

## **ANNEX B**

### **Third Party Submissions**

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## ANNEX B-1

### Submission of Brazil as a Third Party

(31 July 2000)

#### INTRODUCTION

1. Like Japan, many of Brazil's exports to the United States have been subjected to US anti-dumping measures. Also like Japan, these measures have often been aimed at steel products as the US steel industry has moved from grey measure protectionism in the form of trigger prices and voluntary restraint agreements in the 1970s and 1980s to anti-dumping and countervailing duty measures in the 1990s.

2. Brazil and its exporters have long argued that something should be done to curtail the abuses of the US "unfair trade" laws. Japan's first submission before this Panel addresses some of the most egregious of these abuses, as applied in the hot-rolled steel investigations. Given Brazilian exporters' first-hand knowledge of such abuses in this and other cases, Brazil joins Japan in its effort to bring them to a halt.

3. The instant anti-dumping investigation was particularly troubling for Brazil given its small participation in the US market. At their peak in 1998, imports from Brazil accounted for only 0.6 per cent of US consumption. In the period examined, imports from Brazil increased less than 200,000 tons, while US consumption increased by nearly seven million tons, 35 times the size of the increase in imports from Brazil. Yet, imports from Brazil were nonetheless included along with those of Japan and Russia in the US Government's investigation of hot-rolled steel imports.

4. Despite its own involvement and knowledge of these investigations, Brazil does not intend to focus in this third-country submission on the specific factual abuses raised by Japan. Instead, we intend to address US practices that raise broad, systemic concerns for Brazil and all other countries subjected to US anti-dumping measures. These include:

- the US Department of Commerce's ("USDOC") established practice of applying "adverse" facts available in a manner inconsistent with both the spirit and letter of the Anti-Dumping Agreement ("AD Agreement"), and the inclusion of such facts available margins in the calculation of the all others rate;
- USDOC's established practice of applying the unfair 99.5 per cent "arm's length" test that not only inappropriately excludes bona fide home market sales from the calculation of normal value, but also results in the burdensome requirement that the resales made in the home market by affiliated customers be reported in order to replace sales that fail the arm's length test;
- USDOC's new critical circumstances policy, which permits the application of retroactive duties despite the absence of sufficient evidence of any of the factors required under the AD Agreement, and chills trade regardless of whether the USITC ultimately agrees to require importers to pay retroactive duties;

- the captive production provision of US law that requires USITC, under certain factual scenarios, to ignore the domestic industry's internal transfers in its injury and causation analysis; and
- the failure of the USITC to distinguish between injury caused by imports and injury caused by other factors, in particular the increase in production by US minimills during the period of alleged injury.

In addition to the unfair dumping margins and affirmative injury determinations that result from these abuses, the Panel should also bear in mind one other inevitable result: companies are simply choosing not to participate in USDOC anti-dumping investigations, hoping instead that the USITC will prove a more reasonable forum in its injury investigation. The Panel should curtail the application of anti-dumping measures that lead to such results.

## I. THE CONCEPT OF GOOD FAITH SHOULD GUIDE THE PANEL

5. Before turning to the specific abuses identified by Japan, Brazil wishes to elaborate on the arguments concerning good faith that Japan addressed in its first submission. Unlike most cases brought before the Dispute Settlement Body ("DSB"), the political nature of the hot-rolled steel investigations conducted by the United States raises serious questions of whether or not those investigations were conducted in good faith. As the Panel considers the substantive issues raised by Japan, it should be mindful of the requirement placed on all Members to implement their obligations under the WTO Agreements -- including the application of anti-dumping measures -- in good faith.

### A. THE CONCEPT OF GOOD FAITH IS AN ELEMENTAL TOOL OF INTERPRETATION

6. The concept of good faith has become increasingly important as an interpretive tool for defining the rights and obligations of WTO Members under various provisions of the WTO Agreement. Article 3.2 of the DSU directs that existing provisions are to be clarified "in accordance with customary rules of interpretation of public international law." Perhaps the most important of such "customary rules" is the concept of "good faith" as set forth in Article 26 of the Vienna Convention.<sup>1</sup>

7. The Appellate Body has recognized repeatedly the importance of the concept of good faith in ensuring due process rights and fundamental fairness, when a Member provides its government officials with discretion.<sup>2</sup> In general, the Appellate Body has instructed that the *abusive* exercise of a

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<sup>1</sup> Article 26 of the Vienna Convention mandates good faith implementation of all treaty obligations. See Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 *International Legal Materials* 679 ("Vienna Convention"). Article 26 establishes the concept of *pacta sunt servanda* and is appropriately titled as such. *Id.* The provision states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." *Id.*

Article 26 is directly incorporated into Article 31 of the Vienna Convention through Article 31(3)(c), which provides: "There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties." Numerous scholars describe good faith as a fundamental principle of international law. See e.g., T.O. Elias, *The Modern Law of Treaties* 40 (1974); Virally, M. "Review Essay: Good Faith in Public International Law," 77 *Am. J. Int'l L.* 130, 130 (1983) (reviewing E. Zoeller, *La Bonne Foi en Droit International Public* (Paris Editions A. Pedone 1977)).

<sup>2</sup> See e.g., *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, adopted on 6 Nov. 1998, WT/DS58/AB/R at para. 158 and n. 156 ("US—Shrimp"); *United States—Tax Treatment for Foreign Sales Corporations*, adopted on 20 Mar. 2000, WT/DS108/AB/R, at para. 166 ("US—Foreign Sales Corporations").

treaty right results in a breach of the treaty rights of other Members.<sup>3</sup> In this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations.

