of Paragraph 7 permit an authority to choose information that is specifically aimed at punishing a party. The gap-filling purpose of the facts available provisions still applies. What changes when a party is deemed uncooperative through the withholding of information is the inferences an authority might make in its choice of facts available. (See Japan's answer to Question 7.) But still, Paragraph 7 only says that the

[3] Japan's First Submission briefly notes the general practice in paragraphs 59 and 60, but then discusses the application of that general practice at length in paragraphs 61-128.

result *might* be less favourable due to an authority's application of facts available in this instance; it does not give license for an authority to purposefully punish a respondent for lack of cooperation. Rather, the authority must assess whether the facts available chosen are logical and reasonable within the requirements of Article 6.8 and Annex II, as explained in paragraph 15 above.

18. Importantly, in the hot-rolled steel investigation, USDOC did not face the situation where respondents were uncooperative and withheld information. Rather, in the case of NSC and NKK, the information was actually provided -- not withheld -- once the companies realized that they could produce it. Article 6.8, therefore, should not have even been triggered for these companies; facts available need not have even been applied. As for KSC, the information USDOC requested but which KSC did not provide was never withheld because KSC never had control of it -- as demonstrated to USDOC through KSC's repeated efforts to obtain the requested information from CSI, a petitioner in this case. Furthermore, KSC offered alternative information, which USDOC could have used. In other words, even assuming facts available might have been warranted for KSC under Article 6.8, USDOC had no reasonable basis to infer that the second highest dumping margin was the most appropriate data to fill the gap.

Question 5: Could Japan provide the Panel with specific references to, or copies of, documents or other information which in Japan's view demonstrates that the Japanese respondents requested the USDOC for assistance in providing the information requested in the USDOC questionnaire?

Answer

19. KSC: There are many examples of KSC's request for assistance. On 9 November 1998, the day after KSC received CSI's 6 November 1998, letter, refusing the visit from KSC's attorneys and accounting consultant, KSC's attorneys specifically met with USDOC to apprise the agency of the situation. *See* **Exh. JP-42(n)**. Following up on the meeting, KSC submitted a letter to USDOC on 10 November 1998. *See* **Exh. JP-42(i)**. Moreover, in a 3 December 1998 letter to USDOC, KSC reminded USDOC "we have received *no response* from the Department."[4] That statement was made not only based on the belief that USDOC should have provided KSC a response to its meeting and its letters, but also in an effort to elicit a response from USDOC. Also, in that letter, KSC pleaded with USDOC to be a part of a meeting that USDOC staff was going to have with petitioners' counsel (*i.e.* CSI's counsel), specifically addressing CSI's refusal to provide KSC the necessary information, "so that all involved will have a complete understanding of the issues involved." Rather than provide any guidance or assurances that it would also address KSC's concerns, USDOC again did nothing in response.

20. KSC continued its efforts to persuade USDOC to provide them some guidance. In its letter to USDOC of 18 December 1998, KSC was more specific in its request for assistance. KSC stated that it had "received *no information, guidance, or response* from the Department, except for a series of questions in the Department's supplemental Section A questionnaire, which ask KSC to provide information about CSI." *See* **Exh. JP-42(n)** (emphasis added). KSC could not have been clearer about its difficulties in obtaining information from CSI and its need for additional assistance from USDOC.

21. NKK: NKK explicitly asked USDOC for further guidance on how to respond to the request for a weight conversion factor. Following receipt of USDOC's 4 January 1999, Supplemental Sections B, C, and D Questionnaire (**Exh. JP-45(c)**), NKK's attorneys called the relevant USDOC official for clarification of USDOC's request and were told that the supplemental question sought simply to confirm that NKK did not have a conversion factor to report. *See* **Exh. JP-28**. The

[4] KSC Letter to USDOC of 3 Dec. 1998 (attached as **Exh. JP-78**).

USDOC official did not explain that a better estimate of the weight of the affected sales would suffice.[5]

22. Importantly, providing notice to the authority of a party's difficulties in supplying the requested information is all that is required under Article 6.13 to invoke an authority's responsibility to provide assistance. Article 6.13 places the burden on authorities to "take due account of any difficulties experienced by interested parties" and "provide any assistance practicable." These obligations are not dependent on a party's request for assistance. Each of the companies made it clear to USDOC that they were experiencing difficulties. It is USDOC that failed to respond.

23. Furthermore, with respect to NKK and NSC, both companies implicitly requested USDOC's assistance (*i.e.*, accommodation) in permitting it extra time to provide the requested factor. *See* **Exh. JP-29(d)-(e); JP-45(g)** (providing the requested conversion factors).

Question 6: Could Japan please clarify what, if any, it considers to be the difference between "adverse inferences" or use of "adverse facts available" and a "less favourable result" as referred to in Paragraph 7 of Annex II of the AD Agreement?

Answer

24. There is effectively no difference between the US nomenclature "adverse inferences" and use of "adverse facts available." "Adverse facts available" is simply a common short-hand expression for the application of facts available using inferences that are adverse to the affected party. According to the US statute, the authorities first determine that facts available are necessary. *See* 19 U.S.C. § 1677e(a) (**Exh. JP-4(k)**). Then, if a party "has failed to cooperate by not acting to the best of its ability," the authority "may use an adverse inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b) (**Exh. JP-4(k)**).

25. Read on their own, these words as set forth in the statute appear reasonable enough. As discussed in response to Question 4 above and Question 7 below, there may be instances when an authority must make inferences to respond to missing information. The words in the statute alone, however, do not fully explain what USDOC means when it makes adverse inferences. As explained in Japan's First Submission, the United States does not look for credible information; rather, it chooses facts "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information." No effort at all is made by USDOC to discern whether its choice of facts available is logical or reasonable.

26. Therefore, there is a big difference between the manner in which the United States uses of the words "adverse inference" or "adverse facts available" and the words "less favourable" in Paragraph 7 of Annex II. As Japan explained in its First Submission, the last sentence of Paragraph 7 of Annex II mentions only the possibility of "less favourable" results, simply stating that failure to cooperate "*could* lead to a result which is less favourable to the party." (Emphasis added.) The United States reads this sentence as giving it carte blanche to use any facts available it chooses. But, nothing about this sentence removes an authority's obligation under the first and second sentences of Paragraph 7 to use special circumspection in choosing facts available. The facts chosen and inference based thereupon must be logical and reasonable given the circumstances, the result may turn out to be less favourable, but the facts themselves must be proper.

27. The difference, then, between "adverse inference" and a "less favourable result" is that the former -- at least the way in which the United States applies it -- authorizes punishment of a

[5] This issue is not relevant to NSC. The nature of the difficulty faced by NSC was a misunderstanding among corporate divisions rather than a lack of assistance from USDOC.

recalcitrant party; the latter warns of a more uncertain outcome for failing to cooperate. While both concepts may permit the use of an inference that may prove to be adverse, Paragraph 7 does not authorize authorities to use the highest or second highest dumping margin available without paying any attention to the reasonableness of the figure. This is the whole point of the requirement in Paragraph 7 that an authority use special circumspection in its choice of facts available. The US choice of a margin "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information" does not honour the requirements of Paragraph 7.

Question 7: **Is Japan of the view that a party that impedes the investigation should be treated exactly the same as a cooperating party with respect to use of facts available? Does Japan consider that such a party is entitled to the "neutral representative" facts available, in the same way as a party which is simply unable to provide information? What about the case of a party who refuses access to information, *i.e.* refuses to allow certain information to be verified -- does Japan consider that such a party is entitled to the "neutral representative" facts available, in the same way as a party which is simply unable to provide information? Article 6.8 provides that in all three situations, determinations may be made on the basis of facts available. In the event Japan considers that the same neutral treatment is not required in all three cases, on what basis would Japan distinguish between an interested party who "refuses access to" information, "otherwise does not provide" information, or "significantly impedes the investigation"?**

Answer

28. No. Japan recognizes that a party that significantly impedes the investigation may well be treated differently. Japan's point is that Article 6.8 and Annex II do not authorize punishment.

29. At the outset, as explained in response to Question 4, Japan wishes to clarify that Article 6.8 merely enumerates circumstances that may warrant facts available; it does not itself indicate what specific facts might be used once the decision to apply facts available is made. Nonetheless, the language of Article 6.8 should be read closely given the limitations it places on an authority to even apply facts available. First, facts available may be used when a party "refuses access to, or otherwise does not provide, *necessary* information within a *reasonable period*." (Emphasis added.) Only the lack of *necessary* information justifies facts available and parties must have a *reasonable period* in which to provide such information. Second, the authority may apply facts available when a party "*significantly impedes* the investigation." (Emphasis added.) This is very strong language. "Impede" means to "interfere with the progress of" an investigation. "Significantly" means "having or likely to have considerable influence or effect." The provision therefore implies serious obstruction of an investigation. Finally, determinations "*may* be made on the basis of the facts available." The absence of information therefore does not automatically result in the application of facts available. The authority must make some reasonable judgment, based on the limiting principles of Article 6.8, in deciding whether to use facts available. Once the decision is made to apply facts available, any inference to be drawn based on a respondent's behaviour must be logical and reasonable.

Question 8: **The United States has suggested that, because it used information supplied by the particular respondent companies themselves as the "facts available", it was not relying on a secondary source of information. Could Japan please comment on this argument, and its implications, if any?**

Answer

30. The US interpretation of Annex II, Paragraph 7 is far too broad. The United States reads "secondary source" as information from sources other than the parties themselves.[6] However, this

[6] US First Submission, para. B-163 (emphasis added); *see also id.* at para. B-110.

cannot be the intention of Paragraph 7. Primary information is that which is specifically requested. Any other information – even other information supplied by the party – is secondary. To interpret Paragraph 7 otherwise would limit unduly the authority's obligation to use special circumspection in selecting facts available and to corroborate those facts.

31. Paragraph 7's use of the phrase "special circumspection" emphasizes the exceptional exercise of care authorities must observe in relying on secondary information. The purpose of using such a high level of care when relying on secondary information is to ensure that the information used is reliable and as close to reality as possible. The US interpretation of Paragraph 7 defeats this purpose by creating a huge loophole.

32. Moreover, this US interpretation actually undercuts the US argument. If secondary sources means only information not provided by the affected party, the entire paragraph is limited to instances in which the authority uses information from other sources as facts available.[7] Yet, the United States relies on the last sentence of Paragraph 7 to support its application of adverse facts available in this case. According to the United States, the reference to "less favourable" results implies that authorities can select facts that are adverse if a party is uncooperative. If Paragraph 7 does not apply to the use of information from the respondent, then the "less favourable" language does not apply and cannot be used to defend the use of adverse facts available. The United States cannot have it both ways.

Question 9: Japan states that the United States, when negotiating the AD Agreement, proposed language similar to its interpretation that only margins based "entirely" on facts available must be excluded from the calculation of the rate under Article 9.4. Could Japan please provide the relevant references, and copies of relevant documents, to support its contention.

Answer

33. Japan has located an official transmission from Japan's Mission in Geneva summarizing oral discussions held during a "Group of 8" meeting on 23 October 1991. A message sent on 5 November 1991 reports that the US negotiator argued for inserting the word "solely" after the word "established" in the relevant provision of the "New Zealand III" draft text. If the US proposal had prevailed, Article 9.4 would have read, in pertinent part:

> …provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established ***solely*** under the circumstances referred to in Paragraph 8 of Article 6.

Since others did not agree, this US proposal and alternatives suggested by other countries were all rejected, and the provision remained unchanged.[8]

34. The word "solely" has the exact same meaning as the word "entirely," at least in this context, and therefore supports the point that the Members specifically rejected language that would have supported the US position on this issue.

[7] Paragraph 7 must be read as a whole. The opening language of sentence two ("In such cases") ties that sentence to the first sentence, which contains the reference to "a secondary source." The use of "however" ties the third sentence to the rest of the paragraph, linking "less favourable" results to use of facts available from "secondary sources."

[8] Official Transmission From Japan's Mission in Geneva (5 Nov. 1991) (original and English translation) (attached as **Exh. JP-79**).

Question 10: **Assume, for purposes of argument, that the use of facts available was proper in this case. All three margins for investigated respondents were based, in part, on facts available. In such a situation, how does Japan suggest that a margin for uninvestigated producers should be calculated? If the response is that the margins of investigated producers should be recalculated to exclude the "portions" based on facts available, could Japan indicate what provision of the AD Agreement authorizes such recalculations?**

Answer

35. Japan indeed suggests calculating the all-others rate based on the non-facts-available portions of the margins for the investigated producers. In the hot-rolled steel case, it would mean the following:

- Calculating KSC's margin without regard for its export sales to CSI.
- Calculating NSC's and NKK's margins without regard for their sales of product measured by theoretical weights (or calculating them *with* the conversion factors that were in fact submitted by these companies and, for NKK, verified).
- Weight averaging all three margins together, taking into consideration the lower export quantities resulting from using only a portion of KSC's and NSC's export sales (NKK's sales involving theoretical weights were in the home market, so excluding them would not affect weighting by export quantities).

36. This method is authorized by Article 9.4, which sets parameters around an authority's discretion to calculate the margin for uninvestigated producers. Some of these parameters limit the magnitude of the margin—*i.e.*, it may not exceed certain limits established in subparagraphs (i) and (ii). Other parameters are methodological—*i.e.*, the authority's calculations shall disregard margins of zero and *de minimis* as well as margins based on facts available. Since the text of Article 9.4 precludes the use of margins tainted by "facts available," and does not have the limiting word "entirely" as assumed by the United States, Japan believes its suggested approach better reflects Article 9.4. Within these parameters, Japan believes USDOC can and should calculate the all-others rate using record data that is not based on the facts available.

Question 11: **(Part 1) The AD Agreement specifically provides for required preliminary determinations before provisional measures may be imposed, or undertakings offered or accepted. There appears to be no similar requirement with regard to critical circumstances. Is it Japan's view that the determination provided for in Article 10.7 cannot be made before a preliminary determination? If so, please explain.**

Answer

37. Japan believes that, as a practical matter, the determination provided for in Article 10.7 generally cannot be made before a preliminary determination of dumping. Japan has reached this conclusion for three reasons.

38. The first and primary reason is that Article 10.6(ii), and the chapeau of Article 10.6,[9] require the imports in question to be "dumped" before the authority can make a finding of critical circumstances. "Alleged dumping" is not sufficient.[10] Japan believes that Article 10.6's requirement

[9] *See* Brazil's Third Party Submission, para. IV.4.
[10] *Cf.* Article 5 of the AD Agreement ("Initiation and Subsequent Investigation").

that the imports in question be "dumped" effectively prevents the determination referred to in Article 10.7 from being made until a preliminary determination that dumping has in fact occurred.

39. Second, it is difficult to imagine how an authority could determine that "massive dumped imports of a product in a relatively short time … is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied," as required by Article 10.6(ii), before conducting any investigation itself.

40. The third reason relates to the sufficiency of the evidence of importer knowledge of dumping. It is logically impossible to find "sufficient evidence" for importer knowledge of dumping, because USDOC made this finding before any preliminary finding of dumping and even before the USDOC asked respondents to submit questionnaire responses. USDOC concluded that importers should have been aware that they were dealing in dumped merchandise solely because the petitioners *alleged* that dumping margins for NKK and NSC exceeded 25 per cent.[11] This alone cannot constitute sufficient evidence, because petitioners' alleged dumping margins are self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities. This deficiency in petitioners' data is demonstrated by the ultimate dumping determination with respect to NKK and NSC once their information was placed on the record and evaluated by USDOC. Ironically, USDOC then concluded that NKK and NSC -- the two companies whose estimated margins formed the basis of the "25 per cent test" -- specifically did *not* dump by margins exceeding 25 per cent.[12]

(Part 2) In paragraph 34 of its oral statement, Japan argued that "with low standards for <u>both</u> initiation <u>and</u> preliminary critical circumstances determinations, the authority can effectively block imports well before the truth comes out". Does Japan consider that the two standards are identical? Could Japan please explain in what respect, if any, "sufficient evidence" under Article 10.7 differs from "sufficient evidence" under Article 5.3?

<u>Answer</u>

41. Japan does not consider the two standards to be identical. "Sufficient evidence to justify the initiation of an investigation" under Article 5.3 must be a *lower* standard than "sufficient evidence that the conditions set forth in {Article 10.6 } are satisfied," as required by Article 10.7. It is well established that

> the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.[13]

Conversely, what might be sufficient to justify initiation of the investigation under the lower evidentiary standard is not sufficient to support a preliminary determination of critical circumstances. The USDOC, in this investigation, made its preliminary determination of critical circumstances based

[11] *See* US First Submission, para. 269.

[12] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24370 **(Exh. JP-12)**.

[13] Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, adopted 24 Feb. 2000, WT/DS132/R, at para. 7.94 (quoting Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico, 19 June 1998, WT/DS60/R, at para. 7.57 and citing United States—Measures Affecting Imports of Softwood Lumber From Canada, adopted 27-28 Oct. 1993, SCM/162, BISD 40S/358, at para. 332 ("Mexico—High Fructose Corn Syrup").

primarily on the same evidence underlying its decision to initiate the investigation. Article 10.7 requires more.

Question 12: The USITC made a negative final critical circumstances determination and anti-dumping duties were not imposed retroactively under Article 10.6 of the AD Agreement. Can Japan explain what the "measure" is which it is challenging in this respect in light of the fact that the final measure did not include a critical circumstances finding?

Answer

42. This situation presents a classic example of a WTO-inconsistency that is capable of repetition yet evading review. To allow USITC action to prevent any review of USDOC misconduct would allow USDOC routinely to impose commercially prohibitive provisional measures, shutdown trade, but later reverse those findings in its final determination to avoid WTO review. Such an approach should not be permitted.

43. Moreover, as the Appellate Body recently made clear:

> Once one of the three types of measures listed in Article 17.4 is identified in the request for establishment of a panel, a Member *may challenge the consistency of any preceding action* taken by an investigating authority in the course of an anti-dumping investigation.[14]

Japan identified in its panel request the definitive anti-dumping duties on imports of certain hot-rolled steel products from Japan. The preceding actions and determinations taken by USDOC in the course of its investigation are therefore properly before the Panel.

44. The USDOC adopted a new policy statement on early critical circumstances decisions, and has now applied this new policy in a number of cases.[15] Pursuant to this new policy, the USDOC makes decisions prematurely and without adequate information. That new policy -- both generally and as applied in this case -- is an action that should be addressed by this Panel (in addition to the violations associated with the statute itself).

Question 13: (Part 1) In paragraph 26 of the US oral statement, the US claims that "Japan does not contest the Department's discretion to make an early determination of critical circumstances per se". Does Japan agree with this US statement?

Answer

45. The United States is theoretically correct. However, by requiring the decision to be made "as soon as possible after initiation,"[16] USDOC systematically prevents its determinations from:

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[14] *United States—Anti-Dumping Act of 1916*, 28 Aug. 2000, WT/DS136/AB/R, WT/DS162/AB/R, at para. 73 n.39. (emphasis added) (*"US—Anti-Dumping Act of 1916"*).

[15] See, e.g., Preliminary Determination of Critical Circumstances: Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China, 64 Fed. Reg. 61835 (15 Nov. 1999); Preliminary Determination of Critical Circumstances: Certain Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 64 Fed. Reg. 60422 (5 Nov. 1999); Preliminary Determination of Critical Circumstances: Certain Cut-To-Length Carbon-Quality Steel Plate From Japan, 64 Fed. Reg. 20251 (26 Apr. 1999). These determinations will be provided in Japan's Second Submission.

[16] USDOC Critical Circumstances Policy Bulletin, 63 Fed. Reg. at 55364 **(Exh. JP-3).**

(a) satisfying the legal requirements of Article 10.6 that the imports are found to be "dumped" and that "massive imports," if any, are "likely to seriously undermine the remedial effect of the anti-dumping duty to be applied," and

(b) being made on the basis of "sufficient evidence" as required by Article 10.7.

The timing itself was not the problem; but the rush to judgment largely created the problems. As explained in response to Question 11, by making the critical circumstances determination before the preliminary determination of dumping, the United States cannot determine that the imports in question are "dumped," a requirement of Article 10.6. Nor could the United States determine that the imports are "likely to seriously undermine the remedial effect of the anti-dumping duty to be applied," because nothing is yet known about the magnitude of dumping or the availability of any remedy. Japan also reminds the Panel that, on its face, the US statute does not even require either of these findings, regardless of when the preliminary decision might be made.

46. In addition, the premature finding prevents the decision from being made on the basis of "sufficient evidence." The only evidence USDOC had was the petition. Though this might be sufficient to initiate an investigation, it alone is not sufficient to conclude that critical circumstances exist. *See* Response to Question 11. By making the decision before the Japanese mills were even asked to submit their questionnaire responses, USDOC ensured that the record would be incomplete and one-sided in favour of the petitioners. Thus USDOC violated GATT Article X:3.

(Part 2) Article 10.7 allows protective action to be taken at any time "after initiation" once the investigating authorities have "sufficient evidence" of the elements set forth in Article 10.6. This is similar in structure to the provision in Article 5.3 allowing initiation if there is "sufficient evidence" of the elements of dumping, injury and causation set forth in Articles 2 and 3. Where does Japan find a timing requirement for the preliminary decision to withhold appraisement or take other measures under Article 10.7?

Answer

47. Although Article 10.7 does not provide a specific *deadline*, limitations on the timing of an authority's decision under Article 10.7 are implicit in the requirement of "sufficient evidence" as well as in certain substantive requirements of Article 10.6, *i.e.*, that the import in question is found to be "dumped" and that massive dumped imports would be likely to seriously undermine the remedial effect of the definitive anti-dumping measure. Japan simply contends that USDOC, by making the preliminary determination of critical circumstances as early as it did, did not have a sufficient record before it to satisfy the requirements of Articles 10.6 and 10.7.

48. Japan does not believe there is any fixed timetable, provided there is "sufficient evidence." The speed with which an authority can collect and analyze "sufficient evidence" will vary case-by-case.

Question 14: Could Japan please comment on the US position that the use of the words "*would cause* injury" in Article 10.6(i) of the AD Agreement implies that the injury might lie in the future and only be a threat at present?

Answer

49. The US interpretation of "would cause injury" to connote future events is illogical: it would limit the collection of retroactive duties only to instances of threat of injury. This would be inconsistent with the overall retroactive purpose of Article 10. Article 10.6(i) simply cannot be read to describe future events, such as the threat of injury, in light of the use of the present tense in

virtually all other verbs in Article 10 relevant to the factual predicate for what the United States terms "critical circumstances."

50. The United States also attempts to import Footnote 9 of Article 3 into Article 10, so that it can claim an affirmative finding of threat of injury is an affirmative finding of injury pursuant to which retroactive duties may be assessed.[17] As Japan established in its First Submission, Footnote 9 cannot apply to "injury" as that term is used in Article 10 generally, and Article 10.6 particularly. Article 10 consistently distinguishes between threat and injury, and Article 10.6 in particular speaks of injury in the present tense. The US position neglects the remedial purpose of critical circumstances. How can one retroactively redress that which was not yet occurred? This overall remedial purpose is confirmed by other provisions of Article 10. If the authority's final determination is that the US industry is threatened with material injury, then Article 10.4 requires the refund of provisional measures. The same concept applies to retroactive provisional measures when the preliminary injury determination is based only on the threat of material injury.

Question 15: In paragraph 29 of its oral statement, the US argues that "[T]he 700 pages of exhibits in the petition contain very substantial information on all of the relevant points". Would Japan admit that the exhibits in the petition contained information, in the sense of evidence, on all the points of relevance to a determination under Article 10.7 of the AD Agreement?

Answer

51. No. The Panel's question reflects the US emphasis on the quantity of petitioners' allegations and newspaper articles, as if *more* inconclusive newspaper articles or *longer* allegations at some point become proof. They do not.

52. As a threshold matter, the petition alone -- no matter how many exhibits might be attached to it -- can never constitute "sufficient evidence" of the elements of Article 10.6, at least not in a contested case. Even the United States acknowledges that the petition at best tells only one side of the story.[18] One side of the story might be sufficient to initiate an investigation, but it is not a sufficient record upon which to determine that critical circumstances exist.

53. Second, the attachments to the petition do not satisfy two critical aspects of the Article 10.7 determination: that the imports actually be dumped (as required by Article 10.6's references to "the *dumped* product in question" and "massive *dumped* imports"), and that the massive imports, if any, are "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." These two determinations must be made by the authority alone, and they cannot be made until the preliminary determination of dumping. *See* Responses to Questions 11 & 13.

54. Third, as a factual matter the petition's exhibits do not establish the importer-knowledge elements of Article 10.6(i): that "there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury . . . ." The Panel should note Paragraph B-273, footnote 288, of the US First Submission, in which the United States has quoted from selected newspaper articles that it apparently believes best illustrate the existence of "sufficient evidence." They do not. To the contrary, they prove Japan's point. Most of the articles are dated September 1998, just a few weeks before the petition was filed and five months *after* the date USDOC concluded that importers knew or should have known about dumping and injury (*i.e.,* April 1998). The articles are vague (*e.g.*, "1998 is shaping up to be a bad year" or "World prices are well below US prices"). They do not identify (a)

[17] *See* US First Submission, para. B-256.
[18] *See* US First Submission, para. B-72.

dumped imports of (b) hot-rolled steel from (c) Japan as (d) injuring US mills during (e) the period in which USDOC concluded importers should have known this.

Question 16: In this case, the final injury determination was of current material injury. Therefore, and assuming the other conditions were satisfied, retroactive duties could have been imposed. However, it is argued that without an earlier action, taken under Article 10.7, to secure the potential for imposition of retroactive duties, collection of retroactive duties would, for many Members, be impossible. Does Japan recognize any difference between the decision under Article 10.7 to preserve the possibility of retroactive duties, and the decision to actually apply duties retroactively under Article 10.6?

Answer

55. Japan believes that the strict standards of consistency with the obligations of the AD Agreement must be met at each stage in the process, not just at the end of the process. A Member may act pursuant to Article 10.7 when it has met those requirements. Article 10.7 should not be read loosely early in an investigation in order to facilitate relief under Article 10.6 later in the investigation.

56. Moreover, this argument is particularly inappropriate in a US context. Under US practice, adopted by the US Customs Service on 26 May 1997,[19] US Customs withholds making any final determination of duty liability for 314 days after entry precisely to permit retroactive collection of anti-dumping duties. So, it is unnecessary to make an early determination of critical circumstances to secure the potential for imposition and collection of retroactive duties. That potentiality already exists as a matter of law -- as reflected by USDOC's previous policy of waiting until the preliminary determination of dumping to issue its critical circumstances determination. The US argument is simply disingenuous. There is no reason for the United States to ignore its obligations under Article 10.7.

Question 17: Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade, although it disagrees with the test the US applies in determining whether they are or are not. In paragraph 42 of its first oral statement, Japan refers to the language of Article 2.2 of the Agreement as setting out the mandatory and exhaustive list of alternative methods for determination of normal value. As Japan notes, Article 2.2 prefaces the alternatives set forth (constructed value and third country export price) with the statement that these alternatives shall be applied "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or "when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison." Would Japan agree that in this case, there were sales of the like product in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison? If yes, does Japan contend that the stated alternatives are nonetheless the mandatory and exclusive alternatives for determination of normal value?

Answer

57. Japan agrees that in this case there were home-market sales of hot-rolled steel in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison. These ordinary-course sales included both the sales by the respondents to their "affiliates" (which, Japan again notes, simply denotes a company in which the respondent owns as little as 5 per cent of its stock, or which owns as little as 5 per cent of the

[19] Memo from Director, Office of Trade Compliance, File ENT-1 FO:TC:C:E AD (26 May 1997), available at www.cebb.customs.treas.gov/public (attached as **Exh. JP-80**).

respondent's stock), as well as sales to "unaffiliated" customers. Japan contends that USDOC should have used all these ordinary-course sales – including sales to companies that did not survive the 99.5 per cent test – in its calculation of normal value. Then there would be no need to reach the alternatives specified in Article 2.2; Article 2.1 would be sufficient.

58. The alternatives specified in Article 2.2 become relevant in only one situation: if USDOC concludes that there are *no* sales in the home market in the ordinary course of trade. Then, its only choices are to use third-country sales or constructed value. Japan does not argue that authorities must resort to third country sales or constructed value whenever *any* home market sales are found to be outside the ordinary course of trade.

59. What USDOC may *not* do, when it determines that sales to any *individual* affiliated customer are outside the ordinary course of trade, is replace those sales with the affiliated customer's downstream resales. Japan is using Article 2.2 to explain that USDOC has only three choices for calculating normal value when it determines that sales to an individual customer are outside the ordinary course of trade: use the respondent's home-market sales to other customers, or, if there are *no sales* in the ordinary course (or one of the other situations described in Article 2.2 exists) then it must use third-country sales or constructed value. It may not use downstream resales.

