

ANNEX A

First Submissions by the Parties

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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.*,

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

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

<i>KSC</i>	67.59%
<i>NSC</i>	25.14%
<i>NKK</i>	30.63%
<i>All Others Rate</i>	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

<i>KSC</i>	67.14%
<i>NSC</i>	19.65%
<i>NKK</i>	17.86%
<i>All Others Rate</i>	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.

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 investigations²⁰, 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

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

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.

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 deadlines³⁴ — 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

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. See 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.

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

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.

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.

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

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

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.

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

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 of 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

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

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

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 every single sale, 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,

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.

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

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.”

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.

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

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 either (a) "refuses access to, or otherwise does not provide, necessary information within a reasonable

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."

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

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

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**).

sales from its calculation of normal value, noting that they were “outside the ordinary course of 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.

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.

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

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 test. 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—

(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

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 industry¹⁶³, 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

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 <i>Before the Investigation of Hot-rolled Steel from Japan</i>	USDOC Practice <i>During the Investigation of Hot-rolled Steel from Japan</i>
Timing of the Announcement	Contemporaneous with the preliminary dumping determination	“As soon as possible after initiation”
Basis for Imputing Knowledge of <u>Injury</u> to Importers	Injury only, <u>not</u> threat (until 1997 cases involving imports from China, Russia, and Ukraine)	Injury <u>or</u> threat
Basis for Imputing Knowledge of <u>Dumping</u> 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 <i>before</i> 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

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 appraisalment" — 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

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.

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.

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 1993¹⁹⁴, 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 challenge¹⁹⁶, 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.

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

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

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

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.

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 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.

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.

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.

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.

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 market²²⁸, 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 Koplun 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 significantly²³⁵, 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

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.

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

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 investigation²⁴³

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.

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

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 sources²⁵⁹, 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’ briefs²⁶⁵, but USITC itself collected

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 relevant²⁶⁷, 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;

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

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

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.

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).

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, it 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 1998³⁰¹, 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.

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 Koplán, 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 a 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 States¹ and the Determination by the US International Trade Commission (“USITC”) that those imports were injuring the US domestic producers of such steel² 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

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 questionnaire¹¹ -- 37 days.¹² In addition, all of the respondents asked for, and received, the standard fifteen-day extension of this period¹³, 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 regulations¹⁷, a standard that Japan has not challenged here. With Japanese steel

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 investigations¹⁸ 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

¹⁸ See *Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 64 Fed. Reg. 60422 (5 Nov. 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 States²³, 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 initiation²⁴, 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.

²³ First Submission of Japan at para. 171.

²⁴ *Petition for the Imposition of Anti-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-guard³⁰ 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 periods. Presumably, there is no question that a 100 per cent increase in imports from one six-month

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.

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 regulations³³, 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 companies³⁵, 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 investigation³⁶, 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 impossible³⁷, 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,

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.

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

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

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 time⁷¹ (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 determination⁷²(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 NSC⁷⁵, NKK⁷⁶, and KSC⁷⁷, as well as one by statisticians hired by the counsel for NKK⁷⁸, 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 unbiased and objective. Presenting new testimony that was not before the authority seeks to have the Panel go beyond its assigned task.

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**).

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 surge of Japanese imports⁸⁴, the consumption of hot rolled steel in the United States⁸⁵, the

⁸³ See DSU Article 3.2.

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)).

performance of minimills⁸⁶, 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 practice⁸⁹ 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.

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, 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

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

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*

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.

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 interpretation¹⁰⁵, 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

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 anti-dumping questionnaire to NSC, NKK and KSC.¹¹

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

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 1998) (**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 KSC³¹, 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 reporting sales to affiliates located in the United States that further manufactured subject hot-rolled

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.*

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 1998³⁶, 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 with CSI with respect to the Department’s request for the data necessary to calculate antidumping

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)**).

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, 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

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.

⁵⁵ Department's Initial Section B-E questionnaire, at B-19 and C-17 (October 30, 1998) (**Exh. JP-45(a)**).

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 of calculating” the requested conversion factor.⁶² In its response of the same date, NKK reiterated that it would be

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**).

⁶² NSC Section B-D Supplementary Questionnaire Response at B-24-25 (25 January 1999) (**Excerpts at Exh. US/B-12**).