B. GOOD FAITH IS THE KEY TO A PROPER INTERPRETATION OF THE WTO AD AGREEMENT

8. The concept of good faith is particularly important when interpreting the WTO AD Agreement.<sup>4</sup> Anti-dumping procedures take the form of investigative and quasi-judicial procedures, both of which impart a large amount of discretion to the administering authority. In this way, anti-dumping procedures are particularly susceptible to abuse. Due process must, therefore, be a central feature of any anti-dumping regime.

9. The concept of good faith and the importance of due process are prevalent throughout the text of the AD Agreement. As a threshold matter, the specific factual *and* legal standards of review set forth in Article 17.6 are expressions of the obligation of good faith. The standards of review provide:

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

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

(Emphasis added.) The terms used in the factual standard of review directly reflect the principles of due process established by the Appellate Body in *US – Shrimp*: “unbiased and objective.”<sup>5</sup> Similarly, the legal standard of review directs the panel to interpret the provisions in accordance with the tools of legal interpretation, which include good faith. Indeed, good faith becomes all the more important under the “permissible” prong of the legal standard of review, given the usefulness of the tool in defining legal limitations.

10. In this case, the US Government did not serve its supposedly neutral investigative and judicial function in an unbiased manner; rather, the US Government unabashedly took the side of the US steel industry. For each issue raised by the Government of Japan, the text of the AD Agreement imposes an obligation on the administering Member to implement the provisions *in good faith*.

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<sup>3</sup> *US – Shrimp* at para. 158.

<sup>4</sup> While the Government of Japan emphasized the importance of this concept of good faith in the section of its brief dealing with Article X of the GATT 1994, we would also like to point out its relevance to the Panel's interpretation of the AD Agreement.

<sup>5</sup> See also, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, adopted on 28 Jan. 2000, WT/DS132/R, at para. 7.94 (“*Mexico—High Fructose Corn Syrup*”) (citing *Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico*, adopted 19 Jun. 1998, WT/DS60/R, at para. 7.57) (in determining whether sufficient evidence existed to initiate an investigation, the Panel evaluates “whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify” its decision) (emphasis added).

Facts Available	<ul style="list-style-type: none"> <li>• Factual Standard of Review</li> <li>• Legal Standard of Review</li> <li>• Article 6.8: “reasonable period”</li> <li>• Annex II, Paragraph 7: “careful circumspection”</li> </ul>
All Other’s Rate	<ul style="list-style-type: none"> <li>• Legal Standard of Review</li> </ul>
Arm’s Length Test	<ul style="list-style-type: none"> <li>• Factual Standard of Review</li> <li>• Legal Standard of Review</li> <li>• Article 2.4: “fair comparison”</li> </ul>
Critical Circumstances	<ul style="list-style-type: none"> <li>• Factual Standard of Review</li> <li>• Legal Standard of Review</li> </ul>
Injury	<ul style="list-style-type: none"> <li>• Factual Standard of Review</li> <li>• Legal Standard of Review</li> <li>• Article 3.1 “objective examination”</li> </ul>

11. The Panel should adhere carefully to this overriding obligation of good faith. As discussed in greater detail below, the types of abuses perpetrated by the US Government in this case against Japan and our own exporters must be stopped.

## II. THE US ABUSE OF FACTS AVAILABLE SHOULD NOT BE ALLOWED TO CONTINUE

12. In accordance with the Article 6.8 and Annex II of the AD Agreement, the US statute authorizes USDOC to apply “facts available” when an interested party or any other person (1) withholds information, (2) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (3) significantly impedes a proceeding, or (4) provides such information but the information cannot be verified.<sup>6</sup> However, the US statute goes beyond the AD Agreement and authorizes the use of “adverse inferences” to punish participants that “failed to cooperate by not acting to the best of its ability to comply with a request for information.”<sup>7</sup> Although the US courts have constrained USDOC to some extent in its application of this statutory provision, current US practice continues to give USDOC considerable latitude. Indeed, on its face the established practice is punitive and, in turn, inconsistent with the AD Agreement.

### A. FOR YEARS, USDOC HAS MAINTAINED AN UNFAIR, PUNITIVE APPROACH TO FACTS AVAILABLE.

13. A review of prior anti-dumping investigations involving imports only from Brazil demonstrates a consistent trend of applying facts available to Brazilian respondents’ margins. Of the 43 final dumping decisions since 1990, USDOC applied adverse facts available (or best information available under the old statute) in nearly half of the decisions (20 of 43).<sup>8</sup> Reasons varied, including small deficiencies, failure to respond to USDOC’s requests for information, withdrawal from the proceeding, deficiencies discovered during verification, and refusing verification. The extent to which USDOC used adverse facts available also varied, ranging from partial facts available for relatively minor deficiencies to total adverse facts available. Significantly, in twelve of these cases, respondents either did not participate in the proceeding or withdrew their participation. The burden and bias of USDOC’s investigations have therefore discouraged foreign producers from participating in the process.

<sup>6</sup> 19 U.S.C. § 1677e(a).

<sup>7</sup> 19 U.S.C. § 1677e(b).