Question 18: Assume that the information for the entire period of investigation shows different trends from that for the latter period -- for instance, less steep declines over three years than from the second to the third year, or an improvement when comparing the first and third years, but a significant decline from the second year (much improved as compared to the first) to the third year. Is it Japan's view that an investigating authority, in considering the question of injury, is precluded from considering that the information for the more recent period is more relevant and from according it more weight in the analysis?

Answer

60. Japan does not argue that an authority is precluded from emphasizing the latter part of its period of investigation as more relevant. Japan does argue, however, that the USITC's emphasis of the last two years of the period in this case goes far beyond a mere discretionary emphasis. The AD Agreement requires authorities to examine explicitly all relevant trends over the period of investigation. Indeed, the USITC traditionally examines the volume, prices and impact of the subject imports on the domestic industry over the entire period of investigation. Trends between the first and third years of a period that conflict with trends between the second and third years of a period would be especially relevant. Yet these are precisely the trends that the USITC ignored, instead focusing its analysis of impact on the last two years of the period.

61. Articles 3.4 and 3.5 of the AD Agreement obligate authorities to examine trends over the entire period of investigation, even if an authority chooses to emphasize the final two years of the period. Article 3.4 requires "an evaluation of all relevant economic factors and indices." Trends over an entire period of investigation unquestionably have a bearing on the state of an industry. Even if an authority finds the last two years of a period especially probative, its analysis of impact must nevertheless include an explicit analysis of both.

62. Article 3.5 provides that "{t}he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." The Panel in *Argentina—Footwear*, in which an analogous provision of the Safeguards Agreement was considered, held that the Argentine authority had impermissibly focused its causation analysis on the first and fifth years of its period of investigation, thereby ignoring relevant trends over the intervening years when "the *relationship* between the movements in imports (volume and market share) and the movements in injury factors. . . must be

central to a causation analysis and determination."[20] The panel recognized that the causal relationship between subject imports, alternative causes of injury, and industry performance are only apparent when viewed dynamically, over a period of years, rather than statically, between two points.

63. When industry trends differ as between the first and third years of a period of investigation, and the second and third years, an authority cannot focus on the latter to the exclusion of the former without ignoring "relevant economic factors" in violation of Article 3.4 as well as relevant evident concerning the causal relationship between dumped imports and injury, in violation of Article 3.5. Though the authority may deem the final two years of the period more probative -- as most indicative of present material injury, for example -- this does not relieve the authority's obligation to examine specific trends viewed over the entire period of investigation -- especially conflicting trends -- and to make this consideration apparent in its final determination.

64. The USITC's examination of *impact* in this case focused on the last two years of its period of investigation, and slighted its analysis of the first through third years of the period. The contrast between the paragraph at the bottom of page 17 and the top of page 18 of the USITC decision is quite dramatic. The USITC inexplicably shifts from a three-year analysis to a two-year analysis. This unexplained shift for financial performance -- one of the most important factors to be considered -- does not constitute an "objective examination" as required by Article 3.1.

65. As in the Panel's hypothetical, industry trends differed markedly between the two periods. While industry profits and shipments declined between the second and third years of the period, these measures both increased between the first and third years of the period.[21] In other words, these objective measures of the domestic industry's performance improved over the entire period of investigation, despite a 420 per cent increase in subject import volumes.[22] Thus, the USITC abrogated its obligation to analyze these highly relevant trends in its analysis of impact, especially given their conflict with its conclusions, in violation of Articles 3.1, 3.4 and 3.5.

<u>Question 19:</u> Can Japan please clarify to the Panel whether it is arguing that the USITC did not gather information for all three years of the period of investigation and did not at all consider data for the industry as a whole or is it Japan's submission that although this information was recited in the USITC determination, the USITC in its analysis ignored the data?

<u>Answer</u>

66. Japan does not deny that the USITC gathered data over its entire three year period of investigation and that the USITC at least mentioned domestic producers as a whole by referencing overall industry data. Rather, Japan argues that the USITC failed to adequately factor this information into its determination. Specifically, the USITC failed to relate its merchant market findings to producers as a whole, as required by Articles 3 and 4, and failed to make its examination of relevant three year trends explicit in its analysis of impact, in violation of Articles 3.4 and 3.5.

67. As discussed in answer to Question 18, Articles 3.4 and 3.5 together require an authority to examine relevant trends over the entire period of investigation, notwithstanding its emphasis on certain trends over a portion of the period as more probative. The USITC traditionally examines

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[20] *Argentina—Safeguard Measures on Imports of Footwear*, 25 June 1999, WT/DS121/R, at para. 8.237 (emphasis in original) ("*Argentina—Footwear*").

[21] Between 1996 and 1998, total industry shipments increased from 63.6 million tons to 64.0 million tons, operating profits increased from $430.8 million to $560.5 million, and operating profit margins increased from 2.0 per cent to 2.6 per cent. *USITC Final Injury Determination*, USITC Pub. 3202 at III-6, VI-6 (**Exh. JP-14**).

[22] *Id.* at 12 (**Exh. JP-14**).

trends pertaining to volume, price and impact of the subject imports on the domestic industry over the entire period of investigation. In this case, however, the USITC focused its impact analysis on the final two years of the three-year period of investigation. The USITC unquestionably possessed information covering the entire period, identified market share and price trends over the entire period in its analysis of volume and price,[23] and even briefly cited market share and capacity utilization trends over the entire period at the beginning of its impact analysis.[24] Yet the USITC expressly refused to analyze the industry's performance between 1996 and 1998,[25] rejecting respondents' objection to its use of 1997 as the baseline of its analysis:

> {W}e disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which US consumption reached record levels, and the US industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry.[26]

Even accepting this justification, the USITC had an obligation under Articles 3.4 and 3.5 to analyze industry performance, and the impact of subject imports and alternative causes of injury, over the entire three year period. The USITC's determination that certain relevant factors -- including trends -- are less probative than others does not relieve it of the responsibility to make its analysis of such factors explicit in its determination. To the contrary, trends over the entire three year period of investigation were especially relevant as they conflicted with trends over the last two years of the period.

68. Just as the USITC was obligated to relate trends over the last two years of the period to trends over the entire period, it was also obligated to relate trends in the merchant market segment to trends for producers as a whole. In light of this overarching requirement, the Panel in *Mexico—High Fructose Corn Syrup* considered the manner in which authorities may analyze an industry segment as a relevant economic factor under Article 3.4. As a preliminary matter, the Panel expressly held:

> {W}hile an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from making the determination required by that Agreement — whether dumped imports injure of threaten injury to the domestic industry as a whole.[27]

The Panel further held that two Safeguards Panel reports, *Argentina—Footwear* and *Korea—Dairy*, were applicable to an authority's analysis of an industry segment in the antidumping context. Both Panel reports concluded that "the failure of the investigating authorities to either consider all sectors, or to relate their conclusions concerning specific sectors to the industry as a whole, resulted in injury determinations that were not based on injury to the industry 'as a whole', inconsistent with the requirements of the Safeguards Agreement."[28] Thus, an authority may analyze an industry segment separately but must relate its findings to producers as a whole.

69. The USITC made no effort to relate its analysis of the merchant market segment to producers as a whole, instead passively reciting overall industry statistics following merchant market segment statistics. In particular, the USITC did not consider as a condition of competition that the industry's

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[23] *USITC Final Injury Determination,* USITC Pub. 3202 at 12-13 (**Exh. JP-14**) (volume trends analyzed over the entire period), 13-16 (price trends examined over the entire period).

[24] *Id.* at 17-18 (**Exh. JP-14**).

[25] *Id.* at 18-20 (**Exh. JP-14**) (Analysis of industry performance was limited to trends between 1997 and 1998.).

[26] *Id.* at 18 (**Exh. JP-14**).

[27] Mexico—High Fructose Corn Syrup, para. 7.160.

[28] *Id.* at para. 7.155 n.625.

substantial captive production was shielded from import competition, or how direct import competition in the merchant market segment impacted the industry's captive segment. In this regard, the USITC essentially double-counted the impact of merchant market segment performance on producers as a whole: once directly, in merchant market segment data, and again indirectly, in overall industry data embodying the merchant market segment.

70. To fully appreciate the impact of the merchant market segment on producers as a whole, the USITC should have analyzed the merchant market *and* captive segments separately, and then considered how both related to the industry as a whole. Captive segment performance is no less of a relevant economic factor than merchant market segment performance.

Question 20: Could Japan please clarify its apparent view that a change in policy applicable to all subsequent cases demonstrates biased administration of the Member's laws, in violation of Article X of the GATT 1994? Is Japan of the view that the application of a longstanding and consistently applied policy in one case can demonstrate failure to impartially administer that policy? If so, could Japan please explain?

Answer

71. Contrary to the Panel's assumption, Japan is not arguing that a change in policy applicable to subsequent cases automatically demonstrates biased administration of the Member's laws in violation of Article X. It is not the change in practice or non-application of a longstanding policy *per se* that results in an Article X violation, but rather the manner in which those changes or decisions not to apply existing policies are made. In this case, the United States anti-dumping authority changed its policy or refused to carry out longstanding rules and practices in a non-transparent and biased manner in at least four ways.

72. The first way pertains to USDOC's unprecedented acceleration of the case. The acceleration prejudiced respondents by effectively shortening the amount of time they had to prepare for the initial questionnaire and by curtailing the authorities' time for analysis, thereby resulting in error-ridden determinations.

73. The second way pertains to NKK's specific request for a correction of a substantial ministerial error that inflated its margin by 12 percentage points. USDOC's own regulations instruct USDOC officials to correct such errors upon request within thirty days.[29] In this case, however, USDOC officials chose not to do so. While the failure to apply a long-standing policy might not always rise to the level of an Article X violation, the factual circumstances surrounding this particular administration of USDOC rules illustrate a non-transparent, non-uniform, and impartial administration of USDOC's practice of correcting ministerial errors. Here, USDOC ignored a 4-page written request from NKK detailing USDOC's error and specifically asking USDOC to make a ministerial correction.[30] Moreover, the US authority then used this incorrect, inflated margin as part of its basis for a preliminary finding of critical circumstances. That finding was, not surprisingly, later overturned.

74. The third instance pertains to USDOC's change in its critical circumstances policy. This change did not apply only to "subsequent" cases. Rather, USDOC applied it *retroactively* to the hot-rolled steel investigation. A fundamental element of due process is notice. Here, USDOC's issuance of a policy bulletin was intended to serve that purpose. Yet, USDOC acted in bad faith when it applied that new policy retroactively to specific WTO Members in a specific investigation that had already been initiated.

[29] 19 C.F.R. 351.224(e) **(Exh. JP-5)**
[30] *See* NKK Letter to USDOC of 18 Feb. 1999 **(Exh. JP-70)**

75. Finally, USITC changed its policy in a manner inconsistent with Article X when it failed to apply its longstanding policy of examining a three-year period for its injury determination. Here, USITC adopted a non-uniform method of analysis in order to reach an affirmative determination. Anti-dumping agencies cannot tailor their methodologies so as to exact an affirmative determination in particularly controversial cases.

76. The US conduct in this case therefore violated the fundamental requirement of due process (demanded by the Appellate Body in *US—Shrimp*), constitutes *abus de droit* and violates the GATT Article X:3(a) requirement of "uniform, impartial and reasonable" administration by the US of its anti-dumping regime.

77. In short, the manner in which the United States administers its anti-dumping law cannot be assessed in a vacuum. The manner in which decisions are made and actions are taken is crucial to determining whether the US administration of its anti-dumping law is uniform, impartial and reasonable. Partiality may occur, or be discerned, in many different situations. For example, the existence of a long-standing policy that is consistently applied may nonetheless show bias – it may be consistently applied in a biased fashion and yet one single application could lead to a revelation of such bias. Thus, a panel may have to look beyond the text of a seemingly consistent regulation. And, as discussed above, where a Member alters a long-standing policy during the course of a significant proceeding and applies the new policy to disadvantage the respondent in the proceeding, this too is evidence of bias.

Question 21: How does Japan believe the "political context" should be taken into account by the Panel? For instance, if an action is consistent with WTO obligations, does it matter if that action was taken in a context of intense political pressure?

Answer

78. Japan is not proposing that "political context" alone can create a WTO violation. Rather, Japan is arguing that political context is an important part of assessing the consistency of actions with a Member's WTO obligations.

79. Article 17.6(i) underscores the importance of the context of an authority's actions. Panels are to determine whether the "establishment of the facts was proper." The panel cannot make this judgement without looking at both the action and the context of that action. This provision also refers specifically to "whether the evaluation of those facts was unbiased and objective." One must consider the context of certain actions and certain decisions to judge whether or not the evaluation was biased or unbiased.

80. Likewise, in considering under GATT 1994 Article X whether a Member administered its measures in a uniform, impartial, and reasonable manner, the political context in which such administration occurred will shed light on whether it met the requirements of Article X. To that extent, the panel should take into account the political context. A decision or action that, in the abstract, might appear to be neutral clearly is uncovered as being biased where the context shows it was not made in a reasonable or equitable manner.

81. Therefore, the political context to which Japan referred in this proceeding was provided as supplementary evidence that the establishment of the facts in this case was not proper, that the evaluation of the facts was not unbiased and objective, and that the administration of US anti-dumping law was not uniform, impartial, and reasonable, as required by Article 17.6(i) of the AD Agreement and Article X:3 of GATT 1994.

Question 22: With reference to paragraph 12 of Japan's oral statement – if a Member's regulations provide for a procedural action not required by the AD Agreement, on what basis would Japan argue that a change in policy in this regard, or a failure to effectuate that action in a particular case, is a violation under the AD Agreement?

Answer

82. In paragraph 12 of its opening statement, Japan was making points in connection with its Article X claim. Japan has never argued that the failure to correct the NKK clerical error itself created any *violation* of the AD Agreement. Japan does believe, however, that the failure to correct the NKK clerical error provides important context for whether the USDOC was properly establishing facts, and evaluating those facts in an objective and unbiased manner.

83. GATT Article X requires that Members promptly publish "laws, regulations, judicial decisions and administrative rulings of general application" (hereinafter "laws") in such a manner as to enable governments and traders to become acquainted with them. Article X also requires Members not to enforce such laws before they have been officially published; and, it requires a Member to administer its laws in a "uniform, impartial and reasonable manner." These obligations are not limited to laws specified by the Anti-Dumping Agreement (or another WTO agreement). They extend to all laws "pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . .." Here, the US failed to comply with GATT Article X. Its published a regulation that provides for correcting clerical errors. But, in contrast to its practice in other cases, it failed to follow its regulation and correct the error, and thereby treated NKK unfairly in the process.

QUESTIONS TO BOTH PARTIES

Question 39: Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

Answer

84. No. By its terms, Article 17.5(ii) applies only to claims under the AD Agreement. Thus, it is explicitly inapplicable to Japan's claims under GATT 1994 Article X:3. The text of Article 17.5(ii) also makes clear that it is inapplicable to "on its face" claims against an anti-dumping law. The phrase "facts made available . . . to the authorities" refers solely to specific anti-dumping proceedings. It has no meaning in the context of a challenge to the facial consistency of the US law itself.

85. A related issue arose in the recent Appellate Body decision in *US—Anti-Dumping Act of 1916*, which found that Article 17.4 does not limit facial challenges to anti-dumping laws and regulations.[31] Although the Appellate Body did not directly address Article 17.5(ii), the logic of its reasoning extends to Article 17.5(ii).

Question 40: Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted even if they were not made available under the appropriate domestic procedures as required by the AD Agreement? Could there be other reasons apart from the requirements of Article 17.5(ii) of the AD Agreement to exclude certain documents submitted by Japan to the Panel?

[31] US—Anti-Dumping Act of 1916, para. 74.

Answer

86. All exhibits relevant to Japan's GATT 1994 Article X claims are admissible and indeed must be considered by the Panel. In its preliminary objections, the United States relied on only Article 17.5(ii) of the AD Agreement to challenge evidence submitted by Japan in support of its Article X claims. This is not an appropriate legal basis for two important reasons. First and foremost, the AD Agreement does not apply to challenges made under the GATT 1994. Article 17.5 establishes dispute settlement procedures *only for* disputes involving the AD Agreement. It cannot be read to apply to claims raised under other international agreements.

87. Second, and as importantly, the Panel is obligated to consider the proffered evidence because of the nature of GATT 1994 Article X claims. Japan's main claim under Article X is that the United States did not administer its anti-dumping law in a uniform manner. The examination of this claim requires a comparison of the application of the US law in this case with the application of the same US law in other cases. The Article X claim therefore necessarily involves facts that could not possibly have been made available during this specific anti-dumping investigation. Therefore Article 17.5(ii) cannot logically extend to Japan's Article X claim.

88. The Panel must examine the behaviour of the US Government in administering its laws within this investigation, or as between investigations, which requires facts that may or may not have been part of the record. For example, in the hot-rolled steel investigation, the background behind USDOC's acceleration of this case is important because it shows the non-uniform, partial, and unreasonable nature of the investigation. The Panel must hear all the evidence and then determine the probative weight of that evidence, but there is no basis upon which the panel can *a priori* exclude evidence. Indeed, if the Panel chooses to exclude evidence, the Panel runs the risk of violating its own obligations under Article 11 of the DSU, including an objective assessment of the facts and the conformity with the relevant covered agreements.

89. Other than Article 17.5(ii), there is no basis to exclude these documents. DSU Article 11 requires an "objective assessment," and thus requires consideration of any evidence Japan offers to establish its prima facie case of a violation of Article X. Japan notes that in *Hormones*, the Appellate Body explained
that the refusal to consider "evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts" under Article 11 of the DSU.[32]

Question 41: Do the parties consider that documents which were submitted to the USITC but not to USDOC were made available "in accordance with appropriate domestic procedures" and can therefore be considered by the Panel even when those documents are submitted to the Panel with regard to claims concerning determinations made by USDOC? According to the parties, should the Panel consider as relevant this internal US distinction between proceedings before the USITC and USDOC when considering the question of admissibility of evidence under Article 17.5(ii) of the AD Agreement?

Answer

90. Japan views this as a hypothetical question because the US has not raised a claim regarding specific evidence. The answer to the first question is, in general, yes. The answer to the second question is, in general, no.

91. The US cannot insulate itself from scrutiny simply by bifurcating the administration of US anti-dumping law.[33] For WTO purposes, the bifurcation is irrelevant. The structure of the "authority"

[32] *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 Jan. 1998, WT/DS26/AB/R, WT/DS48/AB/R, at para. 133 ("*Hormones*").

selected by the US to administer its anti-dumping law cannot excuse the US from its obligations, whether they are substantive or procedural. A Member cannot be permitted to use a structural artefact as an excuse allowing a branch or division of its government to disregard evidence submitted to another branch or division.[34] The language used in Article 17.5 (ii) also does not spell out any special consideration for governmental structure within each Member. The key here is that the Japanese respondent companies submitted the evidence to the Member, in this case, the United States government.

92. Moreover, in fact the ITC does share information with DOC, and did so in this case. US law requires the ITC, within five days of its preliminary determination of injury or threat, to "transmit to the administering authority {*i.e.*, DOC} the facts and conclusions on which its determination is based."[35] As is evident from the internal memorandum issued by USDOC in making its preliminary critical circumstances determination,[36] USDOC had full knowledge of USITC's negative preliminary determination with regard to current injury.

Question 42: Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

Answer

93. Japan agrees that the permissive term "may" in Article 2.3 means that authorities can, but need not, construct a price based on downstream prices to unrelated parties. Authorities would therefore be well within their discretion simply to accept the price to an affiliated party as sufficient for purposes of the analysis. Indeed, in this particular case USDOC did not express any specific concerns on the reliability of the KSC price to CSI, and never tested those prices for reliability. Since anti-dumping investigations are usually a surprise, in many cases there will be no reason to suspect that the price between affiliated parties has been manipulated to evade anti-dumping measures.

Question 43: Could the parties please clarify their position concerning the degree of cooperation required under Article 6.8 and Annex II of the AD Agreement?

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[33] Article 27 of the Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty."

[34] See Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico, 2 Nov. 1998, WT/DS60/AB/R, at paras. 69-72; United States—Sections 301-310 of the Trade Act of 1974, 22 Dec. 1998, WT/DS152/R, at para. 7.80; Brazil—Export Financing Programme for Aircraft, 9 May 2000, WT/DS46/RW, at para. 6.16 n.23 (Report of the Panel under Article 21.5); see also Ian Brownlie, Principles of Public International Law 35-37 (4th ed. 1990) (excerpts attached as **Exh. JP-83**); Restatement (Third) of the Foreign Relations Law of the United States § 207(c) (1987) ("A state is responsible for any violation of its obligations under international law resulting from action or inaction by … any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.") (excerpts attached as **Exh. JP-84**).

[35] *Antidumping and Countervailing Duty Handbook*, USITC Pub. 3257, at II-12 (Nov. 1999) (excerpts attached as **Exh. JP-82**).

[36] Memorandum From Roland L. MacDonald and Edward C. Yang to Joseph A. Spetrini Regarding Antidumping Duty Investigations of Certain Hot-Rolled Carbon Steel Flat Products from Japan and the Russian Federation—Determination of Critical Circumstances, 23 Nov. 1998, at 2 (**Exh. US/B-42**).

Answer

94. This question was answered in response to Questions 4 and 7 above.

Question 44: Was information submitted to and accepted by the USITC after applicable deadlines?

Answer

95. The USITC accepted corrected questionnaire responses submitted by domestic producers over two months after the applicable deadlines, after failing to compel the more timely correction of questionnaire responses that were grossly and flagrantly distorted. This is not to say that the USITC lacked advance notice of these irregularities: a mere four days after the USITC had released its public prehearing staff report, Japanese and Brazilian respondents filed a submission enumerating the irregularities in meticulous detail.[37] While domestic producers had been instructed to provide the results of operations for merchant market and captive shipments, valuing internal transfers at fair market value, most valued internal transfers at anything but fair market value.[38] Respondents demonstrated that these distortions were calculated to depress industry performance, and manufacture the appearance of injury. Further, domestic producers had allocated most all SG&A (sales general & accounting) expenses to merchant market sales, and none to internal transfers, thereby depressing merchant market profits and contriving the appearance of injury in the merchant market segment.[39]

96. The Japanese and Brazilian respondents strongly urged the USITC to apply "facts otherwise available" to draw inferences that would allow the USITC to plug the holes in the offending domestic producers' questionnaire responses.[40] At the very least, Japanese and Brazilian respondents requested an opportunity to comment on any submission of revised data,[41] and an opportunity to address the distortions and omission at an in camera session of the USITC's hearing, where confidential information could be discussed.[42] The games domestic producers were playing with the record could not have been clearer, and the seriousness of the Japanese and Brazilian respondents' accusations certainly demanded immediate action.

97. Immediate action, however, was not forthcoming. As of the date of the hearing, on 4 May, no revised questionnaire responses had been submitted. In fact, both Chairman Bragg and Vice Chairman Miller were motivated to take the highly unusual step of publicly admonishing petitioners for their lack of cooperation.[43] Vice Chairman Miller stated:

> Let me begin on not such an easy note, however. Chairman Bragg mentioned in her opening statement some problems and difficulties we've had with basically

[37] The USITC released its prehearing staff report on 22 April 1999. Japanese and Brazilian respondents filed their submission on 26 April 1999.

[38] Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 3-4 (excerpts attached as **Exh. JP-85**). While the staff attempted to correct these distortions where it could, several companies had to be omitted from the staff report, pending confirmation of their financial information. *Certain Hot-Rolled Steel Products From Brazil, Japan, Russia: Prehearing Report to the USITC of Investigation Nos. 701-TA-384 and 731-TA-806-808 (Final),* at VI-7 (22 Apr. 1999) (excerpts in **Exh. JP-72**).

[39] Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 5-7 (excerpts attached as **Exh. JP-85**).

[40] *Id.* at 8-9 (excerpts attached as **Exh. JP-85**).

[41] *Id.* at 11-12 (excerpts attached as **Exh. JP-85**).

[42] *Id.* at 12-13 (excerpts attached as **Exh. JP-85**).

[43] USITC Hearing Transcript (4 May 1999), at 9 (Chairman Bragg in her opening stated, "I would like to emphasize to all counsel that responses to Commission questionnaires are mandatory, and I request your assistance in ensuring that your clients respond to Commission requests for information fully and within the time frame specified."), 65-66 (Vice Chairman Miller.) (excerpts provided in **Exh. JP-73**).

> companies that are part of the petitioners' group on getting certain data that we've requested, and I have to just say that I find it very troubling and I'm disappointed that we're having the problem in getting the industry to submit certain information that we need for the purpose of our analysis . . . And I guess in particular I've been very troubled by the fact that it's essentially most, if not all, of the petitioning companies that chose not to provide the information that we needed with respect to internal transfers while other companies were able to do so. So I guess I want to emphasize to you as the chairmen of your companies the difficulty that I think this poses for the Commission, and that I don't really understand why it's worth the risk to your case of posing this problem to the Commission at this point.[44]

98. Still, rather than drawing the inferences, as urged by respondents, the USITC patiently awaited domestic producers' clarifications, and received revised questionnaire responses from eight domestic producers in time for their inclusion in the final staff report, issued 28 May 1999.[45] Domestic producers had succeeded in distorting the record concerning industry profitability until the bitter end of the investigation, when respondents literally had less than a week to comment on the corrected figures, and then only briefly, as final comments are strictly limited to fifteen pages in length per respondent country.[46]

99. Thus, domestic producers only submitted corrected domestic producers' questionnaire responses in time for the 28 May final staff report -- over two months after the domestic producers' questionnaires had been due, on 22 March. By then, the damage wrought on respondents' rights and the USITC's analysis by the distorted record was arguably irreversible.

Question 45: Is the captive production provision relevant to the USITC's analysis of causation?

Answer

100. Japan argues that the captive production provision distorts the USITC's consideration of causation in violation of Article 3.5. Specifically, Article 3.5 provides that "it must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement . . . based on an examination of all relevant evidence before the authorities." In light of footnote 9 and Article 4.1, Article 3.5 requires an authority to demonstrate causation between imports and injury to domestic producers as a whole of the like product, and not merely an industry segment.

101. The captive production provision forces the USITC largely to ignore the attenuated nature of competition in the captive market, and accentuate injury indices from the merchant market segment, where import competition is most acute. It would be logically inconsistent for USITC to both recognize that captive production shields a significant portion of domestic production from import competition while at the same time "primarily focusing" on merchant market data that amplifies import penetration. This is the only explanation for why USITC omitted any mention of the shielding effect of captive production in its decision in this case,[47] which is otherwise a time-honoured fixture of its anti-dumping determinations.[48] By contrast, both Commissioners Crawford and Askey, who did

[44] *Id.* at 65-66 (excerpts provided in **Exh. JP-73**).

[45] *USITC Final Injury Determination*, USITC Pub. 3202 at VI-1 (**Exh. JP-14**) ("USX's verification and LTV's and six other producers' revised financial data were incorporated in this final report. The financial data were changed to revise the sales values, costs, and SG&A expenses of the transfers for these eight producers.").

[46] 19 C.F.R. § 207.30(b) (to be provided in Japan's Second Submission).

[47] USITC Final Injury Determination, at 9-21 (**Exh. JP-14**).

[48] *See, e.g.*, *1993 Flat-Rolled Steel Case*, at 22 (excerpts in **Exh. JP-59**).

not apply the captive production provision or endorse the majority opinion as did Commissioner Bragg, expressly noted that substantial captive production attenuated subject import competition.[49]

102. The significance of this condition of competition has been demonstrated in numerous other cases. USITC recognized the shielding effect of captive production in its contemporaneous cold-rolled steel determination, in which it found a similar degree of captive production, but did not apply the captive production provision.[50] The 1993 hot-rolled steel case hinged on the degree to which substantial captive production mitigated causation between subject imports and the domestic industry's widening financial losses.[51] By forestalling such a finding, the captive production provision prevents USITC from complying with Article 3.5.

Question 46: Could the parties please comment on the relevance of the Panel's decision in *US-Wheat Gluten* for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

Answer

103. The recent Panel report in *US—Wheat Gluten* held that authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury caused by imports rises to the level of "serious injury." Specifically, the Panel considered whether USITC's consideration of each alternative cause of injury satisfied Article 4.2(b), which "prohibits the attribution to increased imports of injury caused by other factors."[52] It found that the USITC "weighed each other factor individually against imports to determine whether such factor was 'a more important cause of injury', and then excluded such other factor as a 'cause of injury' when it did not. . . ."[53] After dismissing all other alternative causes, USITC only presumed that the injury caused by imports alone remained "serious." [54] The Panel held this approach to be inconsistent with the Safeguards Agreement:

> In our view, under USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause "*serious* injury" to the domestic industry. We consider that USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.[55]

[49] USITC Final Injury Determination, at 44, 51 (**Exh. JP-14**).