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 1999⁶⁴, 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) and 4 March 1999, respectively.⁷⁰ However, Commerce determined that the conversion factor data

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.

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

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).

* * *

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.

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 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.

(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**).

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

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

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

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

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

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

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.

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 substantiated¹³⁶, 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 –

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 Community¹⁴⁴, Canada¹⁴⁵ 145

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

Australia¹⁴⁶, and Japan¹⁴⁷, Moreover, Brazil¹⁴⁸, Ecuador¹⁴⁹, the European Community¹⁵⁰, Mexico¹⁵¹, Panama¹⁵², and Uruguay¹⁵³ 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

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 (“If 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 filler¹⁵⁴, 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 decision¹⁵⁸ 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

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.

II. THE DEPARTMENT'S PARTIAL ADVERSE FACTS AVAILABLE DETERMINATION WITH REGARD TO KAWASAKI STEEL CORPORATION

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.

("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 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.

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.

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.

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

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.

¹⁷² KSC Verification Report (**Exh. JP-42 (y)**) (**Exh. US/B-21**).

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

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

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.*

¹⁸³ CSI Shareholders' Agreement (**Exh. JP-42(aa)**).

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 CVRD¹⁸⁴, 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.

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

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 available¹⁹⁵ 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

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

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.

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 excessive²⁰⁹ 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.

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.

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 weight²¹⁰ sales for which they did not provide a theoretical-to-actual weight conversion factor within a 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

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 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.

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 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

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.

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 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 more 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

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**).

²¹⁷ See First Submission of Japan at paras. 116-119.

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 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.

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**).

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**).

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.

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

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**).

²²³ NKK Initial Questionnaire Response at B-30 (December 21, 1999) (**Exh. JP-45(b)**).

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 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.

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**).

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.

- (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 questionnaires²²⁶, 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 verification²²⁹, 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

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.*

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 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, evasive²³³, 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.

²³⁰ *LTFV Final Determination*, 64 Fed. Reg. at 24361 (**Exh. JP-12**).

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)**).

- (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 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.

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.”

- (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

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

²³⁸ See First Submission of Japan at paras. 117-119. (Japan's Article 6.1 argument is made solely with respect to NKK.) *Id.*

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.

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

- (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.

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 factor was affirmatively not required further demonstrates the unreliability of any claims as to this alleged conversation.

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 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

²⁴⁴ See First Submission of Japan at para. 136.

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.

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,

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).

- (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 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 margin²⁴⁷, 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

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).

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 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

²⁵⁰ SAA at 873 (**Exh. US/B-27**).

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”).

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

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.

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 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,

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 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

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.

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.

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 value²⁶³ for use in a margin 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

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. 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.

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.

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 Community²⁶⁶, Brazil²⁶⁷, Argentina²⁶⁸, and Korea²⁶⁹, 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*

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.

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)**).

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)**).

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 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

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.*

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.*

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 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 average²⁹⁴ net price for sales of each product (CONNUM²⁹⁵). All of that exporter/producer’s sales to unaffiliated customers are combined in one pool, and the Department

²⁹⁰ *Id.*

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.

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.

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

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.

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 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 2.4³⁰¹ of the Agreement.³⁰² The first sentence of Article 2.4, in particular, provides that “[a] fair comparison shall be made between the

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 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”.

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 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

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)).

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 per cent *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:

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"

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 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.*

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 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 minimis* 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

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**).

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)").

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 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

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**).

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.

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 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 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

³²⁵ *Id.*

³²⁶ Lord McNair, *The Law of Treaties* 400 (1961) (Exh. JP-54).

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.

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) 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

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**).

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.

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 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 determination³³⁶, 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

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.

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 appraisalment 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 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

³³⁸ For example, an administering authority may, at any time after initiation, suspend liquidation (*i.e.*, withhold appraisalment 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.

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 the section pertaining to injury to the domestic industry)³⁴⁰, the USITC preliminary determination of injury³⁴¹, 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 appraisalment 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 appraisalment 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

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

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 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 steel³⁴⁷, affidavits³⁴⁸, Harmonized Tariff Schedule and US Census Bureau import statistics³⁴⁹, national and international press reports³⁵⁰, Financial Disclosure Reports on major

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**).

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)**).