<sup>8</sup> The 43 decisions include final determinations from original anti-dumping investigations and final results of administrative reviews. (A list of these decisions appears at the end of this submission. **Exhibit Brazil-1.**)

14. USDOC all too often resorts to what it calls adverse facts available, a practice under which USDOC chooses nearly the most adverse facts available. It does so in order to make an example of the respondent against which such adverse information is applied: the information must be adverse enough, according to USDOC policy, so as to deter other respondents from not cooperating with the investigation. Notwithstanding the fact that this practice is often misapplied -- meaning that the deterrent is applied to respondents who do not deserve it, such as the Japanese respondents in this case -- the policy itself violates the AD Agreement on its face.

B. THE US FACTS AVAILABLE STATUTE AND PRACTICE, ON ITS FACE, VIOLATES ART. 6.8 OF THE AD AGREEMENT

15. Article 6.8 of the AD Agreement and its related Annex II define specific circumstances in which facts available may be applied. The US, however, in its legislation and its practice fails to adhere to these strict rules.

16. First, the text of Article 6.8 and its related Annex make clear that the resort to facts available is intended to be a *neutral* option for an administering authority. The only mention of a use of facts available that may be in any way unfavourable to the respondent's position is the weakly phrased second sentence of paragraph 7 of Annex II:

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

The statement is written in the passive voice, emphasizing the lack of a control factor. In other words, the sentence does not provide an authority with a tool to *choose* a less favourable source for facts available, but simply recognizes that the lack of available information means that the choice *may ultimately result* in a less favourable position for the interested party.

17. The US statute turns this neutral tool into an instrument of punishment when the US authorities decide that a respondent is not "acting to the best of its ability." However, paragraph 7 in no way reflects a policy of deterrence or retribution by permitting the choice of a "sufficiently adverse" fact available so as to affect future behaviour. To the contrary, the first sentence of paragraph 7 directs the authority to use "careful circumspection" when selecting a secondary source as facts available, suggesting that an authority exercise caution, not aggressive behaviour. The US has created a policy of retribution and deterrence behind the facts available provision that does not exist, and has thereby abused its rights under the AD Agreement.

18. In this respect, we note that Articles 3.2 and 19.2 of the DSU caution that DSB recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements." The United States, through its leaps in logic and inference attempts to add to its rights under the Anti-Dumping Agreement. The United States adds the right to punish exporters and the right to deter exporters from failing to cooperate.

19. However, nowhere in the Anti-Dumping Agreement does it say that countries may require exporters to cooperate in anti-dumping proceedings or that anti-dumping authorities may use facts available to try to encourage exporters to cooperate in proceedings. Indeed, as discussed in more detail below, because of the built-in biases with which USDOC operates, Brazilian exporters now *regularly choose not to participate in the investigations before USDOC* and instead focus on the injury investigations conducted by the USITC. When an exporter refuses to cooperate, according to the second sentence of paragraph 7 of Annex II, anti-dumping authorities are free to resort to facts available which "could lead to a result which is less favourable to the party than if the party did cooperate." Exporters choose not to proceed in these investigations at their own risk, recognizing that,

if representative information is not available to the authority, then it will likely resort to allegations in the petition. Exporters should not, however, fear artificially inflated margins because they chose not to devote the enormous resources necessary to defend against the built-in bias of the USDOC.

20. Indeed, that same paragraph 7 admonishes the anti-dumping authorities to use “careful circumspection” when resorting to secondary information such as the petition. This cautionary requirement contradicts any US claim that the text of the Anti-Dumping Agreement permits it to affirmatively, punish or deter exporter behaviour by choosing facts available plugs that purposefully inflate the respondents’ margins. Facts available is not about taking aggressive action, it is about acting with caution to fill-in holes in information.

21. The US statute and practice also violate the AD Agreement in other respects. The US statute and practice omits the requirement that the choice of facts available may render the respondent’s position “less favourable” only when the documents are “withheld.” Similarly, the US statute sets a hard and fast presumption that a submission “deadline” should be equated with the “reasonable period” mandated by Article 6.8. The term “reasonable” however is an ambiguous term that can only be decided on a case- and fact-specific basis.

22. The experience of the Japanese respondents amply demonstrates the abusive nature of the US statute. The facts surrounding the treatment of all three Japanese respondents – Kawasaki Steel Corporation (“KSC”), NKK Corporation (“NKK”), and Nippon Steel Corporation (“NSC”) are remarkable. KSC was punished with the use of “sufficiently adverse” facts available so as to deter similar “uncooperative” behaviour in the future, despite the fact that it was a petitioner, California Steel Inc. (“CSI”) , that refused to cooperate with USDOC, not KSC. KSC never had control over CSI’s information and it made the reasonable decision that it could not get that information using what it considered appropriate means. Similarly, in the context of this enormous, accelerated investigation, NKK and NSC were punished not for withholding information, but for failing to meet the strict USDOC deadlines with respect to information that affected only a handful of sales, despite their overall cooperative behaviour throughout the investigation. The “punishment” simply does not fit the “crime”.

23. In its First Submission, the US repeats over and over what a complex and difficult case this was, and what enormous companies the Japanese respondents were; yet, when it comes time to determine what is a “reasonable period,” the US Government reacts angrily to any notion that it should have acted flexibly toward what were, in the broad scheme of things, minor difficulties faced by the exporters with respect to low priority issues. Instead, the United States equates its statutory benchmark of the submission deadline with a “reasonable period” without any thought as to what is meant by “reasonable” in the context of the specific documents that were submitted late and why. The USDOC argues that a deadline is a deadline and agencies need to proceed with their investigations. This belies the flexibility and good faith responsibilities imposed on an anti-dumping authority by the facts available provision in the Anti-Dumping Agreement. Article 6.8, the governing provision, does not use the word “deadline,” but rather “reasonable period.” Therefore, in Annex II, whenever the word “timely” is used, it refers back to the governing language of Article 6.8, “reasonable period”.