[50] *Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000), at 19 (excerpts attached as **Exh. JP-86**) ("{T}he extent of competition between domestic production and subject imports is somewhat limited, given the domestic producers' large volume of internal transfers and contractual sales.") ("*Cold-Rolled Steel Case*").

[51] USITC begins its determination with a four-page section devoted to considering and rejecting petitioners' request that captive production be excluded from the Commission's analysis. *1993 Flat-Rolled Case* at 15-18 (excerpts in **Exh. JP-59**). The Conditions of Competition section contains an entire paragraph devoted to the shielding effect of captive production. *Id.* at 21 (excerpts in **Exh. JP-59**). In the heart of its analysis of impact, USITC devotes over a paragraph to the shielding effect of captive production. *Id.* at 53 (excerpts in **Exh. JP-59**).

[52] United States—Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities, 31 July 2000, WT/DS166/R, at para. 8.151 ("US—Wheat Gluten").

[53] *Id.* at para. 8.151.

[54] *Id.* at para. 8.151.

[55] *Id.* at para. 8.152 (emphasis in original).

This echoes and amplifies the Panel Report in *Argentina—Footwear*, which found that authorities must perform an analysis separating the effects of alternative causes of injury from the effects of subject imports.[56]

104. By extension, anti-dumping authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury rises to the level of "material injury." Article 3.5 of the AD Agreement is perfectly analogous to Article 4.2(b) of the Safeguards Agreement: both provide that authorities must establish a causal link between imports and the requisite degree of injury, and that injury caused by factors other than subject imports must not be attributed to subject imports.[57] Indeed, the wording is almost identical: "causal link" versus "causal relationship"; and "shall not be attributed" and "must not be attributed." Moreover, the Panel Report in *US - Wheat Gluten* specifically cites to prior panel decisions under the Tokyo Round Anti-dumping Code is support of its decision,[58] showing that the panel recognized the close analogy between the language in the two agreements.

105. With respect to this case, to the extent USITC considered alternative causes of injury at all, it held that each only "partly explained" the industry's declining performance in 1998, concluding that subject imports "materially contributed" to the industry's declining performance.[59] A finding that subject imports "materially contributed" to injury, however, is not the same as a finding that the injury ***caused*** by subject imports alone is "material." As it had in *US—Wheat Gluten*, USITC only found subject imports to be a more important cause of injury than any other, without considering whether the injury caused by subject imports alone was material, as required by Article 3.5 and footnote 9.

Question 47: When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipment times for steel exports from Japan to the US?

Answer

106. According to US Commerce Department statistics, imports of subject hot-rolled steel from Japan peaked in November 1998 at 399,927 metric tons, before declining steeply to a negligible 14,437 metric tons in January of 1999.[60]

107. USITC's Prehearing Staff Report found, and the Final Staff Report confirmed, that "{l}ead times for Japanese product averaged 122 days from Japan in 1996-1997 and 113 days in 1998."[61]

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[56] *Argentina—Footwear*, para. 8.267 ("{A} sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any such injury caused by such factors can be identified and properly attributed.").

[57] Article 4.2(b) provides: "The {affirmative determination} shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Article 3.5 similarly provides: "It must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports."

[58] *US—Wheat Gluten,* at para. 141 and 8.142.

[59] *USITC Final Injury Determination,* at 20-21 (**Exh. JP-14**) ("Having taken these {other economic factors} into account, however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's declining performance…").

[60] Japanese Respondents' USITC Prehearing Brief (29 Apr. 1999), at 25, Exhibit 3 (excerpts attached as **Exh. JP-87**).

"Lead time" was defined in the importers' questionnaires as the number of days between order placement with the importer and receipt of the shipment by the customer.[62] Alluding to these three to four month lead times, Japanese respondents observed that although Japanese imports peaked in October and November of 1998, these imports would have been ordered sometime in July and August, long before the antidumping petition's filing on 30 September.[63]

108. Typical shipment times from Japan to the United States is one month to the west coast and one and one half months to the east coast.

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[61] *USITC Final Injury Determination*, at II-11 (**Exh. JP-14**); Japanese Respondents' USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**).

[62] USITC Importers' Questionnaire, *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808, at 15 (excerpts attached as **Exh. JP-88**).

[63] Japanese Respondents USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**); *USITC Final Injury Determination,* at I-1 (**Exh. JP-14**) (Petition filed on 30 September 1998.).

ANNEX E-2

Japan's Answers to Questions from the United States

(6 September 2000)

Question 1: Does Japan claim that, even if it prevails on all of the facts available issues and the Department's 99.5 per cent test, that KSC, NKK and NSC will not, nevertheless, have dumping margins over 15 per cent?

Answer

1. Japan believes this question is legally irrelevant. The issue in this dispute is not the level of alleged Japanese dumping. The issue is whether the US Government adhered to its WTO obligations in determining the level of anti-dumping duties. Even if the Japanese mills were "dumping" in the technical sense of the concept, that does not mean the Japanese mills are not entitled to fair treatment, consistent with US obligations under the WTO.

Question 2: Does Japan dispute that the increase in hot-rolled steel exports from Japan to the United States prior to the Department's investigation was massive?

Answer

2. As a factual matter, Japan does not agree with the value laden word "massive." Percentage increases from a small base can lead to large percentage increases. Moreover, increases need to be viewed in terms of the size of the market, and the rate at which demand is increasing.

3. More importantly, from a legal perspective, this question is irrelevant. Japan is not challenging the US Government findings about the size of the increase in imports. Japan's claim focused on other aspects of the US determination of critical circumstances, and the sufficiency of the evidence to support those conclusions at the time they were made. Meeting one requirement for invoking critical circumstances does not justify essentially ignoring the other requirements.

Question 3: In paragraph 47 of its opening statement, Japan appears to retreat from the absolute position taken in paragraphs 57 through 60 of its written submission that an administering authority may never use an adverse inference in selecting the facts available. Has Japan, in fact, retreated from this position? Can Japan give a single example of a situation in which an administering authority would be permitted to make an adverse inference?

Answer

4. Japan has not retreated from its position. Japan has never embraced the absolutist position which the United States tries to attribute to Japan. This is why Japan challenged the way in which USDOC applies the US statutory provision on facts available in practice, rather than the statutory provision itself. In practice, USDOC does not merely make inferences that may prove to be adverse, but rather specifically seeks to punish respondents.

5. Japan believes that the AD Agreement never authorizes the use of punishment. Authorities may find it necessary to turn to "facts available," and those facts may in many instances be "less favourable" than the result that would have obtained if the parties had provided information to the authorities. But, the United States insists on reading the concept of "less favourable" much too broadly -- not just as authorizing the use of inferences which may prove to be adverse, but as allowing broad discretion to punish foreign respondents.

Question 4: **In paragraph 51 of its opening statement, Japan states: *Implicit* in all of its letters to USDOC was a request that USDOC provide some guidance as to what it should do. (Emphasis supplied.) Yet in at least two places in its first submission, Japan states that KSC had specifically asked USDOC for its guidance (Japan 1st sub. & 67) and KSC asked USDOC for its guidance (Japan 1st sub. & 76.) Is Japan, in its opening statement, retreating from its position in its first submission that KSC explicitly asked Commerce for guidance on the CSI matter? If not, will Japan provide record citations for the assertions in its first submission that KSC did request guidance from USDOC? (Currently, the first submission has no such citations.)**

Answer

6. We answered this question in response to Panel Question 5.

Question 5: **In its first submission, at paragraph 140, Japan stated that its interpretation was that Article 9.4 required the Department to disregard *the facts available portions of these margins* for purposes of calculating the all-others rate and should have used *only that portion of the margins* not based on facts available.**

At paragraph 56 of its opening statement, in contrast, Japan no longer mentions removing facts available portions of the margins. Instead, Japan now states that a plain reading of the phrase is that a margin established using facts available, whether partially or entirely, cannot be used to calculate the all-others rate.

1. **Has Japan conceded that the Agreement does not call for removing portions of the calculated margins?**

2. **As Japan also acknowledges in para. 140 of its first submission, all mandatory respondents' margins were based on partial facts available. Under Japan's new reading of Article 9.4, would the Department then be required to disregard the margins for all three mandatory respondents?**

Answer

7. Japan has not changed its position. Japan believes that the authorities should base the "all others rate" on those portions of margins for responding companies that reflect actual information, not "facts available."

Question 6: **Paragraph 23 of the Japanese statement says that nothing stops the United States from considering as a condition of competition the merchant market v. captive portions of an industry; the problem in this case, according to Japan, is that the statute mandates the approach. Does this mean that an investigating authority's analysis is in accordance with the Agreement if, as a matter of discretion, it looks at the merchant market v. captive sales as a condition of competition?**

Answer

8. The US hypothetical is a far cry from the actual operation of the captive production provision.

9. Japan agrees that the authorities are to consider all relevant economic factors, and that the distinction between the merchant market and the captive market could be one of those relevant economic factors. For this analysis to be consistent with the AD Agreement, it would need to have several features very different from the current captive production provision.

10. First, the authority would need to have discretion to evaluate the particular relevance in a particular case, and should not be shackled by a mandatory instruction to consider.

11. Second, the authority should be free to accord this factor balanced consideration, no more or less than other factors. The authorities should not be instructed to elevate this one factor as the "primary focus" at the expense of other relevant factors.

12. Third, the authority should have the discretion to consider as a condition of competition the "shielding effect" of captive consumption, and should not be forced to focus on the potential effects in the merchant market to the exclusion of the shielding effect in the captive segment.

ANNEX E-3

Responses of the United States to Questions from the Panel

(6 September 2000)

Question 23. Does the US consider that the Panel is limited by Article 17.6(ii) [*sic*. 17.5(ii)] of the AD Agreement in the consideration of evidence with respect to claims under Article X of GATT 1994?

1. The Panel should first consider the scope of the new evidence referred to in this question. Of all the new evidence offered by Japan in this dispute, the only new evidence cited in Japan's Article X argument (paras 282 - 324) are two news reports of Department of Commerce Secretary Daley's statements to the Congressional Steel Caucus. (JP-19 and JP-20). These are offered to show "partiality" in two instances: the decision to accelerate the investigation (First Submission of Japan, at para. 299) and the adoption of the new critical circumstances policy (id., para. 309). None of the other new evidence that is the subject of the United States' preliminary objections are cited or referred to in any way in Japan's Article X argument.

2. So, the issue is whether the Panel should consider these two press reports -- allegedly showing "partiality" -- in considering Japan's Article X claim. Under Article 17.5(ii) of the Anti-Dumping Agreement, this Panel is to examine this matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Under Article 17.6(i), in assessing the facts of the matter, this Panel "shall determine whether [the authorities'] evaluation of those facts was unbiased and objective."

3. The Japanese respondents in the underlying antidumping investigation could have submitted these press reports to the administering authority during the course of the investigation, if they thought they were relevant. This would have permitted the Commerce Department to take this information into account in conducting its investigation, and would have permitted the other interested parties to the investigation (including US steel companies) an opportunity to comment and to "have a full opportunity for the defence of their interests" under Article 6.2 of the Anti-Dumping Agreement. The Japanese respondents chose not to do so. At the same time, they did choose to submit a letter in this proceeding and in the companion hot-rolled steel from Brazil case, protesting alleged bias by the Department in the conduct of the anti-dumping investigations, especially with regard to the expedited schedule. *See* US Response to question number one from Japan, concerning the fact that this evidence of alleged bias is on the Department's administrative record.

4. As discussed further below, the very nature of the proceeding under examination by this Panel – an investigation, on an administrative record, by national authorities – means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities. Article 17.5(ii) reflects this principle with respect to the Anti-Dumping Agreement, but this principle has also been applied in the context of disputes under the Safeguards Agreement, where there is no "Article 17.5(ii)". *E.g.*, *United States - Measures Affecting Imports of Woven Wool Shirts*

and Blouses from India (*United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30; *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities,* WT/DS166/R, Report of the Panel (July 31, 2000), para. 8.6.

5. That this Panel should disregard extra-record evidence in examining Japan's Article X claim is underscored by the particular claim at issue here. It would defy law and logic for this Panel to find that the authorities' decision was "unbiased and objective", based on the standards of the Anti-Dumping Agreement, but not "impartial" under Article X. This could not have been the intention of those who negotiated the specific provisions applicable to the review of antidumping investigations, Articles 17.5 and 17.6 of the Antidumping Agreement. To the contrary, it would suggest that there is a conflict, with respect to this issue, between the Anti-Dumping Agreement and Article X. In the event of such a conflict, the Anti-Dumping Agreement prevails to the extent of the conflict, under the general interpretive headnote to Annex 1A. Therefore, this Panel should not consider, for purposes of Article X, evidence that could have been presented to the administering authorities during the investigation, but was not.

Question 24. The USDOC has a system for the disclosure of confidential information under administrative protective order. Under that system, are the questionnaire responses of one respondent made available to other respondents in the investigation? If the answer is yes, was such disclosure made in this case, and, if so, when was this disclosure made?

6. Under Commerce's procedure for disclosure of confidential information under administrative protective order ("APO"), the questionnaire responses of one *respondent* are not made available to other *respondents* in the investigation. However, the questionnaire responses of a respondent are made available to other respondents' *representatives* (generally, legal counsel) that are authorized under the APO to receive such information. *See* 19 C.F.R. §§ 351.103, 351.105, 351.304-351.306, and 354.19; *see also* www.ia.ita.doc.gov/apo/index.html. In this case, the representatives for all three Japanese respondents (NSC, NKK, and KSC) were covered by the APO and, therefore, were entitled to receive any questionnaire responses that were filed. For example, the representatives for NKK were entitled to and did receive the confidential versions of the questionnaire responses of KSC and NSC. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version); Certificate of Service for NSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version).[1] Disclosure of the questionnaire responses was made at the time that the information was filed with Commerce. The USDOC's regulations require that when a respondent files a document, such as a response to a questionnaire, with the Department, it must simultaneously serve that document on all persons on the service list for the proceeding, and must include a certificate to this effect. 19 C.F.R. § 351.303(f).

Question 25. Could the US list the exhibits of Japan it considers should not be accepted by the Panel and mention for each of those exhibits the reason why it should not be accepted?

7. *Affidavit of Daniel L. Porter, Counsel to NKK* (**Exh. JP-28**): The Panel should not accept this sworn testimony by Mr. Porter because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its

[1] It should be noted that KSC's representatives opted not to receive the confidential versions of the responses of NSC or NKK. *See* Letter from Howrey & Simon to USDOC (18 Nov. 1998) at 1 (Public Document). In addition, it is the United States' understanding that the representatives for NSC requested not to receive the confidential versions of KSC's questionnaire responses. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (APO Version).

domestic procedures. The affidavit includes Mr. Porter's testimony about undocumented, alleged conversations with Commerce officials. It is impossible for the Panel to establish the veracity of these allegations without conducting a mini-trial *de novo* before the Panel, calling the persons involved before it for examination and cross-examination. If these conversations had been important to NKK, it could have submitted evidence of them to the Department during the investigation, so that they could have been analyzed, addressed by the other parties, and made part of the administrative record. Mr. Porter's affidavit also includes testimony about his firm's judgment of the impact on NKK's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Moreover, Mr. Porter has not even clearly stated what changes were made to the Department's computer program to calculate these values. Finally, the remainder of Mr. Porter's affidavit constitutes an indiscriminate blend of factual information already on the record with argument, most of which has already been set forth in Japan's first submission. For example, the statement at paragraph 17 of the affidavit that NKK's conversion factor was submitted "within the limits established by USDOC regulations" constitutes argument on a disputed point, yet is presented as if it were fact.

8. *Affidavit of Daniel J. Plaine, Counsel to NSC* (**Exh. JP-46**): The Panel should not accept this sworn testimony by Mr. Plaine for the same reasons for which it should not accept Mr. Porter's affidavit. In particular, the Department notes the indiscriminate blending of fact and argument on disputed points, such as at paragraph 11 regarding what allegedly happened at verification, at paragraph 19, where it is not clear what conversion factor, if any, was used in calculating the "actual margins" referred to in that paragraph, and at paragraph 26, where it is apparently assumed that *all* of NSC's home market sales to affiliates were made in the ordinary course of trade.

9. *Affidavit of Robert H. Huey, Counsel to KSC* (**Exh. JP-44**): The Panel should not accept this sworn testimony by Mr. Huey because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. The affidavit consists of Mr. Huey's testimony about his firm's judgment of the impact on KSC's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Even if we assume that Mr. Huey's firm ran the computer programs accurately -- *i.e.*, in the same way that the Department would have done had it made the assumptions Mr. Huey made (such as the assumption that *all* home market sales to affiliates were in the ordinary course of trade), the fact remains that his testimony constitutes extra-record evidence and may not be considered by the Panel.

10. *Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians* (**Exh. JP-56**): The Panel should not accept this sworn testimony by Messrs. Heiden and Pisarkiewicz because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. If the Japanese respondents had thought it was important to present their arguments concerning the appropriate statistical test using the testimony of these statisticians, they could perfectly well have done so during the investigation, when that testimony could have been analyzed, addressed by the other parties, and placed on the record. Instead, Japan chose to present this post-determination testimony to the Panel, where the statisticians may not be examined or cross-examined.

11. *Newspaper and Other Articles*: The Panel should not consider the following articles, appended to Japan's First Submission: **Exh. JP-16 through 23, 25 through 27, 32(a) through (e), 33, 36 through 38.** As we explained in our First Submission at paragraph 68, Japan could have, but failed to, put this information on the record during the investigation. Japan cannot now supplement, or belatedly attempt to buttress, that record before the WTO. Indeed, even Japan appears to concede this point, by admitting in its Response to the Preliminary Objections that at least some of its articles are "alternative sources for substantive arguments made during the investigations" (paragraph 26) or sources which "make the same argument" as that made during the investigation (paragraph 27). If

material from the record is adequate to make Japan's points, the Panel should insist that only such materials be used. Otherwise, parties in future WTO anti-dumping cases will be given the green light to append to their submissions whatever evidence or facts they think will strengthen points not made as strongly as they would have liked before the investigating authority, during the proceeding. Moreover, Japan now has provided other articles and materials that Japanese producers provided to the USITC which Japan regards as making the some of the same points that it attempts to make before this Panel. The United States has no objection to Japan's substituting documents that make equivalent points but were on the USITC's record.

12. In addition, some of Japan's exhibits challenged by the United States in its first submission were, in fact, on the record before the USITC. In paragraph 24 of the Response of Japan to the Preliminary Objections of the United States of America, Japan provides a chart listing citations challenged by the United States as being extra-record and citations to the administrative record where those documents appeared in the USITC's proceeding. As Japan's first written submission did not provide us with the location of these documents in the administrative record, we apparently missed some of these documents in our search of the record. We thus withdraw our request to have the panel disregard the documents listed in that chart for all the documents except the Paine Webber article,[2] insofar as these documents involve issues concerning the USITC However, **Exh. JP-32(f), JP-34, and JP-35** are all cited in the "Economic Context" portion of Japan's First Submission, at notes 36, 40, and 42. It is unclear to what, if any, of the issues of the case these articles pertain. To the extent that they may concern Commerce issues, the United States would still urge the Panel to disregard them, given that they were not before the Department, and because of the bifurcation of the administrative proceedings, as we explain further in our response to the Panel's question number 41.

13. As to the Paine Webber article,[3] we note that Japan lists its citation as "cited at Respondents' USITC Prehearing Brief, n.127-28." Thus, although Japanese producers made statements to the USITC based on that article, they chose not to provide the article, itself, to the USITC. The Article therefore was not part of the record before the authority, and the authority had before it only respondents' representations. As a result, we submit that Japan should not put the article, itself, before this Panel, but it should provide to the panel what it provided to the USITC -- the portion of the text of Respondents' Prehearing Brief

Question 26. The United States changed its policy concerning the timing of determinations of sufficient evidence of critical circumstances to justify taking measures necessary to collect anti-dumping duties retroactively. However, it appears that this change in policy was for all future cases. Could the United States verify whether this is in fact so? Could the United States please clarify the status of USDOC "Policy Bulletins" under US law?

14. Yes, the change in US policy concerning the timing of preliminary critical circumstances determinations set forth in Policy Bulletin 98/4 was for all ongoing and future cases. The Policy Bulletin in question, which is entitled "Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations," states that "{t}his policy is effective 7 October 1998 with respect to *all ongoing and future investigations*." Exhibit JP-3 (emphasis added). Indeed, the USDOC has applied its revised policy not only in the investigation at issue here, but also in the investigation of

[2] The articles listed in that chart are: *Preston Pipe & Tube Report* (Nov. 1998) and *Preston Pipe & Tube Report* (Sept. 1998), **Exh. JP-67**; Scott Robertson & Frank Haflich, "US mills lift slab purchases," *American Metal Market* (8 Feb. 1999), **Exh. JP-32(f)**; Charles Yost, "Thin Slab Casting/Flat Rolling: New Technology to Benefit US Steel Industry," in USITC, *Industry Trade and Technology Review,* 1996 ITC Lexis 428 (Oct. 1996), **Exh. JP-34(b)**; Donald Barnett and Robert Crandall, "Steel Decline and Renewal," in *Industry Studies* (2d ed. Larry Duetsch, ed. 1998), **Exh. JP-35**.

[3] Paine Webber, "Steel: A Gauntlet for All, Rewards for the Select," *Steel Strategies* # 24 (June 1998), **Exh. JP-34(a)**.

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation and in at least three other cases. *See Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China*, 64 Fed. Reg. 61835 (15 Nov. 1999) (prelim. crit. cir. determ.); *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422 (5 Nov. 1999) (prelim. crit. cir. determ.); *Certain Cut-to-Length Carbon-Quality Steel Plate From Japan*, 64 Fed. Reg. 20251 (26 Apr. 1999) (prelim. crit. cir. determ.); *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan and the Russian Federation*, 63 Fed. Reg. 65750, 65751 (30 Nov. 1998) (prelim. crit. cir. determ.).

15. Policy Bulletins are official documents which define or explain the Department's interpretation of law, or method of analysis, of a topic under the antidumping or countervailing duty law. Policy bulletins are publicly available statements of policy, which may be found at the Department's website. *See* www.ia.ita.doc.gov/policy/iapolicy/htm. Under US law, Commerce has the authority to change its policies, either before or during an investigation, as long as it clearly explains the reasoning for the change in position, parties have the opportunity to comment on the new position within the context of specific proceedings, and the new position is consistent with the anti-dumping laws. *See Association Colombiana de Exportadores de Flores v. United States*, 19 F. Supp.2d 1116 (20 July 1998); *Hoogovens Staal BV v. United States*, 4 F. Supp.2d 1213 (13 Mar. 1998). Policy Bulletins are particularly useful for providing the public with notice of *general* statements of practice (or change in practice) as developed during the course of administrative proceedings (as compared to *regulations*, which are promulgated less often and require more significant administrative process). However, the Department may similarly make statements of policy in case-specific determinations. In this case, Commerce's change in policy was consistent with the statute and the AD Agreement, and the parties had ample opportunity to comment on and provide evidence pertaining to the new policy within the context of this proceeding.[4]

Question 27. Is the US of the view that a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested necessary information with respect to use of facts available? Article 6.8 provides that in all three situations mentioned in Article 6.8, determinations may be made on the basis of facts available. In the event the US considers that the treatment should be different in all three cases, on what basis would the US distinguish between an interested party who "refuses access to" information, "otherwise does not provide" information, or "significantly impedes the investigation"?

16. The treatment of parties in the application and selection of facts available depends upon the situation. For example, with respect to responses to Commerce dumping questionnaires, a party may be substantially or largely cooperative, as was the case with the Japanese respondents in this case, but may not be cooperative in part, by impeding the investigation, or by refusing access to, or not timely providing, some of the necessary information. As it did in this case, Commerce takes into account those actions, or lack of actions, in determining whether to apply facts available and, if so, whether to take an adverse inference. Thus, whether a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested information would depend upon the facts of the case – *i.e.*, to what extent the party impeded the investigation, or failed to provide the requested information and the reasons for that failure, and the extent of the party's cooperation as to the rest of the requested information.

17. In this regard, the US statute, which applies to both USDOC and USITC, breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). The US statute

[4] See Preliminary Critical Circumstances Memo, at 3 **(Exh. US/B-42)**.

directs the investigating authority to use facts otherwise available where certain circumstances apply, such as whether the party has withheld information, failed timely to provide it, or significantly impeded an investigation. *Id*. § 1677e(a). The statute separately permits the authority to take an adverse inference against a party if the authority finds that the party has failed to cooperate by not acting to the best of its ability. *Id*. § 1677e(b). Thus, our statute does not direct the investigating authority to make distinctions between a party which "refuses access to" information, "otherwise does not provide" it, or "significantly impedes the investigation," in considering whether to apply facts available, and, if so, in considering whether to take an adverse inference.

Question 28. The US seems to suggest that the term "injury" for the purposes of a determination under Article 10.7 of the AD Agreement also includes threat of injury, but that the same term "injury" for a final determination under Article 10.6 of the AD Agreement only relates to current material injury. Can the US please explain this apparent difference in interpretation of that same term?

18. The United States does not mean to suggest this difference in interpretation of the same term. The term "injury," as used in Article 10.6 and applicable, by reference, to Article 10.7 of the AD Agreement, has the same meaning for purposes of both preliminary and final determinations of critical circumstances. Under the definition provided in Article 3, footnote 9 of the Agreement, the term "injury" includes threat of injury "unless otherwise specified." Neither Article 10.6 nor Article 10.7 excludes threat from the definition of the term "injury." Thus, under Article 10.6, a *final* affirmative determination of critical circumstances would be proper if an administering authority finds: (1) that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury *or threat thereof*; and (2) that the material injury *or threat thereof* is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. Sufficient evidence of these same factors is also necessary when making an affirmative preliminary critical circumstances determination under Article 10.7.

19. Confusion on this point may have arisen because of the separate and distinct requirements under Articles 10.2 and 10.4 of the Agreement, regarding the retroactive imposition of anti-dumping duties for the period of provisional measures once there is a *final* determination regarding injury (under US law, a final determination of injury issued by the USITC). Under Article 10.2, retroactive duties may only be applied if: (1) there is a final determination of current material injury (but not threat thereof), *or* (2) there is a final determination of threat of injury *and* the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury. Thus, if the final injury determination in this case had been a finding solely of "threat of injury," an additional finding under 10.2 may have been necessary. Additionally, Article 10.4 requires that (except as provided under Article 10.2), where there is no finding of current injury, definitive anti-dumping duties may be imposed only from the date of the determination of threat of injury. However, because the USITC Final Determination in this case *did* indeed find current material injury, these provisions are not applicable here.

Question 29. The US appears to argue that the use of the words "*would cause* injury" in Article 10.6(i) of the AD Agreement suggests that the injury might also lie in the future and thus only be a threat of injury at the time of making the determination. In this line of argument, however, the term "injury" seems to be limited to current material injury and does not appear to include "threat of injury". Can the US clarify its position in this respect in light of its overall argument that unless otherwise specified, the term "injury" means both current material injury and threat thereof?

20. As expressly set forth in Article 3, footnote 9 of the AD Agreement, unless otherwise specified, the term "injury" means both current material injury and threat thereof . The term "*would cause* injury" in Article 10.6(i) is no exception. Because the term "injury" in Article 10.6(i) is not qualified or limited, it must be read to mean "material injury or threat of material injury." Thus, irrespective of the words "would cause," Article 10.6(i) refers to both "injury" and "threat thereof." A contrary reading would be proper only if the provision stated, "would cause injury (but not threat thereof," as it does in Article 10.2.

21. The use of the words "*would cause* injury" clarifies the question to be resolved under Article 10.6(i) and further establishes that the term "injury" in that provision includes threat of material injury. Article 10.6(i) does not impose a general requirement that there be injury to the domestic industry (or a finding of such). Rather, Article 10.6(i) inquires into whether importers had knowledge (or should have had knowledge) that dumping existed and that such dumping "would cause injury." Because the question under Article 10.6(i) relates to knowledge by importers (an imprecise fact), it is appropriate that the inquiry be simply whether the importers knew or should have known that dumping practices "would cause" injury (or threat thereof). In other words, it would be difficult, if not impossible, for importers to know precisely whether dumping was, at that time, causing injury to the domestic industry, or whether it was threatening the industry. Importers are not expected to know the exact state of the domestic industry (*i.e.*, whether dumping practices are presently threatening the industry or causing current material injury) at a given time. Rather, the question under Article 10.6(i) simply inquires as to whether importers should have been aware that the dumping *would* ultimately cause injury. Thus, although the term "injury" within the Agreement includes both current material injury and threat of injury, the use of the phrase "*would cause*" within Article 10.6(i) actually clarifies that the question is whether importers should have known that the domestic industry *would be injured* (i.e., was being *threatened*) by dumping practices.