Japanese producers (NSC, NKK, KSC and Sumitomo)³⁵¹, consulting firm reports regarding the domestic and foreign steel industries³⁵², 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 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.

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)**).

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.

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.

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

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).

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 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:

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.

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**).

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 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."

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).

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.

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 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 charges³⁷⁶; ocean freight and insurance; unloading and wharfage³⁷⁷; a US trading company

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 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)).

mark-up³⁷⁸; a Japanese trading company mark-up³⁷⁹; 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 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 initiation³⁸³, 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

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 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**).

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.

(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 period³⁸⁷, the magnitude of the margins, information in the petition regarding injury to the domestic industry³⁸⁸, and numerous press reports regarding rising imports, falling domestic prices

³⁸⁶ Articles 5.2 and 5.3 of the Anti-Dumping Agreement.

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

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.

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

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**).

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.*

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 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

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 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 production 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.).

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 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

³⁹⁷ *Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 (Exh. JP-3).

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.

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 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.

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).

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

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 773(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 773(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 773(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

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.

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)

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.

("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 demonstrates², 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 (*i.e.*,

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)**).

captive production). Under certain conditions⁴, 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 contrary⁸, 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.

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 behaviour¹¹, questioning the continued validity of the anti-dumping regime¹² 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.

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

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 statute is examined, and, if the statutory language is unclear, then the legislative history of the statute 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.

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 notes³³, 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 provides³⁴, 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.

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 analysis³⁶ 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 injury³⁸, 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 production⁴³, 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

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

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 statute⁵², 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 alternatively⁶¹, the Chairman and the Vice-Chairman of the USITC must be of different political parties⁶², 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 industry⁶⁸. 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 1999, 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 Koplán, 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 questionnaires⁷⁵, 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 Japan⁷⁹, 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

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 production 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 investigation⁸⁶, 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 provision⁸⁸, 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 imports⁹³, market share⁹⁴, overall consumption⁹⁵, domestic shipments⁹⁶, prices⁹⁷, 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 imports⁹⁸, costs of goods sold (COGS)⁹⁹, production capacity¹⁰⁰, capacity utilization¹⁰¹, employment¹⁰², 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

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 short 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 1998¹¹⁰, 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

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 1998¹²⁰, 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 levels¹²⁸, 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 apply¹⁴⁶ 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 Bragg¹⁴⁹ 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

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 case¹⁵³ 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 contrary¹⁵⁷, 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

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 why 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 fact¹⁶⁷, 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.

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 competition¹⁸², 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 case¹⁸³, 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 1992¹⁹⁴, 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

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 investigation²⁰⁷, 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

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

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 share²²⁷, domestic shipments²²⁸, prices²²⁹, capacity utilization²³⁰, employment indicators²³¹, and capital

²¹⁹ *Argentina-Footwear* at para. 130. The Appellate Body found 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".

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.)

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 ARTICLE 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 April 1994) (*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.

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 Agreement²⁴⁶, 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 steel²⁴⁹) 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;

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 reflection of increased competition within the industry. The USITC acknowledged that a condition of

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.

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 imports²⁶⁴, 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.

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

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.

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 1998²⁷⁰, 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 total US consumption, the market share of nonsubject imports was 5.7 percent in 1996, 5.0 per cent in

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.

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 product²⁷⁴, 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

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

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.

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 claim⁶ 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 proceeding⁷, 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 Agreement¹⁰ – 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 determination¹² 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.

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 request¹⁹, 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 remedy²¹ 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.

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

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	<i>Preston Pipe & Tube Report</i> (Nov. 1998) (Exh. JP-67)	attached to Respondents' USITC Prehearing Brief as Exhibit 21B
Part A, footnote 85	<i>Preston Pipe & Tube Report</i> (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," <i>American Metal Market</i> 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, “ <i>Steel: A Gauntlet for All, Rewards for the Select</i> ,” Steel Strategies #24 (June 1998) (Exh. JP-34)	cited at Respondents’ USITC Prehearing Brief, n.127-28, <i>inter alia</i>
Part A, footnote 86	Charles Yost, “Thin Slab Casting/Flat-Rolling: New Technology to Benefit US Steel Industry,” in USITC, <i>Industry Trade and Technology Review</i> , 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 <i>Industry Studies</i> (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

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

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.

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.