24. The harsh language contained in the US First Submission with respect to the three Japanese exporters reflects the inflexible and bad faith position of the USDOC throughout the proceeding. The US First Submission tries to paint the respondents as “evasive” and in need of the most basic handholding. But the Panel should always keep in mind the truly *inordinate* amount of information that these respondents did actually submit to the USDOC. The mountain of information submitted belies any notion that NKK or NSC acting in an “evasive” manner or that KSC was not cooperating to the “best of its ability”. This attack on three private companies that submitted thousands of pages of information and enormous sales databases does not belong in a dispute settlement proceeding before an international tribunal.

25. These issues demonstrate the importance of the concept of good faith in carrying out the legal standard of review under the AD Agreement. While the US might try to argue that its interpretations meet the outer limits of WTO AD Agreement provisions, the Panel should consider whether these inflexible and punitive rules meet a test of good faith.

C. USDOC'S TREATMENT OF BRAZILIAN RESPONDENTS IN THIS VERY CASE PROVIDES FURTHER EVIDENCE NOT ONLY OF THE US ABUSES OF FACTS AVAILABLE, BUT OF THE POLITICAL NATURE OF THIS CASE AND THE FAILURE OF THE UNITED STATES TO CONDUCT ITS INVESTIGATIONS IN GOOD FAITH

26. In the hot-rolled steel investigation, USDOC seemed to strain itself to find reasons to apply adverse facts available to each respondent. With respect to Companhia Siderurgica Nacional ("CSN"), a significant issue was date of sale, which determines what set of sales are analyzed in the dumping calculation. USDOC rejected substantial evidence that the commercial invoice date was the more appropriate date of sale for CSN's US sales and instead used ex-factory shipment date. CSN did not submit data on a small number of sales with ex-factory shipment dates during but commercial invoice dates after the period investigated. USDOC determined that CSN had not cooperated to the best of its ability and applied the highest margin to the unreported sales. USDOC determined further, without any explanation or analysis, that "this margin is indicative of CSN's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." The fact that the facts available margin was the highest margin and not the mean does not support USDOC's conclusion that the margin is "indicative of CSN's customary selling practices" and there is no evidence to support the finding that the margin is "rationally related to the {affected} transactions".<sup>9</sup>

27. USDOC applied adverse inferences with a vengeance in the margin calculation for Usinas Siderurgicas de Minas Gerais and Companhia Siderurgica Paulista ("USIMINAS/COSIPA").<sup>10</sup> USDOC applied adverse inferences to the following: (1) USIMINAS' reported costs; (2) USIMINAS' unreported US sales where the nota fiscal date--the date of sale--was within the period investigated but the commercial invoice date fell outside the period; (3) downstream sales data; (4) USIMINAS' home market inland freight; (5) USIMINAS' US inland freight; (6) USIMINAS' warranty expense; (7) COSIPA's home market inland freight; (8) COSIPA's brokerage and handling expenses; (9) COSIPA's packing; and (10) USIMINAS' failure to report its affiliated supplier's actual cost of production.<sup>11</sup>

28. With respect to USIMINAS' reported costs, USDOC gave USIMINAS insufficient notice of any deficiencies. USIMINAS relied successfully on the same cost allocation methodology in prior proceedings. Yet, at no point in the hot-rolled steel investigation or the prior proceeding did USDOC ask USIMINAS to resubmit its costs using its normal financial cost accounting system, which violates the letter and the spirit of paragraph 6 of Annex II: "If evidence of information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period...". USIMINAS presumed USDOC's findings in the previous review were valid. USIMINAS presumed USDOC was well aware that there would be differences between the per-unit costs generated by each system. USDOC nonetheless found that USIMINAS' costs were not representative of its normal business records and recalculated USIMINAS' costs using adverse facts available.

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<sup>9</sup> Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38756, 38768 (19 July 1999) ("Brazil's Final Dumping Determination").

<sup>10</sup> Due to the degree of affiliation between these two Brazilian steel producers, USDOC treated USIMINAS and COSIPA as one entity ("collapsed" the two companies) for purposes of determining dumping. See *Brazil's Final Dumping Determination* at 38759.

<sup>11</sup> *Id.* at 38758, 38774-84, 38786-90.



29. The main basis for USDOC's use of adverse facts available for the other nine instances was failure to verify information submitted by USIMINAS and COSIPA. The sales verification reports indicate, however, that USDOC did not follow proper verification policies. In particular, the breadth and depth of USDOC's verification agenda virtually made certain that USDOC would be unable to review all of the information in the verification agendas. In addition, USDOC insisted on verifying in depth all items appearing on the verification agenda. This is obvious not only from the length and language of the verification reports themselves, but also from the extensive documentation compiled by USDOC. Indeed, more than 2,000 pages of exhibits were reviewed and collected by USDOC. Thousands of other pages of documents were reviewed and not taken. And, thousands of other pages of documents were prepared but not examined.<sup>12</sup>

30. Brazil would note that lack of time to verify information due to a self-imposed heavy agenda is a far cry from the conditions set out in Article 6.8 and Annex II that would allow the use of facts available. The USDOC failure to verify information provided by respondents is in direct conflict with the language of paragraph 3, Annex II: "All information which is verifiable ... should be taken into account when determinations are made."