Question 30. The Panel understands that in making its critical circumstances determination, USDOC considered it necessary to rely on other information such as newspaper articles and the information contained in the petition because USITC had preliminarily found threat of injury. Why would USDOC feel it needs more information in a case in which USITC finds only threat of injury if, as the US argues, it is clear that the term injury in Article 10.6 of the AD Agreement also includes threat of injury and Article 10.7 of the AD Agreement thus also only requires sufficient evidence of such threat of injury?

22. Article 10.6(i) involves a question of importer knowledge.[5] In cases where the USITC makes a preliminary finding of *current* material injury, under US practice, the Department presumes, based upon the finding of current injury, that importers *knew or should have known* that the dumping would cause injury. However, in instances in which the USITC makes a preliminary finding that the domestic industry is *threatened* with injury as a result of dumping, but is not facing current material injury, the threat of injury may be less apparent to the importers. Thus, where there is a USITC preliminary finding of threat, but no present material injury, the US looks to other evidence in the record to determine whether importers should have known that the dumping was impacting (i.e., threatening) the domestic industry. In this case, the record contained extensive information suggesting importer awareness of injury (or threat thereof), including: (1) the ITC preliminary determination of threat; (2) various national and international news articles and press reports (*e.g.,* the Wall Street Journal, American Metal Market, etc.) discussing massive dumped imports and plummeting domestic prices; (3) the evidence supporting the high margins in the petition; (4) the 101 per cent increase in imports over the short period of time; and (5) the injury information in the petition.

[5] Note that, although Article 10.6(i) directs administering authorities to determine whether "the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury," it does not prescribe a specific method for making such determination.

Question 31. The US argues that in US practice there is no difference between the requirement of a "reasonable basis to believe or suspect" and the standard of "sufficient evidence" of the AD Agreement. Can the US further expand on this argument and provide examples from its practice that would support this argument?

23. As a practical matter, the Department uses the two phrases interchangeably, as we detail below. Under US law, the phrase "reasonable basis to believe or suspect" in used in several contexts which arise during early stages of anti-dumping or countervailing duty proceedings. For example, the phrase is utilized in the statutory provisions governing determinations of whether to initiate sales-below-cost investigations, determinations of whether to initiate on certain allegations in countervailing duty investigations, and preliminary determinations of whether critical circumstances exist. *See, e.g.,* 19 U.S.C. §§ 1671(e), 1673b(e)(1), 1677b(b). The use of the phrase, "reasonable basis to believe or suspect" does not mean that there is not "sufficient evidence" of the required conditions leading to initiation or preliminary determinations.

24. Thus, where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition. This evidentiary requirement is explicit in Department determinations. Most significantly, the Department has consistently determined that the "reasonable basis" standard requires a finding of sufficient evidence, and has used the two phrases interchangeably in the context of preliminary critical circumstances determinations.[6] In addition, the Department has made similar determinations in the context of initiating countervailing duty investigations.[7] Furthermore, the Department's reviewing court, the US Court of International Trade ("CIT"), has addressed this issue on two occasions. In *Huffy Corp. v. United States,* the CIT found that, "{i}n reviewing the record, . . . even if the appropriate statutory standard is applied, plaintiffs failed to present to the ITA *sufficient evidence to create reasonable grounds to believe or suspect* that sales were being made at below cost in the home market." 632 F. Supp. 50, 58 (Mar. 27, 1986) (emphasis added). Additionally, in a recent case, the CIT found that Commerce had not based its determination to conduct a below-cost test on sufficient evidence. The Court explained, "Commerce did not point to the 'reasonable grounds,' if any, it had to

[6] See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 64 Fed. Reg. 60776, 60779 (8 Nov. 1999) (Section 733(e)(1) of the Act provides that if a petitioner alleges critical circumstances, the Department will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise . . . . Based on the recent existence of this order, there is sufficient evidence to determine that there is a history of dumping of the subject merchandise and a history of material injury as a result thereof.) (emphasis added); Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 64 Fed. Reg. 60422, 60423 (5 Nov. 1999) ("Section 733(e) of the Act provides that the Department will determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping .... The existence of an antidumping order on ammonium nitrate in the EC is sufficient evidence of history of injurious dumping.").

[7] *See, e.g., Notice of Initiation of Countervailing Duty Investigations: Certain Pasta From Italy and Turkey,* 60 Fed. Reg. 30280, 30284 (June 8, 1995) ("The Department does not consider the creditworthiness of a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy. . . . Because petitioners have not provided sufficient evidence of the Turkish pasta producers' uncreditworthiness, we are not including a creditworthiness allegation in our investigation at this time."); *See Notice of Initiation of Countervailing Duty Investigations: Oil Country Tubular Goods From Austria and Italy,* 59 Fed. Reg. 37965, 37967 (July 26, 1994) ("For the purposes of initiation, in determining whether petitioners have provided sufficient evidence of competitive benefit, the Department will determine whether a petitioner has provided a reasonable basis to believe or suspect that [certain conditions have been met]."); *see also Initiation of Countervailing Duty Investigation: Porcelain-on-Steel Cooking Ware from Spain,* 51 Fed. Reg. 26730 (July 25, 1986) (Department stated that "a simple assertion, such as that made by petitioners . . . does not provide sufficient evidence to support an allegation," and thus, does not provide "reasonable grounds within the meaning of {the Act}.").

suspect . . . below-cost sales . . . . Moreover, {the statutory provisions} define what constitutes sufficient evidence with which to form a reasonable suspicion, and there is not evidence in the Final Results that Commerce relied on the type of information required to form the 'reasonable grounds to believe or suspect' that below-cost sales existed before it initiated the investigation."[8] *RHP Bearings Ltd. v. United States,* 2000 Ct. Intl. Trade LEXIS 95, at 35 (Aug. 3, 2000). In other words, both the Department and the CIT have recognized that where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition.

25. It is important to note that, the fact that the phrase "reasonable basis to believe or suspect" is utilized in US law for both initiations of certain types of investigations and preliminary critical circumstances determinations does not mean that the type of evidence for the two types of inquiries is the same. Rather, it merely indicates that, consistent with Article 10.7, the determination may be made at an early stage, prior to the receipt of all potential evidence. In other words, a finding that there is a "reasonable basis to believe or suspect" that certain conditions exist must be based upon sufficient evidence of those conditions for purposes of the particular type of determination at issue. Thus, consistent with Article 10.7, the US statute utilizes the phrase "reasonable basis to believe or suspect" to indicate that preliminary critical circumstances determinations made be made at any time after initiation (*i.e.,* once there is sufficient evidence, but potentially prior to the receipt of all record evidence).

Question 32. On page 10 of its oral statement, Japan quotes from the US first submission that the US acknowledges that "it is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party". Does the US believe that such "likely adverse" information may constitute the sufficient evidence necessary for a determination under Article 10.7 of the AD Agreement? Please explain.

26. Yes. The information contained in a petition *may* constitute sufficient evidence to establish that withholding of appraisement or assessment (or other necessary measures as described by Article 10.7) is necessary. The US agrees that information submitted in a request for initiation is likely, in many cases, to be adverse to the interests of the responding party. It is impossible, however, at initiation, for an investigating authority to know whether the data in the petition are more adverse or more favorable to the respondents than their own data. In fact, in this case, the dumping margins calculated in the petition were actually less than the final dumping margin calculated by the Department for KSC. *Compare Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (6 May 1999) (final determ.) *with* Petition for the Imposition of Anti-Dumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan (30 Sept. 1998) at 21, 21-22 n.33 (Public Version). Nevertheless, although a petition may contain data that are adverse to the interests of the responding party, the data must be based on and supported by the available evidence. Indeed, the petition often reflects *actual* data that are *within the range* of margins for exporters and producers, albeit potentially in the top of the range. As such, the information in a petition may constitute the sufficient evidence necessary for a determination under Article 10.7.

27. It is also important to take note of the purpose and instruction of Article 10.7. In making a determination under Article 10.7, an administering authority is not making a precise finding of

[8] Note that, the relevant statutory provision (relating to below-cost allegations) details the facts that must be considered for that analysis, but does not discuss the meaning of sufficient evidence in general, nor does it describe the type of evidence to be relied upon. The Statement of Administrative Action ("SAA"), however, does provide guidance on what constitutes "sufficient evidence" for purposes of the COP inquiry. The SAA states, **"{r}easonable grounds" will exist when an interested party provides *specific factual information*** on costs and prices, observed or constructed indicating that sales in the foreign market in question are at below-cost prices." SAA at 163.

dumping and consequent injury. Rather, an administering authority is determining whether there exists sufficient evidence of critical circumstances (i.e., knowledge by importers of the existence of dumping and that such dumping would cause injury, and massive dumped imports within a relatively short period of time) to warrant immediate action - withholding of appraisement or assessment, or other necessary measures. The US would not propose that a final margin of dumping (an extremely precise calculation containing many variables) be calculated based solely upon facts contained in a petition without first providing the respondents with an opportunity to provide their own data. The Agreement does not provide for such. However, Article 10.7 does provide that measures may be necessary after initiation in order to preserve the ultimate anti-dumping remedy. Thus, a petition containing sufficient evidence establishing importer awareness and massive dumped imports over a short period of time that has been scrutinized for accuracy, as was the case here, may properly provide a basis for a preliminary critical circumstances determination under Article 10.7.

Question 33. In paragraph 42 of its first oral statement, Japan refers to the language of Article 2.2 of the Agreement as setting out the mandatory and exhaustive list of methods for determination of normal value. As Japan notes, Article 2.2 prefaces the alternatives set forth (constructed value and third country export price) with the statement that these alternatives shall be applied "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or "when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison." Does the US consider that, in this case, there were sales of the like product in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison, and that therefore the stated alternatives are not the mandatory and exclusive alternatives for determination of normal value?

28. Yes. The United States does consider that, in this case, even after certain sales to affiliates were eliminated from the home market because they were found to be "not in the ordinary course of trade," other home market sales of the like product which were made in the ordinary course of trade remained.

29. Article 2.1 of the Agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product from affiliated resellers to the first unaffiliated buyer for consumption in Japan were made in the ordinary course of trade and clearly come within this definition. No party disputes that the downstream sales in question are of the "like product." Moreover, because these sales are to unaffiliated parties, there is no suspicion of unreliability by virtue of affiliation. Indeed, no party has suggested that the downstream sales are "outside the ordinary course of trade" for any reason.

30. Furthermore, there was no contention that a particular market situation or low volume prevented a proper comparison from being made between these downstream home market sales and the US export sales. Article 2.2 provides that when "there are **no** sales" in the home market meeting the above criteria, the alternative bases for normal value are third country sales or constructed value. Because in this case there are sales meeting the criteria for the preferred option of using home market sales as the basis for normal value for each of the products sold to the United States, the Department was not permitted under the Agreement to reach those secondary alternatives. Thus, the question of whether they are "mandatory and exclusive" secondary alternatives is irrelevant.

Question 34. Suppose that sales were made in the home market to, among others, two customers, one of whom is an affiliated customer, while the other is not. Assume also that the weighted average price of the sales to those two customers is identical. It seems it would be possible, under the US 99.5 per cent test, that the sales to the affiliated customer will be

disregarded in the determination of normal value, while sales to the unaffiliated customer having the same weighted average price would not be disregarded, if the weighted average price of all sales to all unaffiliated customers were more than 0.5 per cent higher than the weighted average price to the affiliated customer. Is this a correct understanding of the implications of the 99.5 per cent test in operation? If so, please explain how the US can conclude that sales that are, on average, identically priced may be considered as having been made in the ordinary course of trade when they are made to an unaffiliated customer and outside the ordinary course of trade when made to an affiliated customer?

31. The Panel is correct that, when it applies the 99.5 per cent test in the above-described situation, the Department would disregard sales to an affiliated customer whose sales were made at the same weighted average prices as those to an unaffiliated customer which purchased at prices which were more than 0.5 per cent below the weighted average for the group of all unaffiliated customers.[9]

32. As an initial matter, it should be noted that the margin calculation, which is prescribed by the Agreement, operates in the same fashion. Just as affiliated customer sales fail the arm's length test when their prices fall below the weighted-average sales price to all unaffiliated customers, export sales are considered "dumped" when their average prices fall below the weighted-average price of all home market sales used to calculate normal value. The fact that there may exist a single home market price that is identical or lower than the export price does not eliminate the dumping.

33. We do not disregard sales to the unaffiliated company because they are, by definition, made at arm's length and are appropriately considered, along with other arm's-length sales, in determining the normal value of the merchandise. However, because sales to affiliated parties are inherently suspect with respect to the extent to which the prices are based on market influences, the United States presumes that such sales should be disregarded. It could reasonably have disregarded all such sales in the home market, regardless of price levels to affiliates, as Canada and Mexico do, and relied solely on arm's-length sales to unaffiliated parties.

34. The current test is designed to make limited exceptions to this presumption to increase the volume of sales available for comparison and reduce the need to rely on downstream sales. But this purpose must be balanced against the need to avoid undermining an accurate calculation of normal value–which otherwise would be based on prices to unaffiliated customers in the market *as a whole* and in most instances on *average* prices in the market as a whole. Thus, if pricing to an affiliate appears not to understate pricing in the home market *as a whole* (as reflected in average prices to all unaffiliated customers), we can have a sufficient level of confidence that normal values will not be significantly distorted by including these sales.

35. Because there is no requirement that sales to affiliates *ever* be considered in the ordinary course of trade, there is certainly no requirement that such sales be deemed "ordinary" when made at the level of the lowest-priced sale to an unaffiliated party, rather than at the level of the average of sales to unaffiliated parties. The logical extension of such a practice would be to include all sales to affiliates that were priced at the level of the lowest-price sales to an unaffiliated customer. This plainly would allow respondents to distort the normal value by making targeted low-priced sales to an unaffiliated customer and overweighting the low end of the price range to affiliated customers. Normal value could no longer be assumed to reflect arm's-length prices in the market as a whole.

[9] This situation could occur because the overall weighted average, across all unaffiliated customers, would, by the very nature of an average, include values both above and below that average. Sales to some unaffiliated companies will be characterized by higher-than-average prices, and sales to other by lower-than-average prices. It is possible that the difference between the average and the rate for the lowest-price company will be greater than 0.5 percent, thus producing the situation described above.

Thus, when an affiliate does not pass the test, we simply choose not to deviate from our preference for using downstream sales to unaffiliated customers to avoid possible distortions. Given the inherent concern with respect to the influence affiliation has on pricing, Commerce's interpretation of Article 2.2, through the use of the 99.5 per cent test, is a permissible interpretation.

Question 35. Could the US explain whether, when sales are found to be outside the ordinary course of trade for having failed the 99.5 per cent test, the US will in all cases replace those sales to affiliated customers with re-sales by those affiliated customers? If not, what other methodologies may be applied according to the US?

36. In most, but not all, cases, when home market sales are found to be outside the ordinary course of trade because they have failed the 99.5 per cent test, the Department will rely on sales to downstream unaffiliated customers, or to downstream affiliated customers that pass the 99.5 per cent test. In addition, the Department's regulations, at 19 C.F.R. § 351.403(d), permit it to exclude downstream sales from the normal value calculation if sales to affiliated parties are less than five per cent of the total value of the exporter or producer's home market sales. During the investigation, the Department granted requests from both NSC and KSC that they be excused, pursuant to this provision, from reporting small amounts of home market downstream sales. *See Preliminary Determination*, at 64 Fed. Reg. 8296 and *Final Determination* at Comment 12. We also make exceptions when respondents can demonstrate that they are unable to obtain downstream sales information by allowing them to avoid having to report downstream sales.

Question 36. The US argues that if sales to an affiliated customer pass the 99.5 per cent test, the prices of all sales to that customer will be used in the determination of normal value. Can the US explain how the fact that the prices of all sales to that affiliated customer are used in the determination of normal value demonstrates the reasonableness of the 99.5 per cent test under the AD Agreement?

37. The fact that we use all sales to an affiliate that passes the test demonstrates that the 99.5 per cent test has no predictable or necessary effect on the calculated dumping margin. For any given affiliate that passes, there typically will be some products sold to that affiliate at prices less than the average price to unaffiliated customers as well as other products sold at prices higher than the unaffiliated average. The products actually used for comparison purposes – to determine normal value for exported subject merchandise – may in fact be those products sold to the affiliate at lower than average prices. Conversely, when sales to an affiliate are disregarded because the affiliate did not pass the test, the sales disregarded may include some sales of products at higher than average prices that would otherwise have been used for comparison purposes. Thus, application of the 99.5 per cent test may increase or decrease normal value. The test does not bias the analysis; it may in fact benefit certain respondents.

38. The fact that all sales to a customer which passes the arm's length test are used in the margin calculation is a natural consequence of the fact that the Department' s arm's length test is based on an average which is customer-specific, *i.e.*, it is based on the pricing policies that are the result of relationships between customers. The alternative test proposed during the investigation, on the other hand, was sale-specific; some sales would be deemed affected by the affiliation and others not. Because affiliation is a relationship between customers and not between products, the focus on a customer-specific outcome is one aspect of the reasonableness of the 99.5 per cent test.

39. In addition, the focus on the <u>average</u> price relationships of the affiliated customer is permissible because "averaging" is itself one reasonable way to look at overall pricing behaviour between buyer and seller. In situations involving the sale of multiple products, furthermore, it diminishes the likelihood of data manipulation by "bunching" sales of products to a given customer,

providing some products at lower-than-usual prices as compensation for providing other products at higher-than-usual prices.

Question 37. In paragraph 37 of its first oral statement, Japan has proposed an example of what it asserts is bias in the United States 99.5 per cent test to determine whether sales to an affiliated customer are outside the normal course of trade. Could the US please comment on this example, with specific reference to how the United States would, under the applicable statutory and regulatory provisions, and its established policies, respond to such a situation.

40. The situation described by Japan is one in which a producer sells to its very profitable affiliate at an unusually high price in order to reduce the profits, and thus the tax liability, of the affiliate. Japan complains that the United States "never takes this situation into consideration," and argues that by not discarding such sales, in which the price is distorted but higher than the market average, the United States' arm's length test is "biased."

41. As an initial matter, Section 773 of the Department's statute and section 351.403(b) of its regulations provide that home market sales can only be used in the calculation of normal value if they are made in the ordinary course of trade. If sales are not made in the ordinary course of trade for some reason other than because of affiliation, they can be excluded for that reason. If a respondent were to demonstrate, for example, that a reported "sale" was merely a token vehicle for a transfer of funds to avoid taxes, the sale might be disregarded.

42. A more usual approach is for respondents simply to report the high-price home market sale as being "ordinary." Commerce would apply its 99.5 per cent test, the affiliate to which the higher-price sales were made would pass the test, and these sales would be retained in the database. The retention of such higher-price sales in the home market database, however, in no way constitutes "bias" toward the respondent. Were the Department to disregard higher-price sales to affiliates, it would normally require that the respondent report the downstream sales, which would normally be at even higher prices. In most situations, therefore, the Department's lack of concern with higher-price sales to affiliates may have the effect of reducing margins, compared to the margins that would have resulted from margins based on downstream sales.

43. Nor is the respondent cheated of the benefit it might have had from a comparison to a lower-priced downstream sale. In those infrequent situations where downstream prices are below prices to the affiliated reseller (as when losses are sought to be shifted to the affiliated reseller for tax purposes), the respondent can simply report the downstream prices in the first place. As noted in paragraph 207 of USG's first submission, Commerce instructs respondents that "if you sold to an affiliate who resold the merchandise, report the affiliate's resales to unaffiliated customers [*i.e.*, home market downstream sales] rather than your sales to the affiliate." Where an affiliated customer resells at a price below its acquisition cost, respondents are free to report those lower downstream sales prices even if the sales to that affiliated reseller would have passed the 99.5 per cent test.

Question 38. In paragraph 30 of its oral statement, the US states that "In order to be inconsistent with an international agreement, a domestic law must require actions that are inconsistent with the agreement". Please explain.

44. Japan is arguing that the US statutory provision on critical circumstances is, on its face, inconsistent with the Anti-Dumping Agreement, because it does not explicitly repeat the obligations of the Anti-Dumping Agreement. A statute is not on its face WTO-inconsistent, however, if it permits an interpretation that is WTO consistent. The statute does not have to mimic the words of the relevant agreement. In *United States - Measures Affecting the Importation, Internal Sale and Use of*

Tobacco[10] the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*[11] found that "the mere existence" of the anti-circumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision.[12] The Panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."[13]

45. That the US statutory provision on critical circumstances does not specifically address some of the Agreement's criteria for the imposition of retroactive measures does not mean that those criteria are not addressed by the administering authority. The statute does not prevent the Commerce Department from considering those factors -- to the contrary, the Commerce Department's policy specifically recognizes those factors. Therefore, the statute itself is not contrary to the Anti-Dumping Agreement. The same analysis would apply to Japan's challenges to the " captive production" and "all-others" provisions of the US anti-dumping statute.

QUESTIONS TO BOTH PARTIES

Question 39. Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

46. With respect to Japan's Article X GATT claim, please see the US response to question 23 above.

47. With respect to Japan's "on its face" claims, in which the Panel is considering the WTO-consistency of a statute "on its face", and not as applied in a particular investigation, the United States believes that Article 17.5(ii) does not limit the evidence that the Panel may consider with respect to those claims. Japan does not offer this new evidence, however, to support its claim that the US statute is WTO-inconsistent on its face. Rather, most of this evidence – i.e., the press and other public reports and the attorney affidavits – is offered in support of Japan's claim that the application of the law in this particular investigation was WTO-inconsistent. The only exception to this – and the only exception offered by Japan – is the affidavit by so-called "experts" (i.e., statisticians) that the 99.5 per cent test "can be unfair" and can lead to anomalous results. The 99.5 per cent test, however, is not statutory, nor is it regulatory; indeed Commerce specifically declined to incorporate this test into its regulations, because it wanted to leave itself open to considering other "arm's length" tests in the future. Nothing requires the Commerce Department to apply this test in individual investigations. Indeed, the Commerce Department has specifically kept open the possibility that a different approach might be taken in individual investigations, if the 99.5 per cent test produces anomalous results. If the Japanese respondents thought that the evidence of the statisticians was important to show that the 99.5 per cent test operates inappropriately, they had an obligation to present that evidence to the decision-makers. Since they did not, this Panel should not base its examination of this matter on that affidavit.

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[10] Panel Report on United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, BISD 41S/131 ("US -- Tobacco").

[11] Panel Report on EEC -- Regulation on Imports of Parts and Components, adopted 16 May 1990, BISD 37S/132 ("EEC -- Parts").

[12] *Id.*, paras. 5.9, 5.21, 5.25-5.26.

[13] *Id.*, para. 5.25.

Question 40. Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted even if they were not made available under the appropriate domestic procedures as required by the AD Agreement? Could there be other reasons apart from the requirements of Article 17.5(ii) of the AD Agreement to exclude certain documents submitted by Japan to the Panel?

48. Please see the US response to question 23 above. For the reasons in that response, the exhibits cited by Japan in its Article X argument (JP 19 and 20), should not be considered by this Panel.

49. There are reasons other than Article 17.5(ii) that this Panel should disregard "extra-record" documents submitted to it by Japan. The very nature of the proceeding before this Panel – an investigation, on an administrative record, by national authorities – means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities.

50. The Safeguards Agreement, Article 3, requires that safeguard measures be applied only after an investigation by the national authorities, which includes opportunities for all interested parties to present evidence and views, and respond to the evidence and views of other interested parties. It does not, however, have a provision explicitly limiting a Panel's examination to the facts presented to the national authorities, as does Article 17.5(ii) of the Anti-Dumping Agreement. Nevertheless, in a number of disputes arising under the Safeguards Agreement, panels have emphasized that their review of Members' determinations to take safeguard measures is limited to the evidence used by the importing Members in making its determinations. *E.g., United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (*United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30. Most recently, the Panel in *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities,* WT/DS166/R, Report of the Panel (31 July 2000), para. 8.6, stated that

> With the framework established by the Agreement on Safeguards, it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determination of serious injury and causation. <u>It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not</u>.

Thus, it is not only Article 17.5(ii) of the Anti-Dumping Agreement, but also the nature of the antidumping investigation itself, that directs that the Panel not consider extra-record evidence.

Question 41. Do the parties consider that documents which were submitted to the <u>USITC</u> but not to USDOC were made available "in accordance with appropriate domestic procedures" and can therefore be considered by the Panel even when those documents are submitted to the Panel with regard to claims concerning determinations made by <u>USDOC</u>? According to the parties, should the Panel consider as relevant this internal US distinction between proceedings before the USITC and USDOC when considering the question of admissibility of evidence under Article 17.5(ii) of the AD Agreement?

51. Under the "appropriate domestic procedures" in US antidumping duty investigations, there are two separate administrative records: one for the investigation of dumping by the Commerce Department and one for the investigation of injury by the US International Trade Commission. With very limited exceptions, information is not shared between the agencies. *See* sections 334 and 777(b) of the Tariff Act of 1930. In conducting its investigation and making its determinations, the Commerce Department relies exclusively on the information presented to it and placed on its administrative record; the same is true of the International Trade Commission. Under US procedures, these administrative records are separate, and are not shared between the two agencies. Therefore, when examining this matter "based upon . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", this Panel should disregard documents that are submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record. This is so even if those documents were put on the International Trade Commission administrative record. To do otherwise would be to examine a decision of the Commerce Department based on facts that were not made available to the Commerce Department under its procedures. This would be contrary to Article 17.5(ii).

Question 42. Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

52. The United States agrees with the Panel's suggestion that the use of the word "may" in Article 2.3 may permissibly be construed as meaning that the authority is not *required* to construct an export price on the basis of the resale price to the first independent purchaser in any case. Indeed, as occurred in this case, there are situations where an authority might not construct export price in this manner. For example, as we noted at paragraph 122 of the United States' first submission, Commerce will construct export price in a manner other than on the basis of the resale price to the first independent purchaser, if the value added by the affiliated person is likely to exceed substantially the value of the subject merchandise, when sold to the unaffiliated party. KSC urged that Commerce apply this methodology (the "special rule") to its sales through CSI, but the value added by CSI's further manufacturing did not meet the threshold for application of this rule. Japan did not contest this finding. In addition, as we noted at paragraph 19 of the United States' first submission, Commerce did not construct an export price for the US sales through KSC's affiliate, VEST. Instead, Commerce disregarded those sales altogether, because they accounted for such a small part – less than five per cent – of KSC's US sales.

53. Generally, however, Commerce interprets Article 2.3 in a manner causing it to seek to construct export price on the basis of the resale price to the first independent purchaser. This interpretation ensures that the investigating authority will be using sales and prices of the actual products sold to the United States, even though they must be adjusted for costs incurred in further manufacturing and/or resale. Such information is likely to result in a more accurate construction of the export price, without the problem of searching for surrogate product matches. In addition, this interpretation precludes exporters from manipulating dumping margins by sheltering low-priced sales through their affiliates.

Question 43. Could the parties please clarify their position concerning the degree of cooperation required under Article 6.8 and Annex II of the AD Agreement?

54. Neither Article 6.8 nor Annex II of the AD Agreement addresses the matter of *degree* of cooperation, nor whether that cooperation may be with regard to some or all of the requested information. In fact, the word "cooperate" appears only at the end of paragraph 7 of Annex II, which provides that "if an interested party does not *cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable than if the party did *cooperate*." (Emphasis added.) As we explained in response to question 27 above, the US statute breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). With regard to the second part of the statute -- deciding whether to take an adverse inference against a party -- the investigating authority will consider whether the party has failed to cooperate by not acting to the best of its ability to provide the requested information. *Id*. § 1677e(b). This determination of cooperation will depend upon an analysis of all the facts and circumstances of the case. For example, in this case, all three Japanese respondents – NSC, NKK, and KSC – cooperated by timely producing large amounts of information. It was only with regard to part of the requested information that Commerce determined they did not cooperate by not acting to the best of their ability, such that an adverse inference was warranted as to the facts available for that information.

Question 44. What information was submitted to and accepted by the USITC after applicable deadlines?

55. No information was submitted to and accepted by the USITC after applicable deadlines in the investigation. The deadline for submission of factual information was 3 June 1999, the deadline for parties' final comments was 7 June 1999.[14]

Question 45. Is the captive production provision relevant to the USITC's analysis of causation?

56. Article 3.5 of the Antidumping Agreement provides that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury within the meaning of this Agreement" (emphasis added). As a result, all elements of Article 3.2 (volume and effect of prices) and Article 3.4 (impact of dumped imports on the domestic industry) are relevant to an analysis of causation. The captive production provision pertains to the analysis of Article 3.4 factors. When the captive production provision applies, certain of the factors in Article 3.4 (*i.e.*, those considered in determining market share and those affecting financial performance) are considered as they relate to the merchant market as well as to the industry as a whole. The captive production provision therefore is relevant to the USITC's analysis of causation.

57. The captive production provision, itself, however, does not have any special effect on the causation analysis. It is merely a tool used in analyzing some of the factors listed in Article 3.4 to obtain a more complete picture of the affects of dumped imports on the domestic industry as a whole. Using a segmented analysis in this way does not have any particular affect on the causation requirement listed in Article 3.5.

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[14] *See* Transcript of 4 May 1999 Hearing at 334 (Statement of Chairman Bragg). (**Exh. US/C-20**) The Proposed Work Schedule (**Exh. US/C-21**) identifies 3 June 1999, as the "[c]losing of the record and final release of data to Parties," and 7 June 1999 as the date "[f]inal comments of Parties due." The USITC notice, pursuant to § 207.21 of its regulations (19 C.F.R. § 207.21, **Exh. US/C-22(a)**), scheduling the final phase of the investigation similarly explained that, "[o]n 3 June 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment [and] [p]arties may submit final comments on this information on or before 7 June 1999." 64 Fed. Reg. 10723 (5 March 1999) (included as Appendix A of USITC Views, **Exh. US/C-1**). *See also* 19 C.F.R. § 207.30 (closing of record to parties submissions) (**Exh. US/C-22(b)**), 19 C.F.R. § 207.25 (posthearing brief to include information adduced at or after hearing and answers to Commissioner questions) (**Exh. US/C-22(c)**).

Question 46. Could the parties please comment on the relevance of the Panel's decision in US-Wheat Gluten for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

58. The *Wheat Gluten* panel's decision, insofar as it addresses the consideration of other factors of injury under the Agreement on Safeguards, is not relevant to this case. The United States has announced its intention to challenge the panel's decision to the appellate body, and, therefore, the Dispute Settlement Body has not adopted the decision. In brief, the *Wheat Gluten* panel wrongly interprets the Agreement on Safeguards, without explicit analysis of the relevant language or history of that agreement, as requiring an authority to "ensur[e] that it was the increased imports alone which were causing *serious* injury."[15] So interpreting the Safeguards Agreement, the *Wheat Gluten* panel held that the extent of injury due to increased imports must be "isolated". This interpretation of the Safeguards Agreement, as the United States will demonstrate before the Appellate Body, is (1) contrary to the ordinary meaning of the terms of Article 4 of the Safeguards Agreement and the context of the relevant provisions, which recognize that increased imports may interact with other factors to cause serious injury, (2) contrary to the negotiating history of the Safeguards Agreement, which shows that the members declined to adopt the causation standard that the *Wheat Gluten* panel views as required, and (3) renders the Safeguards Agreement impracticable of application, as it imposes a requirement that cannot in principle be met in most cases.

59. The United States will, if the Panel so desires, expand upon those arguments in this proceeding. It believes, however, that the Panel should decide this case on the terms and history of the Anti-Dumping Agreement, not on that of the Safeguards Agreement. It should remit consideration of the *Wheat Gluten* panel's decision to the Appellate Body.

60. If the panel, however, decides that it may properly consider the *Wheat Gluten* report, it can only conclude that the reasoning of that decision does not apply to the Anti-Dumping Agreement. The *Wheat Gluten* panel itself did not intend its analysis to provide precedent for interpretation of the non-attribution requirement of the Anti-Dumping Agreement. As that panel noted, "significant differences exist between" the legal context for anti-dumping and safeguards cases.[16] The *Wheat Gluten* panel regarded these differences as limiting the relevance to the Safeguards Agreement of *Atlantic Salmon,*[17] cited in the United States' first written submission herein. That decision interpreted the terms of the parallel non-attribution provision of the Anti-Dumping Agreement's precursor, the Tokyo Round Anti-Dumping Code, and was adopted by the Code Committee Members.

61. Accordingly, it is *Atlantic Salmon*, and not the decision in *Wheat Gluten*, that properly forms the background for this Panel's interpretation of the non-attribution provision of the Anti-dumping Agreement. As that *Atlantic Salmon* panel found, the Code parties did not regard it as requiring an authority to demonstrate that dumped imports be the sole cause of material injury to a domestic industry.[18] Although negotiation of the Anti-Dumping Agreement concluded after the *Atlantic Salmon* decision, the Anti-Dumping Agreement, largely modelled on the Code, does not create a " sole cause" requirement, nor has Japan so argued.

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[15] United States -- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Panel, 31 July 2000, WT/DS166/R, ¶ 8.151 (emphasis in original).

[16] *Wheat Gluten*, ¶ 8.142.

[17] United States–Imposiiton of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel Adopted by the Committee on Antidumping Practices on 27 April 1994 (ADP/87).

[18] *Atlantic Salmon*, ¶¶ 546, 549.

62. Moreover, *Atlantic Salmon* and not *Wheat Gluten* is instructive in the current case because, as the *Wheat Gluten* panel itself noted, price is not listed as a relevant factor required to be considered in an injury determination under the Safeguards Agreement.[19] In contrast, the express obligation to examine price effects that existed under Articles 3:1 and 3:2 of the Tokyo Round Anti-Dumping Code has been continued by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Japan's arguments in this case concern whether the USITC's analysis of price effects was adequate in view of other factors that it regards as having placed downward pressures on US prices. The *Atlantic Salmon* decision interpreted the obligation not to attribute to dumped imports injury due to other factors in precisely this context.

63. In particular, in *Atlantic Salmon*, the panel and the United States agreed that there was a factor other than dumped imports that might have put pressure on prices in the US market -- low-cost imports that were not subject to the anti-dumping investigation. The panel held that it was adequate for the USITC to have determined that dumped imports accounted for a large portion of increased imports and played a role in the price decline experienced by the US industry. The panel concluded that "it could not ... reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries."[20] As to other asserted factors, the panel held that the USITC's findings established that the increased availability of Pacific salmon "could have had only a limited effect on domestic prices."[21] Similarly, the panel held that the USITC satisfied its obligation to examine other factors in finding that the domestic industry's performance was worse than could be explained by internal industry problems.[22]

64. As is discussed in the United States' first written submission, the USITC's determination in this case, particularly with respect to price effects, parallels the analysis upheld in *Atlantic Salmon*. It would be extremely anomalous to hold that the USITC's determination here violated the Anti-Dumping Agreement because of a panel decision purporting to interpret the Safeguards Agreement. The *Atlantic Salmon* panel held that the non-attribution requirement,

> "did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than those imports."[23]

65. As indicated by its use of the term "somehow", the panel was sceptical as to whether the extent of injury due to other factors could be isolated, and the Anti-dumping Agreement does not state that, in its examination of other factors, an authority should do so.

66. Rather, Article 3.5 of the Anti-dumping Agreement sets forth an analysis that follows the *Atlantic Salmon* panel's description closely. First, Article 3.5 states, "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." This sentence is drawn virtually verbatim from Article 3:4 of the Tokyo Round Code. As the *Atlantic Salmon* panel discussed concerning the Tokyo Round Code

[19] *Wheat Gluten,* ¶¶ 8.109, 8.110.
[20] Atlantic Salmon, ¶ 557.
[21] Atlantic Salmon, ¶ 558.
[22] Atlantic Salmon, ¶ 559.
[23] Atlantic Salmon, ¶ 555.

provision,[24] this sentence, through its cross-reference to the articles setting forth specific factors, requires a specific form of analysis for demonstrating causation.

67. Second, the second sentence of Article 3.5 of the Antidumping Agreement characterizes the required demonstration as establishing "a causal relationship between the dumped imports and the injury to the domestic industry." Thus, the necessary demonstration need not establish that other factors do not also have a causal relationship to the injury.

68. Third, the third sentence of Article 3.5 states that "the authorities shall also examine any known factors other than the dumped imports which at the same time are injury the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." This provision differs from the Tokyo Round Code only in making explicit what the *Atlantic Salmon* panel stated, namely, that such an examination is required. Article 3.5 does not, any more than the Tokyo Round Code equivalent, specify how such an examination shall be conducted. Rather, it is entirely consistent with the *Atlantic Salmon* panel's conclusion that, in conducting the required analysis of causation factors, an authority must examine other known causes of injury to assure that it has not attributed to dumped imports effects that were due to other causes. Had the negotiators of the Anti-dumping Agreement intended to require the "isolation" of the various causes of injury, and thus a more exacting "standard" for the examination of other causes, they could have done so. Instead, they adopted a provision that was consistent with prior precedent expressly rejecting such a requirement.

69. The United States believes that the *Wheat Gluten* panel should have reached a similar conclusion in its construction of the Safeguards Agreement. The non-attribution provision of that agreement was drawn virtually verbatim from the Tokyo Round Anti-Dumping Code. Accordingly, the United States believes that, properly interpreted, the non-attribution requirements of the Safeguards and Anti-Dumping Agreements are consistent. However, even if the *Wheat Gluten* panel was correct in its interpretation of the Safeguards Agreement, the terms and history of the Anti-Dumping Agreement are so different from those of the Safeguards Agreement, as construed by the *Wheat Gluten* panel, that that panel's analysis cannot be properly applied to determinations under the Anti-Dumping Agreement.

Question 47. When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipments times for steel exports from Japan to the US?

70. Neither annual nor monthly data show Japanese steel exiting the US market over the period of investigation. Dumped imports from Japan were highest in the final quarter of the period of investigation, the fourth quarter of 1998. Thereafter they declined significantly.[25] Lead times for

[24] Atlantic Salmon, ¶¶ 549-551.

[25] Imports from Japan totaled 240,976 short tons in 1996, 548,822 short tons in 1997, and 2,684,756 short tons in 1998. USITC Pub. 3202 at IV-2 (based on official statistics and questionnaire responses). *See* US imports for consumption by source and by month (public portion of confidential memorandum INV-W-124 (9 June 1999)) (**Exh. US/C- 23**).

Japanese product, including shipment times, "averaged 122 days from Japan in 1996-97 and 113 days in 1998.[26]

[26] USITC Views at II-11.

ANNEX E-4

Responses of the United States to Questions from Japan

(6 September 2000)

Question 1. Does the USG believe an authority would ever knowingly leave evidence of bias on the administrative record? If not, does not this mean that evidence of bias will in most cases need to come from extra record evidence?

1. Yes, under US law an authority must leave evidence of bias, or alleged bias, on the record, so long as such evidence is timely and appropriately filed with the Department. Section 351.104(a)(1) of the Department's regulations calls for it to "include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by" it during the course of a proceeding that pertains to the proceeding. Section 351.104(a)(2) provides for Department personnel to return to the submitter documents which contain untimely-filed new factual information and documents which do not meet the requirements with respect to business proprietary information. There is no provision for purging documents from the record on a discretionary basis, because of allegations of bias or for any similar reasons.

2. For example, the respondents in this case and in the companion case on hot-rolled steel from Brazil made a joint public submission on 13 November 1998 protesting the manner in which the Department was conducting the investigation, especially with respect to the expedited schedule for those investigations. The letter alleged that this approach constituted evidence of bias, twice suggesting that the Department's decision to expedite the investigation indicated that it had prejudged the outcome of the investigation. That letter, which was timely and properly filed, remains part of the official record. Japan, however, has not included it in its exhibits for this case. The United States would be glad to provide the Panel with a copy of it, should the Panel request.

3. Finally, this question has no relevance to this dispute. Apart from data on conversion factors (which have no relevance to alleged bias), Japan is not alleging that any evidence whatsoever, whether related to alleged bias or not, was improperly excluded from the administrative records in these proceedings. By arguing that evidence of bias would have been improperly excluded from the administrative record, Japan is simply attempting to justify the failure of its companies to submit information for the record during the course of the antidumping duty investigation. If this information had been submitted for the administrative record, it would now be properly before the Panel.

Question 2. Does the USG believe that objective assessment of the facts in DSU Article 11 sets forth a broader standard of review than AD Agreement Article 17.6?

4. We do not understand what is meant by a "broader standard of review". The "standard of review" generally refers to the amount of deference that is accorded the national authorities when a Panel reviews their decisions. It is not clear what the "breadth" of that deference means. We note, however, that, in the context of safeguards measures, a number of panels have found that Article 11 does not provide for de novo review of the authorities' decision, and does not provide for review based on facts not made available to the authorities:

> We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue.[1] However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected.[2]

Question 3. The US oral statement in para 6 indicates that panels must determine whether facts are established properly, yet argues in para 7 that panels are not fact finding bodies. How can the panel fulfill its obligation to determine whether particular facts have been properly established without considering the factual circumstances, and the evidence of those circumstances, through which those facts were established?

5. The procedures used by the United States to establish the facts in this proceeding are clear from the relevant regulations governing the collection of facts and evidence, found at 19 CFR parts 201, 207 and 351, and from the record of the proceeding itself, which details the process of soliciting and accepting information and views from interested parties. Japan has not challenged those procedures. The only information that Japan has alleged was improperly excluded from the administrative record is the information on conversion factors, submitted by NSC and NKK. Although these data themselves are not on the administrative record, the fact that they were rejected, and the reasons for their rejection, are on the administrative record for review by this Panel. These data themselves are not relevant to whether facts regarding their untimely submission were properly established. In short, the United States believes that there is no need to rely on extra-record evidence, not presented to the authorities during the investigation, to determine whether the establishment of the facts in this investigation was proper.

Question 4. The US has been quite vocal in its support of the admissibility of amicus briefs in panel proceedings. Since such amicus briefs are by definition facts that were not considered by the authorities, does the US believe that no amicus briefs may be submitted to panels considering anti-dumping measures?

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[1] We recall that in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear ("US – Underwear")*, (adopted on 25 February 1997, WT/24/R), paras. 7.53-54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil – Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, adopted on 28 April 1994, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.

[2] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30.

6. Amicus briefs are not "by definition facts that were not considered by the authorities". Japan confuses the appropriateness of considering amicus briefs with the consideration of new facts that were not presented to the authorities during the antidumping investigation. An amicus brief, like the submission of a party, may well present legal and factual analysis based entirely on the facts made available to the authorities during the antidumping investigation. It is not itself a new "fact" any more than Japan's first written submission is a new "fact". Taking into account an amicus brief, therefore, is different from asking this panel to consider new facts that could have been put on the authorities' administrative records, but were not.

Question 5. In its closing statement, the US claims it does not know whether particular "facts available" is adverse or not. Yet in this case, the US determination shows the US believed its choice of "facts available" was sufficiently adverse to teach respondents a lesson. Did the US believe that its choice of "facts available" in this case was adverse or not?

7. As the US explained in its closing statement, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. This uncertainty is reflected in paragraph 7 of Annex II, which refers to the fact that use of adverse facts available "could," rather than "would" lead to a result which is less favorable to the party than if it did cooperate. Nevertheless, in this case, Commerce's choice of facts available for KSC, NSC, and NKK was presumed to be sufficiently adverse, based on a judgment involving all the facts and circumstances of the case, as to be likely to prevent respondents from obtaining a more favorable result by failing to cooperate.

Question 6. The US statute refers to two types of "facts available" --- with adverse inferences and without adverse inferences. Under the US practices, is it not true that either type of "facts available" could lead to results "less favorable" than the actual information? For "facts available" without adverse inferences, what steps does the USDOC take to ensure that such information is not "less favourable?"

8. As we explained in response to question 5 above, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. Thus, it is theoretically possible that either type of facts available (neutral or adverse) could lead to results less favorable than the unknown, actual information, just as it is theoretically possible that either type could lead to results more favorable. Nevertheless, an examination of all the facts of record can usually give Commerce a fair idea of whether its choice of information is likely to be adverse or neutral.

Question 7. If the information about KSC sales to CSI was so crucial to the investigation, why did USDOC not ask CSI for the information?

9. Commerce did not ask CSI directly for the information, because Commerce properly concluded that KSC had ample means to provide the information from its 50 per cent-owned affiliate and because KSC repeatedly told Commerce that CSI would not provide the information and that KSC wished to be excused from providing it. KSC simply failed to employ the means available to it to obtain the information requested by Commerce, and Commerce applied adverse facts available for that failure in a manner consistent with Article 6.8 and Annex II of the Agreement. The administrative record does reflect consideration of the idea that Commerce obtain the CSI information under separate protective order, so that KSC would not have access to it. However, KSC officials advised Commerce at verification that CSI had rejected this idea. *See* Verification Report at 23, **Exh.** US/B-21/bis.

Question 8. What is the difference between "logical inferences" and "adverse inferences" in the context of determinations about "facts available?"

10. The US statute and practice do not make a distinction regarding these terms and, in fact, do not talk about "logical inferences." Neither does the Anti-Dumping Agreement. Japan may be recalling the Oral Statement by the European Communities, delivered before the Panel at the Third Party Session on August 23, 2000. At paragraph 7 of its statement, the EC said:

> When selecting "facts available" the investigating authorities may take into account, among other circumstances, the degree of co-operation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive". (Footnote omitted.) Indeed, strictly speaking, they are not even "adverse." *They are just logical inferences*, based on the assumed rationality of the exporter's behaviour: a rational exporter would co-operate, if it could expect to obtain a better result by doing so than on the basis of "facts available". (Emphasis added.)

See also the Appellate Body's recent decision in the Canadian Aircraft case, cited at the US First Submission, paragraphs 70 of Part B, as well as US discussion at paragraph 79 of Part B, regarding that case and the taking of a logical inference.

Question 9. Why does USDOC believe the information on NSC/NKK conversion factors was too burdensome to include in the determination once it was provided? Why was this information different from the other types of corrections/clarifications routinely submitted pursuant to the special regulation allowing such submissions seven days prior to verification?

11. Japan's question is based on several misconceptions with respect to the facts of this case.

12. First, the Department did not reject the NSC and NKK conversion factor data because it was "too burdensome to include," but rather because it was first presented long after the reasonable deadlines established for providing this information. If administering agencies were compelled to accept any information, no matter when provided, unless they could demonstrate, on an item-by-item basis, that it was "too burdensome" to incorporate particular data elements into their analysis at that time, the right of such agencies to establish and enforce reasonable deadlines for submission of information requested in questionnaires would be entirely gutted and the law would not be administrable.

13. Second, there is no regulation "allowing such submissions seven days prior to verification." The so-called "Seven-Day Rule," codified at 19 C.F.R § 351.301(b)(1), does not govern the submission of data requested in questionnaires, as the conversion factor data were. Instead, section 351.301(c)(2), regarding questionnaire responses and other submissions made on request, requires that data requested in questionnaires be submitted by the questionnaire deadline.

14. Third, the conversion factors and their supporting data did not constitute "corrections/clarifications" to information previously timely submitted in response to a questionnaire. Instead, they were entirely new databases that both NSC and NKK had previously maintained were both unnecessary and impossible to provide.

Question 10. Why does USG believe "neutral gap filler" will be information favorable to respondents? Since respondents don't know what information will be used, how could

respondents possibly know in advance whether information would be favorable or unfavourable?

15. The Department cannot know for certain, for the reasons explained in the responses to questions 5 and 6 above, whether "neutral gap filler" will be favorable, unfavourable, or neutral to respondents. However, when Commerce chooses such information as facts available (because it is declining or not able to take an adverse inference), it does not do so with the intention of selecting information favorable to respondents. Rather, it does so with the aim of filling in information which is likely neither favorable nor unfavourable, but rather neutral, or approximately what the information would have been, had it been available, as best as Commerce can judge from the record. Nevertheless, it can be said that, if an investigating authority used neutral facts available in all situations, this would put respondents in a position of being able to know that they are likely to be better off if they withheld certain unfavourable information. In Commerce cases, respondents have the greatest incentive to withhold information that is least favorable, or adverse, to them, and Commerce reasonably presumes that is why they did not cooperate in providing the information. Therefore, using neutral facts available - information which is judged to be, to the extent possible, neither favorable nor disfavourable - likely would benefit the respondent in most instances. Though respondents might not know exactly what would be used in lieu of the information withheld, the likelihood that they would benefit by withholding adverse information would increase substantially and result in enormous incentives to withhold information.

Question 11. Why does USG read ADA 6.13 as meaning the authority should provide no assistance to large companies? How does USG reconcile this with the mandatory language in ADA 6.13 that authorities "shall take due account" and "shall provide any assistance practicable?

16. The United States does not read Article 6.13 as meaning that the authority should provide no assistance to large companies. As we stated at paragraph 103 of Part B our first submission, the provision, which includes the phrase, "in particular, with regard to small companies," should be given particular force and effect with regard to small companies. As we pointed out at paragraph 104 of Part B of our first submission, KSC is not a small company. Its sales revenue for fiscal year 1998 exceeded $9 billion. Nevertheless, if it were appropriate that KSC should be provided assistance in a given situation, Commerce would provide any assistance practicable, as Article 6.13 requires. It was not appropriate or practicable in this case, as we have explained, because KSC did not seek any assistance, but repeatedly requested that it be excused altogether from providing the information. Moreover, as we also explained in our first submission, advising KSC on how to manage its own joint venture was beyond any "assistance" which the Department might have been required to provide.

Question 12. Why does USDOC believe an isolated margin for a single product category, such as used for KSC, is somehow more representative than the average transfer prices for various product categories?

17. The issue was not one of representativeness, because Commerce had already decided that it would take an adverse inference with respect to KSC. It therefore chose a margin which it believed (although it could not know for certain) was likely to ensure that KSC would not benefit by its failure to cooperate, in light of the inference that the missing information was withheld because it was adverse. If the Department had decided not to take an adverse inference with respect to KSC, and instead to apply "neutral gap filler" facts available, it would have looked for a margin that might represent approximately what Commerce could estimate that the non-adverse margin resulting from KSC 's constructed export price through CSI, to unaffiliated US purchasers, would have been. (In fact, as may be noted in paragraph 32 of Mr. Huey's affidavit, Exh. JP-44, should the Panel consider that affidavit, KSC's own data suggests that that margin was quite high.) In any event, Commerce would not consider reliable or representative the three average transfer prices which KSC provided for

CSI *(see* Exh. US/B-24/bis) because the affiliation between KSC and CSI made these prices suspect. In addition, they were average transfer prices for three very broad product categories, and thus too imprecise to form a basis for comparison to normal values for particular models. It was far more reasonable to look to margins resulting from actual, verified sales by KSC to the U.S., in choosing either "neutral gap filler" or adverse facts available.

Question 13. USG argues that Section 351.301(b)(1) does not apply to data requested in questionnaires. But is not all information collected in an investigation provided pursuant to questionnaires? To what information does the regulation apply?

18. No. Not all information collected in an investigation is provided pursuant to questionnaires. Although most information provided by respondents in investigations is that requested in questionnaires, the domestic industry and importers (neither of which receive questionnaires in antidumping investigations before the Department of Commerce), as well as responding exporters, or even non-selected exporting companies may have factual information they believe the Department should consider in conducting its investigation, including during the verification visits. Rather than creating an exception that swallows the rules governing deadlines for gathering information that the Department knows it requires for the conduct of the investigation, this provision allows for any parties to submit to the Department, up until a week before verification, additional information of which the Department may not be aware, and which they wish the Department to take into consideration. For example, a party might wish to place on the record a news Article providing information on certain costs to be scrutinized at verification.

Question 14. Why does USDOC treat average price levels below 99.5 per cent as outside ordinary course of trade, but treats price levels higher as outside the ordinary course of trade only if the price levels are aberrationally high?

19. DOC's test is designed to allow it to use prices to affiliates in the home market to the extent that those prices will not distort the picture of what is happening in the real, arm's-length, market. We do not consider sales to affiliates that pass the test to be a problem in this respect, because the test indicates that these affiliates are not given favorable treatment due to the affiliation. Thus, in those instances we make an exception to the general rule that sales to affiliates are outside the ordinary course of trade. Moreover, the 99.5 per cent test, which has a specific purpose, does not rule out the possibility that a company could demonstrate that its high-priced sales are outside the ordinary course of trade.

20. Furthermore, affiliation between parties taints transactions between them. This "taint" normally would not result in sales prices being higher than the weighted average price to the arm's-length market, but rather lower. The Agreement, in Article 2.1, defines dumping in a similar fashion: merchandise is dumped if it is "introduced into the commerce of another country at less than its normal value." Purchasing subject merchandise, even from an affiliate, at prices significantly higher than average, if anything, may reflect an attempt to compensate for other sales, at below-average prices. Even among affiliates, there are stronger constraints to artificially high prices than to artificially low prices. And in the dumping context, there are incentives to sell to affiliated parties at artificially low prices.

Question 15. Why is it "fair" to test only whether prices are too low?

21. Please see the answer to Question 14 for the affirmative reasons why this test is "fair." Japan's question implies that, by not also finding home-market sales to be "outside the ordinary course of trade" on the basis of above-average prices, the Department in some way prejudices the interests of respondents. Just the opposite is true. Were the Department to also disregard sales to home market affiliates who pay above-average prices, two things would happen. First, respondents

would be burdened with reporting downstream sales more frequently, because the current test allows some sales to affiliates to be used in lieu of downstream sales. Second, the downstream sales that would otherwise be used would normally be at even higher prices, possibly resulting in higher margins. Thus, the Department's policy of allowing the use of only sales to affiliates that pass the test is not "unfair" to respondents (indeed, it may benefit them), but is merely a reflection of the fact that the Department's sole concern is with the much more common phenomenon of below-average price sales to affiliates, due to price manipulation.

Question 16. Can the US clarify its views on the relationship between arm's length transactions and sales in the ordinary course of trade?

22. For a sale to be made in the ordinary course of trade, it normally must be a sale negotiated at arm's length. A sale which is not made at arm's length does not meet this fundamental condition and is thus presumed to have been made outside the ordinary course of trade. Thus, a home market sale which is made between unaffiliated parties is assumed to be in the ordinary course of trade absent some indication to the contrary, whereas a home market sale made between affiliated parties is inherently suspect. Accordingly, the Department will consider a sale to an affiliate to have been made in the ordinary course of trade – or equivalent to an arm's-length sale – only if that affiliate passes its 99.5 per cent test and is therefore deemed to have a pricing relationship similar to that of unaffiliated customers.

23. Sales made in the ordinary course of trade, however, are not necessarily identical to sales made at arm's length. A sale made to an unaffiliated party, even if it is at arm's length, may still be outside the ordinary course of trade for other reasons. For example, referencing the non-exhaustive list given at page 834 of the Statement of Administrative Action, such a sale may involve merchandise produced according to unusual product specifications, merchandise sold at "aberrational" prices, or merchandise sold pursuant to unusual terms of sale. By the same token, a sale to an affiliate that "passes" the 99.5 per cent test may be determined not to be in the ordinary course of trade for those, or other reasons. In sum, sales which are not made at, or equivalent to, arm's length are only one sub-category of sales not in the ordinary course of trade.

Question 17. Can the USG identify any examples of cases in which it disregarded home market prices as being too high?

24. The United States has not identified any examples of cases in which it was even asked to disregard the home market sales to an affiliated company because they were, on average, so high that the respondent argued that the sales to that affiliate were outside the ordinary course of trade. This is not surprising, given that, as explained in our answer to Question 15, it would not be to a respondent's advantage for the Department to disregard sales made to an affiliate at a high average price, because those sales would be replaced by the affiliate's downstream sales, which would likely be at a higher price.

Question 18. If the average price to affiliated customers is 0.5 per cent below the average price to unaffiliated customers, USDOC considers this evidence that the price has been influenced by the relationship. If so, why is an average price 0.5 per cent higher not also evidence that the price has been influenced? What about an average price 2.5 per cent higher?

25. Prices between affiliated parties at any level are inherently suspect because they are not set according to normal market influences. Nevertheless, for the reasons set forth in the Department' s answers to Questions 14 and 15, the Department is not concerned with possible influence of this sort (which is not related to manipulation of the results of antidumping proceedings and probably has little effect relative to using the downstream sales), and therefore retains these sales in the home market

database (unless they are shown to be outside the ordinary course of trade for some other reason) in order to lessen the need to resort to a greater extent to downstream sales.

Question 19. Could the USG identify specifically the ways in which it "relied on" or in any way addressed the preliminary USITC assessment of whether there was any current injury?

26. The US assumes that this question pertains to the Department of Commerce's preliminary determination of critical circumstances. The USITC preliminarily found that the US industry was being threatened with material injury by reason of the dumped imports from Japan. The USITC did *not* discuss current injury, nor did they make a finding of such.[3] *See Certain Hot-Rolled Steel Products From Brazil, Japan and Russia - Written Views and Report of USITC Preliminary Determination* (Nov. 1998) *("USITC Views")* **(Exh. JP-8).** In order to determine whether importers knew or should have known that dumping existed and would cause injury, the Department relied, in part, upon the USITC's affirmative finding of threat to the US industry.[4] As the US explained in its First Submission (paragraph 459 of Part B), because Article 10.6 utilizes the term "injury" without qualification, it refers to both injury and threat of injury. Thus, the Department's reliance on the ITC's finding of threat of injury, and on other significant evidence (*see* US First Submission at paragraph 476 of Part B), for purposes of determining importer awareness, was consistent with the Agreement.