31. In addition to the problems associated with the verification agenda, USIMINAS and COSIPA noted other troubling aspects of the sales verification reports. First, the reports contained numerous inconsistencies and mistakes of fact. These mistakes and inconsistencies undermined the credibility and findings of the reports. Second, significant portions of the reports contained characterizations of facts that appeared to exhibit a bias against respondents. Indeed, it often appeared that USDOC sought to portray mistakes or inconsistencies in the light most damaging to respondents, rather than simply recording and articulating the facts observed in a neutral manner.

32. After rejecting USIMINAS/COSIPA's protestations about the fairness of the proceeding, USDOC applied adverse facts available. In some cases, USDOC applied the highest dumping rate to certain transactions, making the same unfounded conclusion that "this margin is indicative of USIMINAS/COSIPA's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied."<sup>13</sup> USDOC's pervasive and groundless use of adverse facts available can be described only as biased and unobjective. USDOC's final determination expressed more concern for defending its flawed administrative proceeding than conducting a fair investigation.

#### D. THE ABUSIVE USE OF FACTS AVAILABLE IS UNFAIRLY PREJUDICING UNINVESTIGATED EXPORTERS

33. As with Japan, the application of partial adverse facts available in USDOC's hot-rolled steel investigation of Brazil also drove up the all others rate: the all others rate was calculated based on a weighted average of the dumping margins of the mandatory respondents involved in the investigations. Yet the AD Agreement is very clear in its prohibition against the inclusion of facts available rates -- adverse or otherwise -- in the calculation of the all others rate. As Japan explains in its first submission, Article 9.4 of the AD Agreement states that the all others rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or

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<sup>12</sup> Moreover, USDOC did not prioritize its review of verification subjects. This is particularly true regarding sales trace documentation and sales adjustments, where USDOC devoted substantial amounts of time verifying expenses such as inland insurance and inventory carrying costs at the neglect of more important topics, such as sales prices, sales quantities, invoice dates and numbers, and product characteristics. Even a cursory review of the verification exhibits demonstrates this fact. Indeed, there were more than sixty-three exhibit pages for inland insurance alone, which was one of the smallest expenses on the sales lists. Similarly, USDOC took more than one hundred exhibit pages for indirect selling expenses, a field that is not even used in USDOC's margin calculations.

<sup>13</sup> *Brazil's Final Dumping Determination* at 38779-80 (concerning downstream sales data and unreported sales resulting from a change in the date of sale).

producers...provided that the authorities shall disregard...margins established under the circumstances referred to in paragraph 8 of Article 6.” Given that the other margins for both Japan and Brazil in this case were based on facts available that can only find their authority in Article 6.8 (though no authority exists for *adverse* facts available), the all others rates calculated by USDOC violated the AD Agreement. This clear violation of the AD Agreement should be halted, along with the abusive use of adverse facts available.

34. The United States argues in its First Submission that the phrase “margins established under the circumstances referred to in paragraph 8 of Article 6” in Article 9.4 must mean margins based *entirely* on facts available. But, this is not what Article 9.4 says. If the Members had meant this, they would have used the phrase “margins established *in their entirety* under the circumstances referred to in paragraph 8 of Article 6” or something to that effect. But this is not what the Members negotiated. The word “entire” does not appear in Article 9.4. Whether one agrees with the United States or not that there are an infinite number of permissible interpretations of the Agreement, an interpretation that writes into a provision a word that does not exist and substantively changes the meaning of the provision is hardly a permissible interpretation.

### **III. USDOC'S TREATMENT OF AFFILIATED HOME MARKET CUSTOMERS -- INCLUDING THE USE OF THE SO-CALLED “ARM'S LENGTH” TEST AND THE REQUIREMENT TO REPORT AFFILIATED CUSTOMERS' RESALES -- IS UNFAIR**

35. Under the guise of price manipulation, USDOC treats sales to affiliated home market customers with circumspection. If USDOC determines that the respondent's relationship to a customer is close enough to be deemed “affiliated” under the US statute, USDOC applies a test that excludes the sales to affiliated customers for whom average prices are lower than sales to unaffiliated customers and not sales to affiliated customers for whom the average prices are higher. It then requires the respondent to report the affiliates' downstream sales. The threshold of affiliation, however, is unrealistically low, leading USDOC to require submission of sensitive, proprietary sales information of the affiliated customer whether or not the respondent has *effective* control over the affiliate. In Brazil, respondents' shareholdings in affiliated customers are often relatively small and do not necessarily give respondents the power to force the affiliate to provide the requested information.<sup>14</sup> Similar to KSC's experience with its US affiliate, gathering affiliated customers' sales data has proven extremely burdensome and sometimes impossible for Brazilian exporters. As a result, in addition to driving up margins, USDOC's policy on affiliated home market customers has often forced the unfair application of adverse facts available, or discouraged participation all together at USDOC.

#### **A. US LAW AND ADMINISTRATIVE PRACTICE**

36. The US statute provides that “if the foreign like product is sold . . . through an affiliated party, the prices at which the foreign like product is sold . . . by such affiliated party may be used in determining normal value.”<sup>15</sup> USDOC's policy for determining whether downstream sales should be used in the calculation normal value is:

If {USDOC} determines that an affiliate made downstream sales of a foreign like product, {USDOC} usually will not require the reporting of both the sales to the affiliate and the downstream sales by the affiliate. We will examine the sales between the affiliated parties under paragraph (c). If sales to the affiliate fail the

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<sup>14</sup> See, e.g., *Certain Cut-to-Length Carbon Steel Plate from Brazil: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18486 (15 Apr. 1997) (affiliation found despite minority stake in customer, among other practical limitations to respondent's ability to control the customer).

<sup>15</sup> 19 U.S.C. § 1677b(a)(5).

arm's-length test, {USDOC} will require the respondent to report that affiliate's downstream sales. *If sales to the affiliate pass the arm's-length test, {USDOC} normally will not require the respondent to report the affiliate's downstream sales and will calculate normal value based on sales to the affiliate.*<sup>16</sup>

37. USDOC must first determine whether a customer is "affiliated." The US statute provides that "the following persons shall be considered to be 'affiliated' or 'affiliated persons':

- (A) Members of a family . . . .
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per cent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
- (G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.<sup>17</sup>

38. This definition casts a fairly broad net. In Brazil, manufacturers often have relationships with or own shares in other companies that resell their product. As a result, USDOC often applies the arm's length test to sales to affiliated customers. As explained by the Government of Japan, due to the analytical shortcomings of USDOC's arm's length test, these sales to affiliated customers are commonly deemed abnormal (i.e., outside the ordinary course of trade), requiring respondents to report the affiliate's resales for the calculation of normal value.

**B. BRAZILIAN EXPORTERS' EXPERIENCE IN THIS VERY CASE PROVES THE BURDENSOME NATURE OF USDOC'S TREATMENT OF AFFILIATED HOME MARKET CUSTOMERS**

39. In the hot-rolled steel investigation, USDOC required USIMINAS and COSIPA to report the resales of three affiliated customers -- Rio Negro Comercio e Industria de Aco S.A. ("Rio Negro"), Fasal S.A. Comercio e Industria de Produtos Siderurgicos ("Fasal"), and Dufer SA.<sup>18</sup> USIMINAS owned virtually all of the voting capital (99.99 per cent) of Rio Negro Centro Participacoes Ltd., a stockholding company for Rio Negro, a local distributor that purchased subject merchandise as well as other flat-rolled steel products for resale. USIMINAS owned 50 per cent of a holding company, Siderholding Ltda., the sole purpose of which is to hold stock in Fasal, a distributor that inventories

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<sup>16</sup> *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27296, 27356 (19 May 1997) (emphasis added). USDOC's arm's length test (or "99.5 per cent" test) is described and analyzed in detail in the Government of Japan's First Submission. The Government of Brazil supports that discussion and incorporates it by reference here.

<sup>17</sup> 19 U.S.C. § 1677(33) (emphasis added).

<sup>18</sup> CSN also sold subject merchandise to affiliated customers during the period investigated. However, CSN was not required to report these sales because they represented a small share of CSN's total home market sales. See CSN Section A questionnaire response, at 37.

and further processes steel products, including plate. COSIPA owned 51 per cent of the stock of Dufer, a distributor which resold the like product during the period investigated.<sup>19</sup>

40. USIMINAS/COSIPA laboured to collect and report these affiliates' resale information. The resale information was then subject to verification as part of the large volume of information submitted by USIMINAS/COSIPA. As described above, verification was seriously complicated by the involvement of these affiliates. Due to the relatively short time allowed and the inordinate volume of information and issues to cover, USDOC did not fully review the affiliates' sales data. As a result, USDOC "used the downstream data reported by USIMINAS and COSIPA for CONNUM matching purposes only. In cases in which the best match is to a downstream home market sale, {USDOC} applied as adverse facts available the highest calculated margin for any USIMINAS/COSIPA CONNUM".<sup>20</sup>

41. Brazilian respondents were required to report affiliated customers' home market resales in many other previous cases.<sup>21</sup> As with USDOC's use of facts available, USDOC's policy concerning sales to affiliated parties has taken its toll on Brazilian respondents. For example, in the recent investigation of cold-rolled steel products from Brazil, CSN withdrew its participation in part because of the difficulties it experienced with an affiliated reseller. The burden of collecting and ensuring the accuracy of the affiliate's sales information forced CSN's withdrawal and resulted in the application of total adverse facts available.<sup>22</sup> As USDOC continues to apply its policy concerning sales to affiliated home market customers, respondents will continue to face the dilemma of complying with USDOC's burdensome reporting requirements or declining to participate in the proceeding. This is an unfair choice to make, considering the lack of authority in the AD Agreement for USDOC's policy and practice.

C. THE AD AGREEMENT PROVIDES NO LEGAL BASIS TO DEEM AN AFFILIATED PARTY AS OUTSIDE THE ORDINARY COURSE OF TRADE BASED ON FAILURE OF THE US ARM'S LENGTH TEST

42. The Government of Japan correctly presents the WTO inconsistencies of USDOC's "arm's length" test. While Brazil believes there are instances when affiliated party sales may be deemed outside the ordinary course of trade, the US practice goes way too far:

- the standard for affiliation is far too low;
- prices that are clearly "comparable" under any reasonable standard are being disregarded as outside the ordinary course of trade because of an outrageously biased and nearly impossible 99.5 per cent test;

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<sup>19</sup> See USIMINAS/COSIPA Section A questionnaire response, at 3, 9-10, 48.