Question 20. Does the USG believe that the standard "sufficient evidence" for initiating a case is the same as "sufficient evidence" to justify the extraordinary remedy of critical circumstances?

27. As the US explained in its First Submission (paragraphs 467-470 of Part B), the "sufficient evidence" standard must be viewed within the context in which it is applied. The type of evidence that is sufficient for purposes of initiation of an anti-dumping investigation may or may not be sufficient for purposes of a preliminary critical circumstances determination. In this case, in making its preliminary critical circumstances determination, the Department of Commerce looked to additional evidence outside of that presented at the time of initiation of the anti-dumping investigation.

Question 21. Beyond the general statement of purpose in the Policy Bulletin, where did USDOC make specific factual findings about the remedial effect of imposing antidumping duties?

28. Because the finding is apparent in the Department's analysis and in the record evidence, a separate, delineated finding was not necessary. Article 10.6(ii) states, "the injury is caused by massive dumped imports of a product in a relatively short time *which in light of the timing and the volume of the dumped imports and other circumstances* (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. . . ." The Department considered the effect of the timing and volume of the dumped imports. First, the Department determined there was a 101 **per cent** increase in imports over

[3] To the extent that there is any discussion of current material injury, it is found in Commissioner Crawford's separate determination that the US industry was suffering current material injury by reason of the dumped imports. *See USITC Views*, at 19 **(Exh. JP-8)**. In Commissioner Crawford's views, she found that the domestic industry "would have increased its prices, and therefore, its revenues, significantly had the subject imports been fairly traded," and thus, the domestic industry was materially injured as a result of the dumped imports. *Id.* at 26. This is the only discussion in the USITC's preliminary determination relating to current material injury.

[4] Note that the USITC also specifically found threat of material injury resulting from the surge of dumped imports. The USITC stated, "we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future." *See USITC Views,* at 15.

a short time following the time when importers and exporters became aware that a dumping case was likely, and that the producers accounting for the majority of the imports were dumping. Additionally, the record contained significant information indicating that the surge of dumped imports contributed, or caused, threat to the US industry. For example, the USITC preliminary determination states, "[w]e recognize that petitioners have not specifically alleged that the volume of subject imports during 1995-97 was injurious. However, we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future. . . . In our view, these increases in volume and market penetration indicate a likelihood of substantially increased subject imports in the imminent future." *USITC Views,* at 15. Additionally, numerous exhibits in the petition demonstrated that the *surge* of dumped imports was severely impacting the US industry - causing prices to collapse, forcing US producers to cut production and diminishing earnings.[5] This evidence shows that, without some remedial action, the surge of dumped imports was likely to continue and compound the threat to the US industry even further. Because the Department considers these factors in its analysis, it stated in Policy Bulletin 98/4 that the "purpose of [the critical circumstances] provision is to ensure that the statutory remedy is not undermined by massive imports following initiation of an investigation," *see Critical Circumstances Policy Bulletin*, 63 Fed. Reg. 55364 (15 Oct. 1998)**(Exh. JP-3)**. As such, this factor was fully considered and addressed in the preliminary determination of critical circumstances in this case as set forth above. Because all of the factors in Article 10.6 were fully considered and addressed therein, the preliminary determination was consistent with the Agreement.

Question 22. If the captive production provision seeks only to add an additional relevant factor to be considered, why does the statute say "shall focus primarily" rather than simply saying "shall consider."

29. At the outset, the United States notes that Japan's question is misplaced because the captive production provision does not "add an additional relevant factor to be considered." The relevant factors that the USITC must consider are listed in 19 U.S.C. § 1677(7)(C)(iii), and these factors correspond to the factors listed in Article 3.4 of the Antidumping Agreement. The captive production provision merely requires the USITC, when considering certain of these listed factors, to examine the merchant market segment as a step in considering injury to the industry.

30. The statute directs the USITC's attention specifically to the merchant market segment because it is there that evidence of injury by reason of dumped imports would be most readily apparent. From there, the statute then requires the USITC to consider the effects of dumped imports,

[5] *See, e.g., Metal Bulletin* (24 Sept. 1998) ("The July figure fully supports our industry's contention that massive levels of steel are being dumped.")**(Exh. US/B-40(c))**; *Morgan Stanley, Dean Witter Industry Report* (21 July 1998) ("hot-rolled imports are in at a price of . . . 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in later September or early October.")**(Exh. US/B-40(b))**; *Wall Street Journal* at A4 (21 Sept. 1998) ("Steel imports to the US continued at their record pace in July . . . lost market share has hit the US steelmakers hard, particularly in the last three months as the US industry's pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earnings estimates for the third and fourth quarters.")**(Exh. US/B-40(b))**; *Metal Bulletin* at 33 (7 Sept. 1998) ("Nucor has cut production . . . in response to low market prices . . . because of market turmoil in the wake of a flood of cheap imports.) **(Exh. US/B-40(b))**; *Paine Webber - Metal Stock Strategies* (8 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.")**(Exh. US/B-40(b))**; *Wall Street Transcript Corporation - Industry Report* (20 July 1998) ("Imports were simply so large, and prices at which they entered markets so low, that steel pricing was compromised. . . . Further, the prices at which these products are being offered continues to erode the pricing outlook for domestic steel.")**(Exh. US/B-40(b))**. All of the cited newspaper articles are on the Department's administrative record.

including the effects of dumped imports on the merchant market, as well as on the industry as a whole. This scheme does not in any way place emphasis on the merchant market segment over the entire industry. Nor does it have anything whatsoever to do with the weight given to any factor. In fact, in the determination in this case, the significance of the consideration of the merchant market followed by the industry as a whole was not lost on the Commissioners. Notably, Commissioner Bragg took exception to this order of consideration -- not to the weight that the other Commissioners in the majority were placing on the merchant market segment.[6]

31. Moreover, Japan's apparent preference for the "shall consider" over the "shall focus primarily" language is also misplaced. As the USITC found, in accordance with the statements in the Statement of Administrative Action, by using the "shall focus primarily" language, Congress has required the USITC to consider both the merchant market segment and the entire industry in its examination of certain factors. "Shall consider," without any description of how the consideration is to take place (*i.e.* primarily), would leave open the possibility that an authority could consider the merchant market exclusively. Congress removed this potential ambiguity by stating that the USITC "shall focus primarily" on the merchant market and thus provided a more precise structure than that proposed in the Japanese language.

Question 23. Even if the word "primarily" connotes more than one item of focus, [what] does the term mean about the relevant weight to be assigned the various areas of focus.

32. The captive production provision has no bearing on the weight that the USITC assigns to each factor. Commissioners assign weight to each factor based on the facts of the case before them. Article 3.4 of the Antidumping Agreement provides that no "one or several of these factors [can] necessarily give decisive guidance." In keeping with this provision, 19 U.S.C. § 1677(7)(E)(ii), states that "the presence or absence of any factor which the Commission is required to evaluate . . . shall not necessarily give decisive guidance with respect to the determination of the Commission . . ." The captive production provision does not inject into the impact section of the statute any new obligations that would dictate the weight to be given to any particular factor. The captive production provision merely calls for an extra step in the evaluation of certain of the factors listed in the impact section of the statute before those factors are weighed with all other factors. Thus, it does not disturb the overarching principle, articulated in both the statute and the Anti-dumping Agreement, that the weights to be assigned to each factor are determined by the Commissioners on a case-by-case basis.

Question 24. In para 34 of its oral statement, the US alludes to a two step approach. In light of the statutory requirement to "focus primarily" on the merchant market for market share and financial performance, could the US clarify the relative weight to be assigned to each step in the analysis?

33. As stated above, the captive production provision merely interposes into the statutory scheme an additional requirement to consider certain factors as they relate to the merchant market as well as the entire industry. It does not intervene in the assessment of relative weights that the Commissioners are to assign to any factors.

Question 25. How does the USG justify giving primary focus to the merchant market concept of "sales" at the expense of other factors such as overall domestic industry concept of "output?"

34. The United States does not systematically look at any factor listed in the Anti-Dumping Agreement or the US statute "at the expense of" any other factor. The Commissioners place emphasis on the various factors based on the facts of each case.

[6] *See, e.g.* USITC Views at nn. 59, 75.

35. In fact, it is Japan that argues for an approach that would systematically emphasize one factor "at the expense of" another. As we have argued extensively in our first written submission, sales occur in the merchant market. In recognition of that fact, the captive production provision provides for an analysis of the merchant market to capture the effect that dumped imports are having on sales. Without such a focus on the merchant market, the USITC would be limited to evaluating only domestic producers' output (transfers plus sales) and would ignore the effects of dumped imports on sales.

Question 26. Where does the USITC explain the way in which it resolved the inconsistent trends in operating profit over the 1996-98 period between the industry overall and the merchant market only?

36. The USITC was not required to resolve any inconsistent trends in the data. Under Article 3.4 of the Anti-dumping Agreement, the USITC only had an obligation to consider all relevant economic factors bearing on the state of the industry. The USITC considered the operating profits for the 1996 to 1998 period for the merchant market and the entire industry.[7] Thus, the USITC satisfied its obligations under the Agreement.

Question 27. In footnote 157 of its submission, the USG accuses Japan of not being clear what "factor" of financial performance it means. How does the USG address the fact that the operating income ratio for the domestic industry as a whole in 1998 exceeded that of 1996, even after the increase in imports?

37. Again, the USITC is not required to address every fact bearing on each factor. It is charged with examining relevant economic factors to assess injury. The USITC satisfied this requirement. The USITC looked at three year trends and noticed that during the last two years of the period, when apparent consumption increased to record heights, operating income and the ratio of operating income to net sales declined. It explained this anomalous situation based on declining unit values and shipments over this period.[8]

38. Japan takes issue with the fact that the USITC did not discuss the ratio of operating income to net sales for 1996 (as stated above, the USITC did address the operating income for 1996). The USITC, however, considered the ratio of operating income to net sales in light of the trends from 1996 to 1998 and noticed that the data for 1997 to 1998, in particular, posed a question that needed to be resolved. A comparison of 1996 to 1998 data does not respond to this question. It is true that a comparison of 1996 to 1998 data, alone, without consideration of 1997 data, would show an increase in the ratio of operating income to net sales for the entire domestic industry, as Japan suggests. This trend over the entire period does not mandate a negative determination, however. As the panel found in *Argentine-- Footwear*,[9] simply because one indicator follows a trend different than other factors does not mean that the USITC's injury determination is fatally flawed. Moreover, the USITC made no finding that the domestic industry was healthy in 1996. As a result, this panel should not be swayed by Japan's focus on the changes from 1996 to 1998. It is possible (although the USITC made no findings to this fact) that the USITC would have found the domestic industry performing poorly in 1996 *and* 1998. Because the USITC did not have to resolve this question to reach its material injury determination, Japan's arguments are misplaced. Further, it is clear that the USITC found that falling

[7] It looked at and compared the domestic industry's declines in the unit costs of goods sold and the unit values for the like product in the merchant market and the industry as a whole over the entire period. USITC Views at 16 n.88. It then also referred back to this discussion in its analysis of the impact of dumped imports on the domestic industry. USITC Views at 18 n.99.

[8] USITC Views at 18.

[9] Appellate Body Report, *Argentina -- Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear")*, WT/DS121/8, adopted 14 Dec. 1999 at para. 139.

back towards the 1996 level was unacceptable and a sign of injury when aggregate demand was substantially higher in 1998 than 1996. Thus, in that sense, the comparison that Japan seeks in fact occurred. The USITC had a particular concern with the data from 1997 to 1998 and it addressed that concern in its determination. The USITC performed a well-reasoned analysis, considered all the factors, and paid particular attention to the seemingly anomalous occurrence of poor performance by the domestic industry at a time of increasing consumption.

Question 28. Since USITC analyzed a three-year trend in profitability in the 1993 case, why did the USITC consider only a two-year trend in the current case?

39. Japan mischaracterizes the USITC's determinations in both the 1993 *Flat Rolled Steel* investigation and the current case. As noted above, in the current hot rolled investigation, the USITC considered the profitability of the domestic industry over the three year period[10] but then provided an extensive discussion of the 1998 anomaly. Simply because the USITC looked for an explanation for why, from 1997 to 1998, apparent consumption increased but the domestic industry performed worse does not mean that the USITC ignored, or in any way failed to consider, the data for 1996, especially in light of the discussion of the 1996 data that is apparent on the face of the determination. As to the *Flat Rolled Steel* determination, Japan correctly points out that the USITC considered three year trends, but it fails to mention that the USITC also considered trends within that period.[11] The USITC compared data from year-to-year within the period in both investigations.

40. Japan's repeated reliance on the *1993 Flat Rolled Steel* case is misplaced. Each investigation turns on its own record facts and the USITC's determinations are *sui generis*. Although the two investigations deal with the same or similar products, as explained in detail in our first written submission, the facts presented to the USITC during each investigation are very different. In particular, for example, in the 1993 investigation, the USITC found that domestic apparent consumption, production, and shipments all followed the same trends -- decreasing and then increasing over the period of investigation. As already noted, in the current investigation, the USITC had to address the fact that, while US apparent consumption was increasing to record heights, the US producers' production, shipments, and market share were declining. These facts were not present in the *1993 Flat Rolled Steel* investigation. Therefore, the analyses in the two cases had to be different. The USITC could not simply ignore the facts of the investigation before it and perform a rote analysis based on the record in an investigation six years earlier.

Question 29. Where does the USITC decision address the price trends in non-subject imports? What evidence is there that the USITC even collected any information on non-subject import price trends?

41. Nonsubject imports are relevant to the causation analysis articulated in Article 3.5 of Anti-dumping Agreement only as they pertain to the proscription against attributing injury from other causes to dumped imports. That provision requires authorities to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" so that injury from other causes should not be attributed to the dumped imports. A factor which Article 3.5 states *may* be relevant to this analysis is the "volume and prices of imports not sold at dumping prices."

[10] USITC Views at 16 n.88 and 18 n.100 (comparing unit costs of goods sold to unit values).

[11] *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("*1993 Hot Rolled Steel*") at 52-53 (**Exh. Jpn-59**) .

42. The USITC examined the effects of nonsubject imports. It noted that "[i]mports from nonsubject countries maintained a stable presence in the US market throughout the period examined."[12] It thus satisfied the requirement to examine any known factors injuring the domestic industry. With an "essentially flat" market share, at a time when subject imports were rising sharply, nonsubject imports were not responsible for the decreasing market share of the domestic industry.[13] If the price effects attributed to the dumped imports were in actuality from the nonsubject imports, then it would be expected that those nonsubject imports would be entering the United States and sold to purchasers in the same quantities as the dumped imports and capturing an increasing market share in the same way as well. Thus, the USITC's findings on volume accounted for the risk that the Commission could have mistaken the price effects of nonsubject imports for the effects of dumped imports.

43. The USITC does not collect pricing data for nonsubject imports in the same way that it collects pricing information for dumped imports. As opposed to the product-by-product prices that the USITC staff gathered for dumped imports, the USITC collected information on the value of nonsubject imports.[14] This different approach to data collection stems from the different issues that the USITC resolves with respect to prices of dumped imports and prices of nonsubject imports. With respect to dumped imports, the USITC must determine whether they are having price effects on the domestic industry by specifically considering, pursuant to Article 3.2 of the Anti-dumping Agreement, whether the dumped imports undersold the domestic like product and whether the dumped imports caused price suppression or depression of the domestic product. This analysis requires, by its own terms, a detailed price analysis. As to nonsubject imports, the USITC must not attribute any injury caused by nonsubject imports to the dumped imports pursuant to Article 3.5. Such detailed price comparisons as are needed for dumped imports are therefore not required in the context of nonsubject imports.

Question 30. Why did the USDOC not correct the NKK clerical error? Can the USDOC identify any other examples of failing to correct properly alleged clerical errors?

44. As we explained in our first submission at paragraphs 28-29, Part A, and paragraph 14, Part D, Commerce's failure to correct NKK's clerical error at the preliminary determination stage was an oversight subsequently corrected in the final determination. Such an oversight is not without precedent in Commerce practice. For example, in *Certain Stainless Steel Wire Rods from France, Amended Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 47169 (30 Aug. 1999), www.ia.ita.doc.gov/frn/index.html, Commerce corrected respondents' alleged clerical errors regarding the final results, but failed to correct petitioners' alleged errors. When petitioners drew this oversight to Commerce's attention, Commerce subsequently corrected their errors as well. In *Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, *Final Determination of Sales at Less Than Fair Value,* 65 Fed. Reg. 42669 (11 July 2000), Commerce did not correct a respondent's alleged clerical errors at the preliminary determination stage. It did, however, correct one of the errors in the final determination. Just as the oversights in these cases in initially failing to correct clerical errors do not reflect any evidence of bias on Commerce's part, the oversight in the instant case also does not reflect any evidence of bias.

[12] USITC Views at 10.
[13] USITC Views at 11.
[14] USITC Views at IV- 11.

ANNEX E-5

Responses of Chile to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to use in the determination of normal value?

Reply

There are no regulations in this respect. In practice, there is no particular treatment for sales to affiliated companies, but only the "in the ordinary course of trade by reason of price" test, i.e. the analysis of below-cost sales, for any sale. Regardless of whether or not the domestic sale is made by a related company, an analysis is made to determine whether sales are below total cost in accordance with Article 2.2 of the Anti-Dumping Agreement. Below-cost sales are not excluded from the calculation of normal value. If, as a result of the below-cost sales, the sales used to determine the normal value are not sufficient in terms of footnote 2 to Article 2.2, either the third country sale price or the constructed value is used. No substitute prices are used for below-cost sales. There is no other methodology.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

No. In no way and under no circumstances does the Anti-Dumping Agreement permit the use of "adverse" facts available. The objective and spirit of the provisions of the Anti-Dumping Agreement (Article 6.8 and Annex II) pertaining to cases when a party does not cooperate call for use of the information available. But not the worst information. The Agreement reads "… on the basis of the facts available", and not "on the basis of the **adverse** facts available". The Agreement does not qualify the information.

The idea is to substitute or complete the missing information when a company does not cooperate, but it is not the intention of the Agreement to "punish" such companies.

ANNEX E-6

European Communities' Answers to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, a\ substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The EC practice depends on the extent of the relationship between the related parties. Where the exporter has control over a related party, the EC authorities will use the price charged by the related party to an independent buyer.

Where the exporter does not control the related party, Article 2.1, second paragraph, of the EC's Basic Anti-Dumping Regulation[1] provides that:

> "Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal values unless it is determined that they are unaffected by the relationship."

Sales not in the ordinary course of trade are excluded from the normal value calculation. The EC authorities will normally calculate a constructed normal value if the remaining sales in the ordinary course of trade are not sufficiently representative.

Question 50

The EC proposes, in Section B of its Oral Statement, an alternative methodology for determining whether margins should be considered as based on facts available, and thus excluded from the calculation of the weighted average provided for in Article 9.4 (i). But such a method could result in the very situation about which it expresses concern, that there may be NO margins not based on facts available, and thus no margins on the basis of which a weighted average can be calculated. What, in the EC's view, may an investigating Member do in such a circumstance? How does the EC propose that this test be applied in practice? What is the EC's practice in this regard?

[1] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ(1995) No L 56/1 of 6.3.96.

Reply

The point made by the EC was that an interpretation of Article 9.4(i) which required to exclude a dumping margin whenever facts available have been used would often lead to the result that the method set out in Article 9.4(i) could not be applied. Indeed, almost every dumping calculation includes small elements of facts available. This is not necessarily because the exporters are uncooperative, but because small errors of a clerical nature have been made or because the information requested was simply beyond the reach of the exporters (for instance, in the case of transport costs).

The EC authorities have never encountered the situation described by the Panel. In the unlikely situation that significant adverse facts available were included in all the margins, there seems to be no alternative but to resort to facts available for the non-sampled exporters. However, in that case no adverse inferences should be drawn.

Question 51

In paragraph 22 of its oral statement, the EC notes that the US description of EC practice in the situation of captive production is incorrect. Could the EC specify in what respect that description is incorrect, and provide the Panel with a correct description.

Reply

The EC recalls that the present dispute is concerned exclusively with the US law and practice. The practice of other Members, therefore, is not directly relevant to this dispute.

The EC reiterates its position that the US description of the EC practice is not entirely accurate and, therefore, requests once again that the Panel disregard such description.

ANNEX E-7

Korea's Responses to Questions to Third Parties

(6 September 2000)

Q48. Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Korea Trade Commission ("KTC"), as the organization responsible for conducting antidumping investigations, considers a set of related factors to determine whether particular sales are made in the ordinary course of trade. The relationship between the producer and the related party, the amount or portion of the affiliated party sales, and other factors relating to the affiliated party sales are considered together. The KTC applies a fairness standard to determine whether to use the affiliated party sales in the calculation of normal value. If the KTC determines that the affiliated party sales are an inappropriate basis for establishing normal value, then it considers constructed export price or third country sales price.

We would remind the Panel that Korea does not object to the application of a test for affiliated parties *per se*. We object to the application of a test which is arbitrary and creates an unfair comparison because it may or may not compare comparable sales. There is no attempt by the US to make sure that other factors affecting comparability are taken into account before the test is applied, and the test is biased as only higher priced affiliated party sales are included after the comparison.

Q.49 Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The object and purpose of Article VI of the GATT and the Anti-Dumping Agreement is to ensure that unfair trade practices in the form of dumping can be offset or prevented by anti-dumping duties. (See, e.g. , Articles VI:1 and VI:2 of the GATT and Article 1 of the Anti-Dumping Agreement. Hereinafter, "Agreement"). To that end, Article 2 of the Agreement provides numerous rules for how sales in both markets are to be determined, adjusted and compared. The Agreement also independently requires that there be a fair comparison between the export price and the normal value**.**

Article 6.8 of the Agreement recognizes that, in some circumstances, the evidentiary support for such determinations, adjustments or comparisons, may not be available or the interested party may refuse to supply it. Article 6.8 encompasses both deliberate acts ("refuses access to") and involuntary or negligent acts ("or otherwise does not provide"), resulting either in information remaining absent after a "reasonable period of time" or whose absence "significantly impedes the investigation." In either circumstance, Annex II is to be followed.

Nowhere does Annex II endorse the concept of a "punitive" facts available, e.g. , as applied by the US in this case against KSC as a result of CSI's actions. At most, Annex II contemplates that after an authority follows all the other requirements for checking and confirming the secondary information used, as provided for in Paragraph 7 of Annex II, it is permissible that the authority's use of such data produce a result which could be less favorable. The US, by its own admission, deliberately sought the information which was the least favorable and used it for that reason.

The concept of "adverse" versus "neutral" facts available is neither the starting point nor the end of the analysis. The issue is that the Agreement requires the authorities to use the most reliable secondary information available, a determination reached only after "special circumspection." "Circumspection" is defined as "Circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness." The Compact Edition of the Oxford English Dictionary (1971). In other words, the decisions regarding whether to use a secondary source and, if so, which source to use, should be made very, very carefully -- with "special circumspection."

Furthermore, once a secondary source is selected, it must be "checked" against other independent sources. This ensures that the information is reliable.

Most importantly, the Article 2.4 requirement of a "fair comparison" applies regardless of the source of the information used. Annex II provides no exception to the Article 2 requirements regarding the calculation of normal value, export price or a fair comparison.

For all these reasons, the US selection of adverse secondary information in order to penalize respondents is not consistent with the Agreement. As explained in our Third Party Written Submission, the selection of secondary information for the purpose of penalizing the respondent sidesteps the required analysis discussed above. The US cannot justify its selection of the secondary information on this basis as consistent with the Agreement.

Q.52 The first sentence of Article 2.4 requires that "A fair comparison shall be made between the export price and the normal value". There are rules for the determination of normal value set out in Article 2.2, and rules for the determination of export price in Article 2.3. Article 2.4 continues to set out specific rules for the comparison of export price and normal value. Could Korea clarify for the Panel how it interprets a requirement of fair comparison of export price and normal value to also require overall "fairness" in the determination of normal value?

Reply

In the substantive meeting on 23 August, the EC argued that the first sentence of Article 2.4 applies only with respect to the 'comparison' between the export price and the normal value, because the calculation of the normal value precedes that comparison and is not subject to any general 'fairness' requirement. On the other hand, it was Korea's view that 'fairness' should be interpreted in a broader sense, because fairness is a general principle of law. Such an interpretation of Korea is corroborated by the textual analysis of Article 2 of the Anti-Dumping Agreement as well.

Article 2.1 provides a basic guideline for determination of dumping. What the paragraph says is that there is dumping, if export price is less than normal value. Thus, the basic guideline and the key element of determination of dumping is comparison between export price and normal value. Article 2.2 and 2.3 provide for determination of normal value and export price in exceptional circumstances, where export price and normal value are not available in the ordinary course of trade. Article 2.4, after exceptional cases of export price and normal value have been brought into the purview of Article 2 through Art.2.2 and 2.3, gets back to the key element of dumping, which is comparison between export price and normal value. Here, the text says that comparison should be fair.

The title of Art.2 is 'determination of dumping'. Determination of dumping is to be done, as we saw in the preceding paragraph, through fair comparison of export price and normal value. In EC's view, fairness applies only to the comparison. In other words, calculation of normal value and export price does not have to be fair, because there is no fairness requirement in either Art.2.2 or Art.2.3.

Such an interpretation is not acceptable for Korea for the obvious reason. The determination of dumping cannot be fair, if only part of the process is fair. In other words, fair comparison of normal value and export price would not lead to fair determination, if normal value and export price were not established in a fair manner as well. Besides, it should be pointed out as well that Article 2.2 and 2.3 do not deal with determination of normal value and export price as such, but determination of those prices in exceptional circumstances.

Apart from the textual analysis as above, Korea's interpretation of fairness requirement is consistent with Article 2 in view of the object and purpose of the article. The object and purpose of Article 2 is to determine dumping margin, which , as was elaborated above, is to be done through fair comparison of normal value and export price. The object and purpose of the article would not be met, unless normal value and export price, which should be compared in fair manner, have been established in a fair manner.

Finally, even if the Agreement lacked the "fair comparison" requirement in Article 2.4, the requirement of fairness in the administration of anti-dumping laws nonetheless would exist and would bind all WTO Members. Absent such a requirement (often referred to in the reverse as *abus de droit*), none of the provisions would have any meaning whatsoever. Is it seriously to be contended that a party has a right to take actions which are "unfair" so long as the action is not specifically proscribed or addressed by a specific provision of the Agreement?

Q53. In this case, the final injury determination was of current material injury. So under Korea's view of Article 10.6, and assuming the other conditions were satisfied, retroactive duties could have been imposed. However, it is argued that without an earlier action, taken under Article 10.7, to secure the potential for imposition of retroactive duties, collection of retroactive duties would, for many Members, be impossible. Does Korea recognize any difference between the decision under Article 10.7 to preserve the possibility of retroactive duties, and the decision to actually apply duties retroactively under Article 10.6?

Reply

We do not see how one could interpret Article 10.6 and Article 10.7 differently or separately since Article 10.7 specifically incorporates by reference Article 10.6 and requires that once all the conditions set out in Article 10.6 are satisfied by sufficient evidence (and not before) the authorities can then act under Article 10.7. In other words, the "measures" of Article 10.7 are merely the tools for effectuating the retroactive application of duties under Article 10.6.

Another way of stating this is that, apart from Article 10.6, there is no separate authority or basis for acting under Article 10.7. The authority or basis for action under 10.7 is found in Article 10.6 and all of the preconditions of Article 10.6 must be met.

We do not read Article 10.7 to grant authority to "preserve the possibility" of imposing retroactive duties before the conditions of Article 10.6 are met. This would be a particularly flawed interpretation since Article 10.7 says the opposite: "once" the conditions of Article 10.6 are met, Article 10.7 measures can be taken. Since Article 10.6 addresses the application of retroactive, definitive anti-dumping duties and Article 10.2 requires a finding of present injury (and not threat of injury except under special circumstances) in order for definitive anti-dumping duties to be applied retroactively, a preliminary determination of present injury and dumping must be made or a history of dumping must be present so that the importer was "aware" that injurious dumping was occurring, prior to applying measures under Article 10.7.

ANNEX E-8

Responses of Brazil to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value? How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or third country sale price uses, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Brazilian experience involving sales to affiliated parties is quite limited. When this situation occurs, a comparison is made between sales to related parties and those to non-related parties. If a distinct pattern is detected and if the exporter cannot establish the existence of factors, other than company affiliation, that may justify the different patterns, all sales to affiliated parties are considered to be not in the ordinary course of trade and are consequently disregarded. Since the sales to non-affiliated parties were always sizeable and representative, only these sales were used to calculate the normal value. Exporters have not yet questioned this procedure.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The interpretation of Article 6.8 and its related Annex II *cannot* include the right to penalize respondents with adverse facts available, regardless of a respondent's behaviour. Reading in a right to punish respondents would (1) establish an impermissible interpretation of Article 6.8 and Annex II, and (2) broaden the rights of WTO Members in a manner inconsistent with Articles 3.2 and 19.2 of the DSU.