<sup>20</sup> *Brazil Final Dumping Determination*, at 38779.

<sup>21</sup> See, e.g., *Certain Cut-to-Length Carbon Steel Plate from Brazil: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18486 (15 Apr. 1997) (sales to affiliated home-market customer failed arm's length test and disregarded); *Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil*, 60 Fed. Reg. 31960 (19 Jun. 1995) (same); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicomanganese from Brazil*, 59 Fed. Reg. 31195 (17 Jun. 1994) (same); *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Certain Steel Flat Products*, 58 Fed. Reg. 7080 (4 Feb. 1993) (same); *Certain Iron Construction Castings From Brazil; Final Results of Antidumping Administrative Review*, 55 Fed. Reg. 26238 (27 Jun. 1990) (same).

<sup>22</sup> *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 Fed. Reg. 5554, 5554 (4 Feb. 2000).

- the averaging methodology used by USDOC not only removes prices that might even be higher than most sales to unaffiliated customers, but in doing so also removes products that might prove to be a more appropriate match to export sales.

Under any definition of the concept of fair, this is simply not a fair test. It violates Article 2.4 of the AD Agreement.

43. Moreover, there is no textual basis for USDOC's replacement of certain affiliated party sales with the *resale* prices of the downstream sale. The AD Agreement, particularly Article 2, makes absolutely no mention of using resale prices in the domestic market context. This silence stands in stark contrast to the specific rule set forth in Article 2.3 with respect to the export market. There, the AD Agreement recognizes that sales to related importers can be manipulated to achieve specific results in an anti-dumping investigation. The underlying policy of Article 2.3 is logical given that the objectives of the importer and exporting manufacturer are often aligned when anti-dumping measures are imposed because both entities' business is affected by anti-dumping measures. On the other hand, a similar assumption is illogical in the domestic market context because a manufacturer's domestic customers are economically ambivalent to any anti-dumping measures the manufacturer might be facing abroad.

44. The US First Submission suggests that Article 2.2 permits the use of downstream sales, but it appears that the United States has misread this provision. It states in Paragraph 234 of Part B that "Article 2.2 plainly states that normal value may be based on third country sales prices or on constructed value...." In fact, Article 2.2 plainly uses the word "shall," not "may." The United States is reading into the Agreement another permissive interpretation where the language is clearly mandatory.

45. USDOC's replacement of certain home market sales with downstream resales is also inconsistent with Article 2.4 of the AD Agreement. Article 2.4 requires that a "fair comparison" be made between the export price and the normal value, at the same level of trade, normally at the ex-factory level." The substitution of higher downstream resale prices increases normal value so as to vitiate any "fair comparison." Moreover, the use of resale prices results in a comparison of ex-factory prices in one market to a comparison of a downstream resale price in another market. This asymmetry is inconsistent with the Article 2.4 mandate of a "fair comparison" normally at the "ex-factory price" level. Finally, Article 2.4 states that on authority "shall not impose an unreasonable burden of proof" on parties whose sales are subject to investigation. To the extent USDOC punishes respondents who have difficulty obtaining the necessary data from their affiliates -- as it often does with Brazilian respondents -- USDOC is violating this part of Article 2.4 as well.

46. The fact that USDOC disregards *only* the lower priced sales that fall outside the 99.5 per cent test and replaces certain related-party sales with *higher* downstream prices demonstrates the bad faith manner in which the US Government has implemented the AD Agreement. These skewed statistical choices manipulate the dumping margin by inflating normal values. These rules, therefore, are biased against the foreign respondents, a sign that respondents' due process rights are being denied.

#### **IV. THE NEW US CRITICAL CIRCUMSTANCES POLICY UNFAIRLY CHILLS TRADE AND VIOLATES THE AD AGREEMENT**

47. Brazil also supports Japan's challenge of the US Government's new critical circumstances policy. As the Government of Japan aptly points out, USDOC's policy was implemented in bad faith, *after it had already initiated the hot-rolled steel investigation*, and it is inconsistent with WTO rules.

48. First, Article 10.6 of the AD Agreement governing critical circumstances does not allow for a critical circumstances decision based on solely the threat of material injury -- the basis for the USITC's affirmative preliminary determination. Unlike the other paragraphs of Article 10 that

specify when “threat” is relevant to the analysis, Article 10.6 specifies only current “injury.” The United States seems to suggest in its First Submission that USDOC can make its own injury determinations, regardless of what the USITC does. Yet, Article X:3(a) of GATT 1994 clearly requires that the decisions made by an authority be uniform. In any event, to impute to importers knowledge of something two US federal agencies cannot even agree on clearly goes too far.

49. Moreover, the US reached its preliminary determination of critical circumstances on the basis of only speculative evidence, in violation of both Article 10.6 and the “sufficient evidence” standards set forth in Article 10.7. Article 10.6 requires determinations of dumping and injury before application of retroactive duties. Yet, no such determinations were made at the time of the preliminary critical circumstances finding in the hot-rolled steel investigation of Japan. Even if one accepts the US point that the USITC’s preliminary threat determination was sufficient to meet the injury requirements for applying retroactive duties (which Brazil does not accept), there was still no determination of dumping at the time of the preliminary critical circumstances determination. The chapeau of Article 10.6 clearly requires such determination to have been made, given that retroactivity is permitted only “when the authorities determine *for the dumped product in question* that . . . .” No such determination had been made; USDOC simply assumed dumping existed. It therefore violated Article 10.6.