Article 6.8 does not distinguish between situations where a party deliberately tries to obstruct an investigation and where information simply is not otherwise provided. Rather, Article 6.8 treats those situations exactly the same, by calling for the authority to fill in the information with facts available. The first sentence of Article 6.8 effectively establishes an equal footing between a case where a party "refuses access" to data and that where a party simply "does not provide" the necessary

information. This plain language establishes that even when a party "refuses access" to information, the consequence of such action is simply the use of "the *facts* available".

Therefore, Article 6.8 is about filling in missing information, no matter what the cause. It does not treat uncooperative parties any differently from cooperative parties that simply do not have the required information. This equal treatment is no surprise given that it is often hard for an authority to determine, for example, whether a party does not have information at its disposal or whether the party is actually hiding information. Therefore, Article 6.8 operates upon a presumption of good faith and treats all parties equally.

According to the customary rules of treaty interpretation, Article 6.8 should first be read according to the ordinary meaning of its text. The primary meanings of the word "fact" in common dictionaries are "an event or thing known to have happened or existed" and "a truth verifiable from experience or observation". The concept of an "adverse fact" introduced by the US is, in this way, self-contradictory. One single *fact* cannot be chosen in a way that it may configure a less favourable result for a respondent.

Paragraph 7 of Annex II is entitled "Best Information Available", and it tries to ensure that along the course of an investigation *information* is used in such a way that it resembles the *facts* as closely as possible. It contains the only mention of "cooperation" as it applies to an authority's choice of "facts available" (i.e., paragraph 7 does not apply to the decision *whether to apply facts available, but only to the choice of "facts available").* Yet, even this provision does not permit use of facts available to punish non-cooperative respondents as argued by the United States. First, paragraph 7 uses the verb "could" when referring to unfavourable results, thereby removing any possibility that authorities can affirmatively seek out figures that will punish or have a deterrent effect on respondent behaviour. Second, paragraph 7 instructs the authority to use "careful circumspection" in selecting its choice of information available. This phrase is an expression of "good faith" as discussed in paragraph 10 of our Third Party Submission and reinforces the notion that the *information* selected should reflect the *facts* mentioned in Article 6.8. The concept of punishing respondents simply does not fit within this obligation to act in good faith and constrain oneself when choosing appropriate facts to fill in the holes.

If representative information is available, then the authority should use it. If representative information is not available - or perhaps unreliable - because a party significantly impeded the investigation or refused to provide certain information, then such a party runs the risk of the authority using information from the petition or other "secondary source". The point, though, is to search for the most reliable information, not to choose unrepresentative data for the sheer purpose of punishing a party with an adverse result. The language and spirit of Article 6.8 and of Annex II effectively preclude an investigating authority from selecting information available *in order to* achieve a pre-determined set of results, namely the one that is least favourable to a perceived non-cooperating party. Information selection criteria cannot be based on a result oriented approach. Such criteria should be based on the quality of the information available; in other words, which information available is best suited to reflect a given indicator or a given *fact*.

The use of available facts has the purpose of facilitating the conduct of an investigation that would otherwise be brought to a halt due to lack of essential information in sole possession of a particular party. This provision is not intended to punish a party that *may* not be cooperating. In brief, any interpretation of the AD Agreement that could grant an additional punitive power to the investigative authorities would effectively expand the rights of the WTO Members under that Agreement in violation of Articles 3.2 and 19.2 of the DSU.

ANNEX E-9

Japan's Answers to Questions from the Panel at the Second Meeting of the Panel

(6 October 2000)

Question 1: In paragraph 5 of its oral statement Japan says that the use of facts available has to be logical and reasonable. In Japan's view, can it ever be logical and reasonable to use adverse inferences in the selection of facts available? Please explain.

Answer

1. Depending on the particular circumstances in a case, the most logical and reasonable inference may be adverse. For example, if the particular factual circumstances demonstrate that a respondent has withheld information intentionally, the logical and reasonable inference to be drawn might well be more adverse to the respondent than the inference to be drawn under other circumstances. But there is a fundamental difference between making inferences that end up being adverse because the particular factual circumstances make such an inference logical and reasonable, and making inferences that are purposefully adverse for the sole purpose of punishing respondents and inducing cooperation in future cases. The United States routinely uses high dumping margins as "adverse facts available" that are neither logical nor reasonable. Indeed, they are not inferences at all, but rather punishment.

2. The United States describes its adverse facts available practice in benign terms – arguing that it is only drawing adverse inferences that are reasonable and logical. But merely finding that a company failed to cooperate to the best of its ability -- the standard set forth in the US statute -- does not by itself justify any adverse inference. It must first be determined that information was in fact withheld, as required by Paragraph 7 of Annex II. Then, the authority must ensure that the inference being made is logical and reasonable in light of the circumstances. A failure to cooperate, even when information is withheld, does not justify any facts available the authority can arbitrarily think of to punish the respondent. If this were the case, there would be no reason for the protections contained in Annex II.

3. The Panel should compare the US descriptions of its supposedly benign practice with USDOC's actions in the hot-rolled steel case. The severe punishment of KSC, NSC, and NKK illustrates the true color of the practice. Instead of drawing particular inferences that are logical and reasonable – and that in some cases might also be adverse – USDOC made adverse inferences as a punishment and a warning. With KSC, USDOC punished a respondent with the second highest margin available, even though doing so would clearly reward the petitioner who failed to cooperate. With NSC and NKK, USDOC had the actual data it had requested in plenty of time to use in calculating these companies' margins, but applied the most adverse margin or price in a blatant effort to punish the companies for making a mistake. It made no attempt to use facts that most closely approximated the truth -- facts which were clearly available and which should have been used. The use of adverse inferences for such purely punitive purposes goes beyond the mandate of Article 6.8 and Annex II.

Question 2: Paragraph 7 of Annex II of the AD Agreement provides that "special circumspection" is due when authorities base their findings on information from a secondary source. Does Japan consider that the information provided by a particular company in its questionnaire response is information from a secondary source with respect to the application of facts available to that same company?

Answer

4. Yes, information provided by a company in its questionnaire response can be considered as information from a secondary source. It is important to consider both who provided the information and what information has been provided. A primary source is from the same company and responds to a specific request for information. A secondary source could be either from a different company, or information other than that specifically requested. A number from elsewhere in the response of a company related to completely different sales or a completely different category of information is just as much "secondary source" information as is data from a different source.

5. This case illustrates well the difference. USDOC decided (wrongly) that it did not have information on the conversion factors for NSC and NKK. USDOC could have filled the gap in information with logical and reasonable facts available, for which it had many alternatives. The most obvious alternative would have been the conversion factor reported by KSC and accepted by USDOC as reasonable. Although from a different company, this surrogate information had a far more plausible connection to the missing NSC and NKK conversion factors than did the highest dumping margin or the highest normal value from the same company. But, rather than use this logical and reasonable alternative, USDOC decided instead to punish NSC and NKK with the highest margin or price it could derive from the companies' sales lists.

6. Consider the illogic of the US interpretation of "primary" sources. Under the US view, the use of the KSC conversion factor, even with its close nexus to the category of information at issue, would have required "special circumspection" as a secondary source. (Japan, of course, considers that "special circumspection" is required whenever such a secondary source is used.) Yet any figures from NSC's and NKK's responses -- from whatever category of information within those responses -- could be used without any special circumspection or corroboration merely because these numbers were provided by NSC and NKK themselves. This is a totally unbalanced conclusion and, thus, the US interpretation is not permissible.

Question 3: In paragraph 37 of its second oral statement, the US argues that "the fact that KSC regularly ignored the shareholders agreement does not prove that it had no power under that agreement - only that KSC did not always choose to exercise that power." Could Japan please comment on this statement?

Answer

7. The United States is trying to divert the Panel's attention away from USDOC's conduct by focusing on what it thinks KSC should have done. But, the issue here is USDOC's misapplication of facts available. Unless the United States can identify action (or inaction) taken by KSC that was aimed at withholding information from USDOC, then there is no justification for USDOC's decision to apply an adverse inference to KSC. No such action or inaction has been identified. Japan, however, has identified multiple problems with USDOC's actions.

8. First, the United States focuses its attention only on KSC and pretends that CSI was not involved in the investigation. But both KSC and CSI were interested parties to this investigation with diametrically opposed interests in the outcome of the investigation. When considering the plain meaning of "withheld," it seems far more logical to apply this term to the petitioner CSI, which was

the party in control of the necessary information, than to apply this term to KSC, which was trying to obtain the information from CSI.

9. Second, the United States assumes that USDOC had no duty even to try to obtain the information from CSI. Yet, USDOC held its own separate meeting with representatives of CSI and other petitioners to discuss the issue and also failed to obtain the requested information.[1] If the authority with the legal power to issue dumping margins in response to CSI's petition was not able to obtain the information from CSI, on what basis can it possibly punish KSC for being unable to do so?

10. Third, the United States is holding respondents to the standard of perfect knowledge. While it may be easy for USDOC to identify additional steps that in hindsight could have been taken, respondents struggling to comply with extensive and burdensome questionnaires on short notice may sometimes overlook a step that could have been tried. This is particularly true in this case. CSI first told KSC that CSI would help (according to Mr. Declusin), and only later did CSI change its position and refuse to assist (by order of CSI's President and CEO).

Question 4: The Panel understands that the USDOC and USITC have different rules and deadlines with respect to information gathering and application of facts available. The Panel understands the US to have asserted that each agency applied its own rules to the parties appearing before it in an impartial manner. Does Japan contend that the USDOC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the USITC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the difference between the rules applied by the USDOC and the USITC demonstrates partiality or failure to uniformly administer the anti-dumping law?

Answer

11. With respect to the first question, the answer is yes. USDOC's rejection of NSC's and NKK's theoretical weight conversion factors was partial and non-uniform first because it deviated from USDOC's own normal practice. As the United States admits in its own Question 9 posed to Japan (see below), corrections are normally accepted as late as the first day of verification (although this deadline is normally reserved for minor corrections, while the seven-day rule typically applies to more significant corrections and other additions to the record). The lack of impartiality and uniformity of USDOC's actions in this instance is evident from the fact that USDOC refused to accept certain information from NKK and NSC before verification despite its established practice of doing so in previous cases and, for certain other information, in this very case. USDOC's practice shows that questionnaire deadlines are never the last chance an interested party has to submit information for the record.

12. As for the Panel's second question, the answer is no. Japan is not arguing that USITC's acceptance of petitioners' untimely-filed questionnaire responses in this case themselves violate USITC's own procedural rules. USITC's actions are relevant in this context only in that they show the impropriety of USDOC's and USITC's actions as a whole (i.e., the actions of the US Government).

13. Finally, regarding the Panel's third question, the answer is yes, based on the assumption that this question addresses the consequence of the difference between the rules of USDOC and USITC, which have specific roles to play vis-à-vis respondents and petitioners. When we consider the fact that the two agencies act in tandem as the US anti-dumping authority, the different rules applied by the agencies exhibit a double standard for respondents and petitioners. The rule USDOC applied in

[1] KSC asked to be a part of this meeting to try to resolve any problems with obtaining CSI's information. *See* KSC Letter to USDOC of 3 Dec. 1998, at 1 (**Exh. JP-78**).

this case -- which was a clear departure from USDOC's established practice -- served to reject certain corrected information submitted by NSC's and NKK's after the questionnaire deadline. Meanwhile, the rule applied by USITC served to accept only petitioners' corrections to the record even though they were also submitted well after the questionnaire deadline. These disparate rules -- taken by the US anti-dumping authority -- favor petitioners over respondents. Article X:3 is specifically intended to prohibit such double standards.

Question 5: In light of the US statements at the second meeting concerning rules of statutory construction and interpretation of US law, does Japan still maintain, as it asserted in its second oral statement, that the captive production provisions "takes precedence" over the other provisions of US law regarding the analysis and determination of injury? If yes, please explain on what basis Japan maintains this position.

Answer

14. Nothing in the US statements at the Second Meeting changes Japan's position in its Second Submission that the captive production provision in 19 U.S.C. § 1677(7)(c)(iv) supersedes 19 U.S.C. § 1677(7)(c)(iii), when applicable. The United States grossly mischaracterizes Japan's arguments concerning statutory construction.[2] Japan nowhere argues that the captive production provision repeals 19 U.S.C. § 1677(7)(c)(iii), by implication or otherwise. This would be impossible, because the captive production provision only applies when certain conditions are met, and expressly refers to Section 1677(7)(c)(iii). Japan only argues that when the captive production provision applies, it supersedes those elements of 19 U.S.C. § 1677(7)(c)(iii) that conflict with its command to "focus primarily" on market share and financial performance in the merchant market.

15. Japan cites canons of statutory construction concerning the interpretation of statutes addressing the same subject matter, which are said to be "in pari materia."[3] Under these canons, "{i}t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter."[4] The captive production provision and Section 1677(7)(c)(iii) are in pari materia because "one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way."[5] Both provisions concern USITC's analysis of the impact of subject imports on a domestic industry. But while Section 1677(7)(c)(iii) sets forth USITC's general approach to analyzing the impact of subject imports on domestic producers as a whole, Section 1677(7)(c)(iv) creates a specific exception to this approach. The express language of the captive production provision modifies Section 1677(7)(c)(iii), providing that when the provision's criteria are met, "the Commission, in determining market share and the factors affecting financial performance *set forth in clause (iii)*, shall focus primarily on the merchant market for the domestic like product." (Emphasis added).

[2] Oral Statement of the United States, Second Meeting, para. 25.

[3] *See generally* 2B Sutherland Stat Constr § 51.01 (5th Ed. 1992) (additional excerpts attached as **Exh. JP-107**).

[4] *Id.* at § 51.02 (additional excerpts attached as **Exh. JP-107**).

[5] *Id*. at § 51.05 (**Exh. JP-101(a)**).

16. When the captive production provision applies, USITC cannot "focus primarily" on the market share and financial performance of both producers as a whole and the merchant market segment; in other words, Sections 1677(7)(c)(iii) and 1677(7)(c)(iv) are in conflict. Under the canon of statutory construction cited by Japan, such conflicts are resolved in favor of the more specific provision, in this case, the captive production provision.[6] The more general provision is not repealed by implication, but only disregarded in favor of the more specific provision, when it applies.

17. This is not a complex argument – Japan is only suggesting that the statute means what it says. When the captive production provision applies, USITC is to "focus primarily on the merchant market for the domestic like product" in determining "market share and the factors affecting financial performance set for in clause (iii)" instead of determining market share and the factors affecting financial performance with respect to the industry as a whole, as it would ordinarily under clause (iii) Indeed, in the hot-rolled steel case, three commissioners faithfully applied the captive production provision, methodically analyzing each of the provision's three criteria and, finding them satisfied, modifying its analysis of impact accordingly: "Because we have found the captive production provision to apply in this case, we have focused primarily on the merchant market in assessing market share and the factors affecting financial performance."[7]

18. After inventing an argument that Japan has never made, the United States attacks its straw man by citing *Watt v. Alaska*, "repeals by implication are not favoured. . . . The intention of the legislature to repeal must be 'clear and manifest.'"[8] As Japan does not argue that the captive production provision repealed Section 1677(7)(c)(iii) by implication, this holding is completely irrelevant. Moreover, Japan cites *Watt* not to support its argument that the more specific captive production provision supersedes the more general Section 1677(7)(c)(iii), but to support its related argument that when two provisions conflict, the more recent provision should prevail.[9] The United States is silent on the Supreme Court case cited by Japan, *Busic v. United States*, which affirms the canon that a "more specific statute will be given precedence over a general one."[10]

19. Beyond its mischaracterization of such basic concepts of statutory construction, the United States also incorrectly asserted at the Second Meeting that Japan has abandoned a point made in its First Submission – specifically, that "it was improper to consider, either primarily or secondarily, data for the merchant market sector."[11] In actuality, Japan recognized in its First Submission that the panel report in *Mexico—High Fructose Corn Syrup* does not completely preclude a sectoral analysis.[12] Japan only argued, "the commissioners could not have considered, either

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[6] *Id.* ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter with prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.") (citations omitted) (**Exh. JP-101(a)**).

[7] *USITC Final Injury Determination*, USITC Pub. 3202 at 35 (**Exh. JP-14**). The United States argued at the Second Meeting that the Statement of Administrative Action expresses Congress' intent that the captive production provision would be consistent with the AD Agreement and that USITC is therefore somehow free to resolve ambiguities in the captive production provision "in a manner consistent with the United States' obligation under the Agreement." Oral Statement of the United States, Second Meeting, at para. 23. Such statements, however, do not ensure that a provision -- or its application -- is in fact consistent with the Agreement. This is for the Panel to determine, not the United States. In Japan's opinion, as discussed above, the provisions are inherently inconsistent, and USITC did nothing in its final determination to overcome this fact.

[8] Oral Statement of the United States, Second Meeting, para. 26.

[9] Japan's Second Submission, para. 193 n.221.

[10] *Id.* at para. 193 n.221 (citing *Busic v. United States*, 446 U.S. 398, 406, 65 L.Ed.2d 381, 389 (1980)).

[11] Oral Statement of the United States, Second Meeting, para. 19 (incorrectly citing Japan's First Submission, para. 45 instead of para. 245).

[12] Japan's First Submission, para. 223.

primarily or secondarily, data for the merchant market *in this case* without distorting their judgment."[13] Far from abandoning this argument, Japan's Second Submission actually amplifies it, elaborating on how USITC cannot relate merchant market segment findings to the industry as a whole, as the AD Agreement requires, without also examining all other industry segments.[14]

[13] *Id.* at para. 245 (emphasis added).
[14] *See, e.g.*, Japan's Second Submission, para. 222.

ANNEX E-10

Japan's Answers to Questions from the United States at the Second Meeting of the Panel

(6 October 2000)

Regarding CSI's alleged inability to provide information requested by Commerce:

Question 1: Isn't it true that, in CSI's letter of December 14, 1998 (JP-42(m)), addressed to KSC, CSI claimed it was unable under its accounting system to provide the information requested with regard to only question one, when KSC in fact posed twelve questions (JP-42(1))?

Answer

1. While it is true that CSI responded directly to only the first of twelve questions posed by KSC, the first question sought the most important information – transfer prices and the prices to the first unaffiliated US customer for all sales of subject hot-rolled steel that CSI further manufactured. The other eleven questions requested subsidiary information about product descriptions and specifications, source documentation supporting any reported resales, price lists, documentation or explanations of CSI's sales process, frequency of changes in sales terms, and general financial or corporate structure information.[1] The absence of the basic price/sales data rendered the remaining information useless. CSI itself noted in its response:

> In reference to your letter of December 8, 1998, this is to inform you that CSI is unable under its accounting system to provide the information on sales requested in question 1. While we could provide other information to you, it would be difficult for us to provide such information within the time frame specified in your letter. *It is also our belief that without being able to provide the important information of sales prices requested, the provision of other data requested by you would be neither usable nor useful in the investigation of Kawasaki and therefore would be a waste of resources for both CSI and Kawasaki.*[2]

2. This letter does not make clear the reason for CSI's refusal to provide the subsidiary information. The tone suggests unwillingness, but the fact remains that the absence of necessary price information, which CSI was unable to provide, made the other requested information useless. KSC repeatedly informed USDOC of CSI's inability and/or unwillingness to provide necessary information, including providing CSI's 14 December 1999 letter.

[1] KSC Letter to CSI on 8 Dec. 1998 (**Exh. JP-42(l)**). Note that each of the questions KSC posed to CSI restated USDOC's questionnaire verbatim.

[2] Mr. Goncalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**) (emphasis added).

Question 2: Where precisely in the exhibits Japan has cited did *KSC* inform *Commerce* that CSI was *unable* to supply the requested information? In addition to providing the cites, please quote actual statements by KSC.

Answer

3. KSC repeatedly informed USDOC that CSI was *unable* to supply the requested information, either by explicitly saying so in its letters to USDOC, or by referencing, or attaching to, CSI's Letter to KSC of 14 December 1998 (**Exh. JP-42(m)**) (in which CSI stated it was unable to supply the information requested in Question 1 of KSC's Letter of 8 December 1998).[3] We have provided below relevant quotes and references from Japan's exhibits.

- KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-93(a)**): "Attached to this letter is the most recent written response of CSI {CSI's Letter to KSC of 14 Dec. 1998} to our requests for information. . . . CSI has declined to provide KSC with information necessary to respond to Sections C and E. . . ." The attached letter clearly indicated CSI's inability to provide the information.

- KSC's Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**): "CSI responded to this request a week later, on December 14, 1998, and with multiple excuses indicated its *inability*/unwillingness to provide the necessary information, including (1) that its accounting system was *unable* to provide information regarding its sales of further manufactured products. . . ." (Emphasis added.)

- KSC Verification Exhibit 20 (Mar. 1999) (**Exh. JP-93(b)**): KSC again provided USDOC with {CSI's Letter to KSC of 14 Dec. 1998}, which contained CSI's statement that it was unable to provide the information requested in question 1 of KSC's Letter to CSI of 8 December 1998.

- KSC's USDOC Case Brief, at 16, Exhibit 2 (12 Apr. 1999) (**Exh. JP-93(c)**): In the text of its case brief on page 16, KSC quoted in its entirety CSI's Letter to KSC of 14 December 1998, which explicitly CSI's inability to provide the information requested in question 1 of KSC's Letter to CSI of 8 December 1998. Moreover, KSC again provided USDOC that letter in Exhibit 2.

4. As the evidence demonstrates, KSC repeatedly informed USDOC that CSI was unable to provide the information requested in Question 1 of KSC's Letter of 8 December 1998. Sometimes KSC said it directly, other times KSC quoted the words of CSI. Japan is alarmed that USDOC is not familiar with the record of its own investigation.

Question 3: Isn't it true that KSC told Commerce, in KSC's questionnaire response of December 21, 1998 (JP-42(p)), that CSI did not provide a reason for its claim that under its accounting system it was unable to provide sales information?

Answer

5. Yes. KSC noted in its questionnaire response the terse CSI comment, which included no explanation, to show that CSI was not at all forthcoming with KSC. Whether the statement was true or not is not something KSC was ever able to determine. If USDOC questioned the veracity of the

[3] *See* Japan's Second Submission, para. 46.

statement or wanted an explanation, it could have followed up with CSI directly after KSC informed USDOC of CSI's response. CSI was, after all, an interested party to the investigation.

Question 4: Isn't it true that, in all of the following documents submitted to Commerce, KSC said that CSI refused to supply, or would not supply, or would not cooperate with KSC to supply (rather than was *unable* to supply), the requested information: JP-42(n) (KSC letter to USDOC, 18 Dec. 1998); JP-42(p) (KSC response to section C of USDOC questionnaire); JP-42(u) (KSC response to first USDOC section A supplemental questionnaire); JP-42(v) (KSC response to sections B and C of Commerce supplemental questionnaire)?

Answer

6. Japan's answer to US Question 2 above documents the numerous instances in which KSC communicated this basic point to USDOC, and includes citations to some of the documents identified here. KSC assumed that USDOC would be reading not just the text of its answers, but also the attached correspondence from CSI. The fact that KSC may not have provided full quotations from the CSI correspondence in the text of each and every letter it submitted to USDOC does not change the fact that the correspondence is on the record.

7. Perhaps the best and most obvious example is from KSC's Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**). KSC informed USDOC that CSI responded to KSC's latest request for information on December 14, 1998, and "with multiple excuses indicated its inability/unwillingness to provide the necessary information, including (1) that its accounting system was unable to provide information regarding its sales of further manufactured products." With this and many other submissions, KSC clearly documented CSI's unwillingness *and* inability to provide necessary information.

Regarding the KSC/CSI transfer price information:

Question 5: Isn't it true that the transfer price data which KSC submitted to USDOC (JP-93(f) and US/B-24bis) excludes product characteristics such as prime, paint, quality, carbon, strength, coil, tempered, and pickled?

Answer

8. No, this is not entirely true. The table KSC provided in its Section A response showed which types of steel it sold to CSI. [4] The table contained pertinent product characteristic data including thickness, width, and specification. From the specification, USDOC could have determined quality, carbon, and strength, as explained in KSC's Section C Questionnaire Response..[5] Further, KSC indicated in its Section C Response that all sales to the United States were prime, unpainted product.[6]

9. The remaining product characteristics mentioned in the question (coil, tempered, and pickled) were not provided -- but they were also never requested by USDOC. This is because USDOC inappropriately assumes that all export sales to affiliates are unreliable -- an assumption Japan thinks is erroneous. The United States cannot now defend this erroneous assumption by blaming KSC for following USDOC's questionnaire.

[4] KSC's Section A Questionnaire Response, Exhibit 37 (16 Nov. 1998) (**Exh. JP-93(f)**). The information was provided in product groups, *i.e.* ["thinner gauge HRS for resale," "HRS for Cold-Rolled" and "Galvanized," and "HRS for Pipes"]. (HRS is hot-rolled steel.)

[5] KSC's Section C Response, at C-2 (21 Dec. 1998) (additional excerpts attached as **Exh. JP-108**).

[6] *Id.* at 7-8 (additional excerpts attached as **Exh. JP-108**).

10. In any event, the missing information was not critical for determining whether KSC-to-CSI prices were reliable. A test of reliability does not depend on a comparison of products using USDOC's CONNUMs. USDOC had the most important product characteristics in the data KSC provided in its Section A response. These were more than sufficient to determine the reliability of the gross unit prices at which KSC sold to CSI.

11. Furthermore, given the difficulties USDOC knew KSC was facing in obtaining downstream data from CSI, USDOC could have requested the other product characteristics from KSC in order to form a more reasonable basis for facts available if the KSC-to-CSI prices were, in fact, deemed unreliable.

Question 6: Isn't it true that this same information excludes selling expenses such as rebates, credit, advertising, warranty, technical services, indirect selling expenses, and packing expenses, as well as terms such as order date, pay date, sales terms, payment terms, and quantity type?

Answer

12. This question misses the point. USDOC does not need a full response to its questionnaire to test whether the relationship has influenced the prices. Given KSC's data on prices, quantities, and most product characteristics, USDOC could undertake a basic examination of the reliability of the KSC-to-CSI prices without the missing data. Furthermore, as discussed above, knowing that KSC was having difficulty collecting the downstream information from CSI, USDOC could have asked KSC for more detail regarding its transfer sales to CSI.

Regarding Japan's Second Opening Statement and KSC:

Question 7: How can Japan state in its Second Opening Statement (para. 10) that the "USDOC ignored the fact that the company whose information USDOC demanded was a petitioner" when the USDOC, in its final determination (JP-12), specifically addressed this fact, as explained and quoted in the US 1st Submission (para. B-114)?

Answer

13. In its Oral Statement at the Second Meeting, Japan made this argument to highlight USDOC's refusal to give this fact any weight. An authority can mention a fact, but then make a decision that completely ignores the significance of that fact. To do so is to ignore the fact at issue.

14. The quoted passage demonstrates that USDOC did not give full and fair consideration to the very important fact that CSI was an active petitioner in the investigation. The discussion quoted in para. B-114 of the US First Submission only obliquely references CSI's status as an active petitioner. The vast majority of USDOC's analysis treats this case like any other case involving affiliates, just assuming that affiliates act in concert to the benefit of the whole. USDOC's discussion of what KSC did or did not do and the possible benefits accruing to KSC and CSI is remarkably void of any reasoned consideration of the obvious effect CSI's status as petitioner would have on the situation.

15. The only perceptible reference to CSI as petitioner is where USDOC casually stated, "while KSC's business relationships may involve certain internal conflicts of interest, the use of an adverse inference in determining the dumping margins on CSI sales does not contradict the Department's policies."[7] It is exactly the "internal conflicts of interest" caused by CSI's independent decision to participate in the investigation as an adversary to KSC that created the problem. If CSI had wanted to help KSC in the defense, CSI would have cooperated, KSC could have met USDOC information

[7] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24368 (**Exh. JP-12**).

demands, and there would have been no need for "facts available." CSI itself stated that its status as petitioner affected its willingness to assist KSC.[8] USDOC dismisses CSI's obvious independent self-interest, by assuming affiliates act in concert regardless of the circumstances. USDOC's theory that KSC and CSI acted in concert was not supported by the facts in this case. Thus, its adverse inference was illogical and unreasonable.

Question 8: Why does Japan persist in referring to "cases" in the plural (Japan's 2nd Opening Statement para. 10 and Japan's 2nd Submission para. 78) with regard to a USDOC case involving a US importer/petitioner, when there is only one such case (JP-93(h))? Isn't it true that, with regard to this one case, Commerce found the petitioner to have had "exclusive control" over the requested data?

Answer

16. While Japan has checked again and could find no other relevant cases directly on point, this is unsurprising. How often is the US affiliate of a foreign company authorized to file an anti-dumping petition against its parent? The very fact that KSC was unable to prevent CSI from joining the anti-dumping petition demonstrates KSC's lack of control over CSI.

17. The United States is wrong to insinuate that USDOC declined to apply adverse facts available in *Stainless Steel Wire Rod From Taiwan* merely because it found the petitioner had "exclusive control" over the requested data. It is clear that USDOC made this decision based on no fewer than four factors, best summarized in the USDOC's "Walsin Concurrence Memorandum," which the determination explicitly cites:[9]

> {A}t the time of response preparation and verification, Carpenter and Walsin were not affiliated within the meaning of section 771(33)(E) of the Tariff Act of 1930…In addition to this fact, it is important to note Carpenter's role as a petitioner in the investigation of SSWR, its interest in domestic production of SSWR rather than importation from Taiwan, and its lack of direct financial liability with respect to imports of the subject merchandise which occurred after the suspension of liquidation."[10]

Thus, aside from the issue of control over the requested information, USDOC also recognized Carpenter's ample incentive to sabotage Walsin's questionnaire responses, given its role as petitioner, its interest in domestic production, and its lack of direct financial liability for antidumping duties. USDOC refused to punish Walsin for Carpenter's self-interested behaviour, and applied neutral facts available.[11]

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[8] *See* Japan's Second Submission, para. 61 (quoting letters from CSI: "please remember that CSI is one of the petitioners, and eventually we would be in a difficult position to supply some kind of information" and "{t}his behaviour has been adopted here at CSI in order to protect the company as an American steel company, regardless of the Brazilian and Japanese ownership.").

[9] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 40461, 40464 (29 July 1998) ("For further discussion, see Walsin Concurrence Memorandum.") (**Exh. JP-93(h)**).

[10] Anti-Dumping Duty Investigation of Stainless Steel Wire Rod (SSWR) from Taiwan, A-583-828, Walsin-Cartech Specialty Steel Corporation: Concurrence Memorandum for the Final Determination (20 July 1998) (excerpts attached as **Exh. JP-109**).

[11] *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. at 40464 ("Given these *unusual* circumstances, we have not determined that Walsin failed to act to the best of its ability. . . . Therefore, in applying facts available, we used the weighted-average margin for all of Walsin's reported sales to the CEP sales that were not reported. . . .") (emphasis added) (**Exh. JP-93(h)**).

18. CSI's incentive to sabotage KSC's questionnaire response was no different. CSI was a petitioner. Its primary interest was in domestic production, not importation, as evidenced by USITC's decision to not exclude any related parties from its preliminary investigation.[12] CSI no longer imported hot-rolled steel from KSC, so it would not have been financially liable for any future anti-dumping duties.[13]

19. In any event, regardless of whether USDOC followed past practice, its treatment of KSC violated its WTO obligations. USDOC should have recognized KSC's predicament and applied special circumspection in its application of facts available, as required by Paragraph 7 of Annex II. It should also have rendered practicable assistance, as required under Article 6.13. The adversarial approach USDOC adopted in this case, and its ultimate resort to adverse facts available, violated the letter and spirit of the Agreement.

Regarding NSC/NKK:

Question 9: Japan's Second Written submission, at fn. 89, claims that the Polyester Staple Fibre case shows that the "Seven-Day Rule" does apply to information requested in questionnaire. It is undisputed that that case dealt with corrections to data already submitted, and that Commerce regularly accepts such corrections as late as the first day of verification, as it did in this case for all three Japanese respondent firms. Given that the deadline for "corrections" is not seven days before verification, but the first day of verification, and that the reference to the "Seven-Day Rule" in the Polyester Staple Fibre case is therefore clearly an incorrect citation, and given that the *chapeau* of 19 C.F.R. § 351.301(b) expressly provides that the questionnaire deadlines in 19 C.F.R. § 301(c) take precedence over the general deadline in 19 C.F.R. § 351.301(b), how can the Polyester Staple Fibre case provide that the Department's general practice is to allow the submission of new data categories, including those that-like the theoretical weight factors – are not corrections, long after the questionnaire deadlines?

ANSWER

20. The United States is drawing a distinction between corrections and new information that does not apply in this case. First, NSC's and NKK's submissions of conversion factors were in fact corrections. Both companies had incorrectly stated they did not have the information requested. This incorrect statement was then corrected. Neither company left this question blank. Both provided an answer, and they then sought to correct that answer as soon as they discovered their initial answer was incorrect.

21. Second, the conversion factor cannot reasonably be considered a "new data category." NSC and NKK provided quantities, prices, and all the necessary adjustments. The only outstanding issue was whether and to what extent the quantities being reported needed to be adjusted. In other words, was the quantity that had been reported correct, or did it need to be corrected?

22. Third, the United States responded to a Panel question at the Second Meeting by arguing that allowing new information creates a loophole and creates unfairness. Neither claim is correct. Because the USDOC policy of accepting corrections itself contemplates new information coming later

[12] *See USITC Final Injury Determination,* USITC Pub. 3202, at 5-6 ("In the preliminary phase of this investigation, we found that two domestic producers were related parties…We further found that appropriate circumstances did not exist to exclude either of these producers from the domestic industry. In the final phase of this investigation, we have not found any evidence to warrant changing this finding.") (**Exh. JP-14**).

[13] *See* KSC Letter to USDOC of 10 Nov. 1998 ("While CSI has historically been the importer of record for all imported steel including KSC HRS, when a HRS shipment arrived potentially subject to retroactive antidumping duties, CSI required that purchase to be entered by . . . Kawasho International.") (**Exh. JP-42(i)**).

in the investigation, the addition of such information cannot be considered a loophole to the questionnaire deadlines. Nor is there any unfairness. The "seven-day rule" allows for information to be placed on the record prior to the verification, and weeks before the arguments by both sides. This case illustrates well the amount of time available for comment. Petitioners had time to comment before the verification, during the verification, and after the verification. Petitioners had time to make arguments in their brief, and make arguments in the oral hearing. Given these extensive opportunities to comment, the United States cannot argue credibly that there was no time for systematic analysis or comments by others.

23. We also note the illogic of the US argument. If corrections can be made as late as the first day of verification, then the seven-day rule must apply to other categories of information. If this is true, then it is unclear on what basis USDOC can justify rejecting NSC's and NKK's conversion factors.

Regarding Affiliated Sales in Home Market:

Question 10: Japan continues to complain that it is unfairly harmed by Commerce's failure to exclude, as not in the ordinary course of trade, sales to an affiliate made at artificially high prices, such as those which might be made to a cash-rich affiliate for subsequent resale as a lower price for tax purposes. In response to Panel Question 37 on this hypothetical situation, the Department noted (at paragraph 43) that if the transfer price sales were, in fact, outside the ordinary course of trade because the merchandise was sold to the affiliate at artificially high prices, the producer could report the downstream sales at the market price, even if these were below the affiliate's cost of *acquisition*. (We note that the Department did not, as Japan suggests in its Second Written Submission, state that it would accept downstream sales below the cost of *production*; such sales are expressly outside the ordinary course of trade.) In its Second Written Submission, at paragraph 125 and fn. 124, Japan's response is to question whether Commerce would, in "a real investigation," accept the below acquisition cost sales.

In this investigation, KSC made a large percentage of its home market sales through its affiliated trading company, Kawasho. KSC did not report its transfer prices to Kawasho. Instead, as permitted by the Department's standard questionnaire, KSC reported only Kawasho's downstream sales. (Preliminary Analysis Memorandum for KSC, Exh. USB-6.) NSC also directly reported downstream sales for its principal home market trading company, in lieu of the transfer price sales to that company. (Preliminary Analysis Memorandum for NSC, Exh. USB-32.)

Given this situation, in this "real investigation," could Japan please explain how the Department would be in a position to know what an affiliate's acquisition costs were if a producer chose, instead of reporting the artificially high sales, to report the more ordinary downstream sales instead? If the Department does not even know what the acquisition costs are, how can the Department decline to accept downstream sales on the grounds that they are made below their acquisition cost?

Answer

24. The US question (as well as the accompanying essay) misses the point. Japan is not complaining that any high-priced sales were inappropriately included in this case. Rather, Japan has demonstrated that the asymmetry of the US 99.5 per cent test makes it inherently unfair. The US policy subjects low-priced sales to a severe test, and yet does no testing at all of high-priced sales.

25. The choices made by foreign producers in a given case reflect the constraints imposed by the USDOC questionnaire. USDOC cannot give instructions in a questionnaire – such as saying you may

ignore the related party sales and simply report the downstream sales – and then complain that by following such instructions the respondents did not provide the necessary information. The USDOC questionnaire is a further indication of the flawed USDOC policy.

ANNEX E-11

Answers of the United States to Questions from Japan at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO JAPAN'S QUESTIONS TO THE US

Question 1: Where does the USITC determination mention in any way the profit level for 1996? How can the USITC evaluate a crucial fact without mentioning that fact?

1. At the outset, we note that Japan seems to confuse the evaluation of factors required in Article 3.4 of the Anti-dumping Agreement with examination of evidence (facts). Articles 3.1 and 3.5 require that a determination of injury be based on "positive evidence" and an "examination of all relevant evidence." The United States maintains that it performed an objective examination of all the evidence, including the 1996 financial performance of the domestic industry, in its examination of the impact of imports on the domestic industry, as required by Article 3.4. Article 3.4 simply requires that the USITC provide "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[1]

2. A panel recently faced with this issue assessed whether Thai authorities had "failed to consider the factors listed in Article 3.4."[2] At the outset, we note that the panel characterized the obligation of the Thai authority as to "consider." Although the word "consider" does not appear in Article 3.4, "examine", which is the language in Article 3.4, is defined as "to consider or discuss critically."[3]

3. As the *Angles* panel found, an appropriate consideration does not require a finding or determination specifically about the factor considered. Although a panel may prefer such an explicit characterization, a reference to the factor need not be explicit on the face of the decision. All that is required is that the USITC demonstrate that it has "given attention to and taken into account" the factor under consideration.[4] The USITC has considered properly when it puts a factor "into context."[5] In determining whether the USITC met this obligation, this Panel should take all "statements and characterizations into account."[6]

4. Accordingly, the USITC properly evaluated profits in its examination of the impact of dumped imports when it provided a description of the financial performance of the industry. The USITC's explicit findings demonstrate that it adequately considered profits in accordance with the Anti-dumping Agreement. The USITC discussed the 1997 to 1998 declines in operating income and

[1] Panel Report, Thailand -Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Angles"), WT/DS122/R, circulated on 28 September 2000, para. 7.236.
[2] *Angles* at para. 7.238.
[3] The Compact Edition of the Oxford English Dictionary 364 (1985).
[4] *Angles* at paras. 7.161 & 7.180.
[5] *Angles* at para. 7.170.
[6] *Angles* at para. 7.165.

in the ratio of operating income to net sales.[7] Referring back to its discussion of price effects, the USITC also considered the unit cost of goods sold and unit values (the difference in these two indicators being unit profits) from 1996 to 1998.[8]

5. Japan has refined its argument such that it is now focused not on whether the USITC considered profits, but on whether it considered profits over the entire period -- from 1996 to 1998. The USITC clearly considered the 1996 data in rendering its determination. In its discussion of the financial performance of the industry, the USITC specifically cited to the table in the staff report that included the information for 1996.[9] The USITC also explained why it considered the 1997 to 1998 period particularly probative and, in so doing, made clear that it had considered the 1996 data. Respondents had argued to the USITC that 1997 was a banner year. As a result, respondents asserted, increases from 1996 to 1998 were more instructive to the USITC's analysis than declines from 1997 to 1998.[10] The USITC expressly rejected this argument. Implicit in the explanation of why 1997 to 1998 was an appropriate period of comparison is a consideration of the 1996 information and a rejection of the proposed 1996 to 1998 comparison.[11] In sum, the USITC did consider the 1996 data but simply expressed its determination in a manner different than Japan would have this panel believe is required -- instead of providing its reason for *not* relying on a 1996 to 1998 comparison (which would in all likelihood have included a recitation of the 1996 data), the USITC clarified why it *was* relying on 1997 to 1998 comparisons. Either way, 1996 data clearly was considered.

6. Moreover, the USITC found that the industry's performance was "substantially poorer than what would have been expected given record levels of demand in 1998."[12] This statement reflects the USITC's understanding that performance trends might (depending on the time period examined) be regarded as growing, as in 1996 to 1998, rather than falling, as in 1997 to 1998. Further, the USITC's discussion of average unit values and unit cost of goods sold shows that it was cognizant of the profit trends over the period, with 1998 profits lower than those in 1997 but still higher than in 1996.[13]

7. The characterization of 1998 as underperforming shows not only that the USITC was aware of the trends over the entire period, but also that it found the negative impact of dumped imports on growth, another Article 3.4 factor, as instructive in its determination. The USITC found that the domestic industry should have been performing better in 1998 in light of the conditions of competition at that time and that the dumped imports were preventing the industry from taking advantage of the increased demand. While Japan may "have preferred a more robust evaluation of" profits[14], the USITC's consideration of profits, and specifically the 1996 profit levels, is apparent in the determination.

8. This Panel should also note that Japan's question rests on the false premise that the profit level in 1996 was a "crucial fact." "In a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case."[15] In some cases, certain listed factors may not be relevant at all and their "relative importance or weight can vary significantly from case to case."[16] Here, the USITC's report explained the weight it gave to the

[7] USITC Views at 18.
[8] USITC Views at 18 n.100.
[9] USITC Views at 18 nn.99 & 100.
[10] Respondents' Posthearing Brief at 19 **(Exh. US/C-32)**.
[11] USTIC Views at 18.
[12] USITC Views at 20.
[13] USITC Views at 18 n.100.
[14] *See Angles* at 7.241.
[15] *Angles* at para. 7.225.
[16] *Angles* at para. 7.236.

evidence concerning each of the enumerated factors. This Panel should not follow Japan's lead in its attempt to reweigh the evidence.

9. Further, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodologies to be used."[17] Japan has not demonstrated that the USITC's methodology "introduced a flaw in the authority's analysis."[18] Thus, this Panel should not find fault with the fact that the USITC did not rely on the 1996 profit levels.

10. Finally, Japan's argument about the 1996 profitability are not properly before this panel. Based on *High Fructose Corn Syrup*, Japan is attacking the USITC's determination by asserting that the decision does not make the consideration of the Article 3.4 factors apparent.[19] However, Japan has not claimed a violation of Article 12 of the Anti-dumping Agreement, in which the requirements to make "detailed findings" and respond to parties arguments appear. Consequently, this panel need not "make a specific finding as to the adequacy of the text" of the USITC's determination.[20]

Question 2: Where on the documents [had] USITC "recognized the effects of captive production" (para. 33) as opposed to simply noting the existence of captive production?

11. In this case, the USITC noted the existence of captive production[21] and, accordingly, some Commissioners applied the captive production provision. The captive production provision, in itself, is a recognition of the fact that having significant amounts of captive production may skew an analysis of injury. Consequently, in applying the provision, three Commissioners necessarily did more than merely note the existence of captive production.

12. In addition, the determination is replete with references to the effects of captive production on the USITC's analysis. In footnote 28, the USITC found that dumped imports and the domestic like product were sold in the same channels of distribution, notwithstanding the fact that domestic producers internally transfer significant amounts of hot rolled steel. On page 11, the USITC recognized that minimills are more sensitive to competition than integrated producers in part because "their captive operations are generally not as substantial." On page 19, the USITC found that minimills had a worse financial performance than integrated producers because they had a "greater dependence on the merchant market, where imports are concentrated." To say that those firms that lack captive operations are more "sensitive" to import competition is equivalent to saying that those firms that have captive operations are relatively shielded from import competition. The particular method of explanation used by the USITC in this case stemmed from its comparison of the performance of integrated producers with that of minimills to show that imports affected the industry as a whole. This analysis resulted in the conclusion that the integrated producers, who were less sensitive to import competition, performed better than the minimills, and the results for both groups of firms showed that the industry was adversely impacted by imports. Finally, the USITC makes parallel findings about the merchant market and the industry as a whole throughout its determination. By implication, each of these parallel findings includes a finding about the captive segment of the market because there are only two segments that make up the whole -- merchant market and captive production.

13. Japan seems to view the effects of captive production only as shielding the captive segment of the market from competition, without recognizing that the merchant market sector remains affected by

[17] *Angles* at para. 7.159.
[18] *Angles* at para. 7.159.
[19] Japan 's First Written Submission at para. 259.
[20] *Angles* at n.244.
[21] USITC Views at 9.

import competition. As a result, Japan's challenge to the USITC's analysis of captive production rests largely on the fact that the USITC characterized the effects of captive production differently in this case than it did in the 1993 *Flat Rolled Steel* investigation. The Panel should reject this argument because the USITC properly recognized the effects of captive production in both cases in light of the conditions of competition in the industry at the time.

14. Two factors other than the captive production provision affect the different context from the 1993 decision in which the USITC discussed captive production in its 1999 decision. In this case, an additional layer was added to the analysis because, as respondents urged, one segment of the domestic industry, minimills, was becoming increasingly important and was more heavily dependant upon the merchant market. Thus, in discussing the relative effects of captive operations in the context of the relative impact of imports on minimills, the USITC was simply recognizing a change in the conditions of competition since 1993.

15. Moreover, the evidence concerning the effects of imports that the USITC was examining was different in 1999 than it was in 1993. In 1993, the domestic industry's market share fell by one percent while its profitability declined sharply.[22] Notably, subject imports generally had higher prices that fell less than the price of the domestic product.[23] Further, it was reported that the domestic producers led price declines as minimills entered the market.[24] These factors led the USITC to conclude that something other than dumped imports was causing injury to the domestic industry. Even then, however, the USITC characterized its analysis at that time as giving "separate consideration to the effect of subject imports on the *merchant market* segment of the industry."[25] As Japan suggests, however, the USITC discussed captive production in terms of the captive consumption segment. Thus, it is obvious that the USITC did not find the distinctions between an analysis based on the captive segment and an analysis founded in the merchant market as telling as Japan now claims.

16. By contrast, in the current case, subject imports doubled their market share at a time of increasing consumption[26], subject imports increasingly undersold the domestic like product[27], and the domestic industry's financial indicators were decreasing at the time of the highest import penetration.[28] Respondents argued that established and efficient minimills were driving down domestic prices and causing injury to the domestic industry. The USITC thus looked at price declines for these producers, finding them exaggerated because of competition with imports.[29] In this analysis, the USITC was compelled to consider the merchant market where minimills generally participate in the marketplace.

17. In these two cases, the USITC discussed the same phenomenon, but did it using different terms and with different emphasis because the conditions of competition in the hot rolled steel industry had changed in the intervening years. Thus, it is Japan's desired rote analysis which would violate the Anti-dumping Agreement and not the method employed by the USITC in this case. Japan

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[22] Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("Flat Rolled Steel") at 52.

[23] Flat Rolled Steel at 48.

[24] Flat Rolled Steel at 49-50.

[25] *Flat Rolled Steel* at 17 (emphasis added).

[26] USITC Views at 12-13.

[27] USITC Views at 14-15.

[28] USITC Views at 18.

[29] USITC Views at 15-16.

would have this Panel reject the USITC's decision in favour of a methodology which concerned itself with facts that are no longer relevant to the industry today. The Panel should decline this offer.

Question 3: What is the textual basis for interpreting Article 6.13 as requiring the respondents to ask for help?

18. Article 6.13 states that "[t]he authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable." In order for an investigating authority to be aware of an interested party's need for assistance, such that Article 6.13 applies, the party must communicate, in some objective and understandable manner, its need for assistance. Otherwise, the investigating authority will not be aware of the need for that assistance, while the responding party could later claim that it should have gotten help for which it never communicated a need. Thus, Article 6.13 necessarily assumes that parties have identified any problems that they are experiencing.

19. The Panel's question number 5, of its first round of questions to Japan, asked: "Could Japan provide the Panel with specific references to, or copies of, documents or other information which in Japan's view demonstrates that the Japanese respondents requested the USDOC for assistance in providing the information requested in the USDOC questionnaire?" In its response, at paragraph 22, Japan argued that the obligations of Article 6.13 are not dependent on a party's request for assistance and that KSC and NKK "made it clear" to Commerce that they "were experiencing difficulties." However, that was not the case. As explained in the United States' second submission at paragraph 18, KSC, rather than communicating to Commerce its supposed need for assistance in dealing with its affiliate CSI, requested that Commerce excuse KSC altogether from its responsibility for providing the requested information. *See also* United States' First Submission at para. B-106. If KSC's request to be excused from reporting the requested information was meant in fact to be a request for assistance, then KSC was asking the Department to be a mind-reader. An interpretation of Article 6.13 that would require the Department to provide assistance under such circumstances is neither logical nor permissible.

20. With regard to the difficulties alleged to have been experienced by NKK and NSC in reporting the weight conversion factors, the United States notes that the Department facilitated the efforts of these companies to provide the factors in various ways. First, the Department's questionnaire did not require any particular methodology be used in providing the conversion factors. Instead, it gave both companies wide latitude to arrive at such factors in the manner most suited to their own processes and data maintenance systems. It was the companies, not the Department, which were most familiar with these processes and systems. Thus, any action which the Department might have taken to prescribe exactly how any particular company should have obtained internal data and calculated the conversion factor would have *limited* that company's options, rather than constituting "assistance." Second, the Department provided additional response time when requested by NKK and NSC. Both companies were granted extensions of both the original questionnaire deadline and the deadline for the supplemental questionnaire. Third, the Department's service requirements permit counsel for one respondent to examine the approaches used by counsel for other respondents, as a source of possible solutions, should they lack ideas about how a particular issue might be approached (without imposing any particular approach). In this case, for example, if NKK had been truly stymied as to how it might calculate a conversion factor, its counsel could have examined KSC's initial questionnaire response (which was provided to NKK 's counsel long before NKK's response to the supplemental questionnaire was due) to determine whether KSC 's methodology might be adaptable to NKK's own databases. NKK did not need to wait for the Department point out this obvious possibility. Similarly, the Department should not have had to point out the obvious fact that coils would be weighed at the factory, not at the Tokyo office, and that weight data not available at the Tokyo office might nonetheless exist at the factory. Thus, while Japan complains that the Department failed to give NSC and NKK sufficient "assistance" with regard to the conversion factors, the

Department in fact provided all the "assistance" it could to these large, sophisticated companies who were, themselves, the masters of the information requested.

ANNEX E-12

Answers of the United States to Questions from the Panel at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO THE PANEL'S QUESTIONS TO THE US

Question 6: According to the United States, did KSC provide KSC-to-CSI sales data with its Section A response as Japan maintains (paragraph 9 of Japan's Oral Statement)? On what basis did the United States conclude in this case that prices of KSC to CSI were unreliable because of association? Did it base this conclusion on any facts particular to the KSC-CSI relationship, or the facts in this case, or did the United States presume such prices were unreliable based on the fact of that relationship?

1. The United States presumed that the KSC/CSI transfer prices were unreliable based on the relationship between the parties: KSC owned 50 per cent of CSI. Such a presumption represents a permissible interpretation of Article 2.3 of the Agreement. That article states, in pertinent part, that "[i]n cases ... 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 in the condition as imported, on such reasonable basis as the authorities may determine." In this case, Commerce presumed that the parent-subsidiary association between KSC and CSI caused any prices between them to be inherently unreliable, because of the potential for manipulation of those prices. In such a case, Commerce will nearly always use the downstream sales to the first unrelated buyers as a basis for calculation of export price.

2. This is not to say that Commerce *always* insists on using downstream prices. It is the Department's practice not to use downstream sales in two circumstances which presented themselves in this case: where the "special rule" for further manufacturing applies and where there are a small number of sales through a US affiliate. As explained in the United States' first submission, para. B-122, and in the US response to question 42 of the Panel's first questions, KSC requested that Commerce exclude CSI's sales pursuant to the "special rule" for further manufacturing. Under that rule, if substantial value is added (over 65 per cent) to the imported product before it is sold to the first unrelated buyer, Commerce will not construct export price, on the theory that it is not worth gathering all the necessary information concerning further manufacturing and then "backing out" those data to construct the price. Instead, in such a situation, Commerce uses a surrogate export price. In this case, KSC did not meet the threshold for the "special rule" and Commerce did not apply it. By contrast, KSC requested, and Commerce agreed, to exclude altogether its sales to its affiliate VEST, because they represented such a small amount (less than 5 per cent) of KSC's US sales.

3. Nevertheless, even if Commerce had wanted to calculate export price using the limited KSC/CSI sales data which KSC did supply with its Section A questionnaire response (JP-93(f) and US/B-24bis), it would have been unable to do so, because that information was inadequate as a basis for the calculation of export price. KSC did not provide the data necessary for an accurate

product-by-product matching to Japan's home market sales. The missing information included: product characteristics such as prime or not prime, painted or not painted, the quality, the amount of carbon, the yield strength, coil or cut-to-length, temper rolled or not temper rolled, pickled or not pickled, the edge trim, and with or without patterns in relief; selling expenses such as rebates, credit expenses, advertising expenses, warranty expenses, technical services expenses, indirect selling expenses, and packing expenses; and terms such as order date, payment date, sales terms, payment terms, and quantity type. In fact, KSC never responded to Commerce's Section C questionnaire, which requested full matching data for KSC's downstream sales through CSI. *See* Exh. JP-42(p) and (v).

4. Although KSC did supply limited KSC/CSI transfer price data (Exh. US/B24bis and JP-93(f)), the data it supplied responded only to Commerce's Section A questionnaire, which requested general quantity, price, and value data for further manufactured products. Commerce routinely requests such data, which can be used to determine whether the "special rule" for further manufactured products, involving substantial value added, may apply. When KSC later requested to be excused from reporting its sales to CSI, it used this volume and value data to support that request. *See* Exh. JP-42(i). While the KSC/CSI transfer price data were sufficient for, and indeed used by, Commerce to determine the applicability of the special rule, they were completely inadequate to serve as a basis for calculating export prices to be matched to identical or similar home market prices in Japan for purposes of the margin calculation.

5. Finally, with regard to Article 2.3 generally, the United States does not wish to suggest, by this answer to the Panel's question, that the United States considers every export transaction that involves an "association or compensatory arrangement between the exporter and the importer or a third party" to require the construction of an export price, *per se.* There are many forms of association, some of which are quite remote. Presumably, there are forms of compensatory arrangements that would amount to simple adjustments to the export price, rather than indicating that the export price was not an arm's-length price, and therefore was not an appropriate basis for the dumping comparison. It is possible that in many of these situations, the United States would not consider the construction of an export price necessary.

6. The relationship between KSC and CSI, however, did not involve a mere "association" between the exporter and the importer or some objective compensatory relationship. Rather, it involved a very close level of *affiliation* - - KSC was the 50 per cent owner of CSI. Given this intimate level of affiliation, there is absolutely no way that the intra-corporate transfer price between KSC and CSI constituted an arm's-length price that could serve as an appropriate basis for a dumping comparison.

Question 7: The US (in paragraph 41 of its second oral statement) makes a distinction between "corrections" to questionnaire responses that were accepted by USDOC and "new information" such as the weight conversion factors that were not. Could the US please explain what it considers the difference is between "corrections" and "new" information submitted in response to a request for such information in the questionnaire?

7. A "correction" is a revision to data that have previously been submitted. While corrections necessarily involve replacing the erroneous data with different, hence "new," data, the Department generally accepts information which should have been provided by a questionnaire deadline only when it constitutes a correction to data which <u>were</u> timely submitted.

8. NSC and NKK did <u>not</u> submit any conversion factors in their responses to the original or supplemental questionnaires requesting these factors. These factors and their supporting data were entire *categories of information* which had not been submitted by the questionnaire deadlines; thus, they were not "corrections."

9. Japan's position suggests that a respondent can simply assert that requested data are "unnecessary" or that it is "unable to respond," and that such statements in a questionnaire response would then enable it to submit any and all categories of data, for the first time, at verification, under the rubric of "corrections" to such statements. Under this theory, by merely inserting a boilerplate "place holder" in its questionnaire response, a responding party could convert any information it wished to withhold until after the preliminary dumping determination into a "correction" the Department would be forced to accept.

10. NSC and NKK assert that their original claims – that the factors were unnecessary or impossible to provide -- were made in "good faith". An assertion of good faith does not require that these factors be accepted as "corrections." This is not a workable standard, and the Agreement does not impose any such standard. Administering agencies have no way of verifying the truth of allegations as to what motives a company may have for providing, or withholding, particular data at a particular time. Were the position espoused by Japan to be adopted, administering authorities would have to accept any data a party chose to provide at verification, so long as a protestation of "good faith" (which could never be refuted) were made. Just as the Agreement does not require reasonable deadlines to dissolve under the effects of a "place holder" excuse, it also does not dictate that such deadlines must dissolve whenever a party invokes the mantra of "good faith." Were the Panel to adopt either of these positions, it would be impossible to enforce the reasonable deadlines necessary to gather and allow comment on information in a systematic fashion, prior to the preliminary determination.

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