50. Furthermore, there was far from sufficient evidence to support USDOC’s “findings.” There was no evidence of dumping -- only petitioner allegations. There was no evidence of injury -- only unsubstantiated press reports. And, there was no evidence of “massive dumped imports” -- only, again, unsubstantiated press reports. Allegations are never “sufficient evidence” under GATT and WTO legal interpretation.<sup>23</sup> The United States itself admits, in another context (Paragraph 72 of Part B), that “information submitted in a request for initiation is likely to be adverse to the interests of the responding party.” In other words, petitioners include information in their petitions that is as adverse and one-sided as possible. How this, without more, could meet the sufficient evidence standard is unclear.

51. Beyond the failings inherent in relying on petitioner allegations, the United States also violates the sufficient evidence standard when applying its arbitrary threshold for imputing knowledge of dumping to importers. Why a 25 per cent margin of dumping -- alleged or even determined -- means the importer knew or should have known the product it was buying was dumped is nonsensical. Importers rarely know the price of their suppliers’ product in the home market.

52. The failure of the US Government to comply with the WTO standards in the hot-rolled steel investigation is explained in part by the fact that the US statute itself is inconsistent, on its face, with the requirements of Articles 10.6 and 10.7. First, the US law fails to require a finding that the massive dumped imports are “likely to seriously undermine the remedial effect” of the duty, contrary to the specific requirement in Art. 10.6(ii). Second, far from requiring “sufficient evidence,” the US statute requires only “a reasonable basis to believe or suspect,” a substantially lower threshold. The common meaning of the terms dictate that a “basis” that leads one to “suspect” a fact simply cannot meet the degree of support necessary to provide “sufficient evidence” of a fact.

53. The Panel should not be constrained to rule on this issue by the fact that critical circumstances were ultimately not applied in this case. The policy on its face violates the AD Agreement. Further,

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<sup>23</sup> See *United States—Measures Affecting Imports of Softwood Lumber from Canada*, adopted 27 Oct. 1993, BISD 40S/358, at para. 332 (“*US—Softwood Lumber*”) (explaining that sufficient evidence means “more than mere allegation or conjecture, and could not be taken to mean just ‘any evidence.’” In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement.”); *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, adopted 25 Apr. 1997, WT/DS33/AB/R, at 15 (“*US—Wool Shirts*”) (commenting that “we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof”).

the impact of the policy is felt not only when it is ultimately applied, but by its mere existence. Exporters tend not to ship product when their importers face the possibility of paying retroactive duties. Such tendency is even greater when the USDOC policy is to make affirmative critical circumstances determinations with only flimsy -- not "sufficient" -- evidence.

**V. THE CAPTIVE PRODUCTION PROVISION IS A CLEAR VIOLATION OF THE AD AGREEMENT'S REQUIREMENT THAT AN AUTHORITY ANALYZE THE DOMESTIC INDUSTRY "AS A WHOLE"**

54. While most of the US abuses of the AD Agreement occur at USDOC, one troubling aspect of the USITC's investigations is the statutory requirement that -- when certain facts exist -- the USITC must "focus primarily" on a domestic industry's merchant market sales to the exclusion of their captive sales (internal transfers). This so-called captive production provision was passed by the US Congress following the enormous political pressure brought to bear by the US steel industry when it failed to convince the USITC that it was materially injured by reason of imports in the 1992-1993 round of flat-rolled steel cases. As Japan thoroughly documents in its first submission, there is now ample WTO jurisprudence for the notion that Articles 3.4, 3.5 and 4.1 -- in conjunction with one another -- require an authority to examine the domestic industry "as a whole," not merely a part of it, when determining injury and causation.

55. The exclusion of the captive portion of an industry can have a dramatic effect on an authority's analysis. For instance, by focusing on the merchant market, the USITC can miss the fact that an industry has chosen on its own to decrease its merchant market shipments in favour of captive shipments to downstream production that reaps higher profits. In this example, while the industry might or might not appear more healthy with the internal transfers, the industry's condition is certainly explained at least in part by the production decisions made by the industry -- factor that must be considered as an alternative cause of the industry's condition. The fear in this case would be that the USITC would attribute to imports the effects of other causes -- in this case the industry's own self-imposed causes.

56. Whatever the results, the bottom line is that consideration of only one segment of an industry is simply not permitted under the AD Agreement. Even if the US can argue that the captive portion of the industry does not compete with the merchant market, this is irrelevant: if there is one like product, then there is one industry. There is no reason such competitive conditions cannot be considered on a case-by-case basis, without tying the hands of the authority and requiring it to ignore the captive portion of the market when certain statutory conditions are met, as the US captive production provision does.

**VI. USITC'S FAILURE TO DISTINGUISH BETWEEN INJURY CAUSED BY IMPORTS VERSUS INJURY CAUSED BY OTHER FACTORS VIOLATES THE AD AGREEMENT**

57. Without addressing in detail Japan's fact-specific claims with regard to the USITC's causation analysis as applied to the hot-rolled steel case, Brazil suggests that the Panel examine whether US practice with respect to alternative causes is sufficiently rigorous. As evidenced from this as well as other cases, Brazil believes it is not.

58. Article 3.5 states, in pertinent part, that "The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." In other words, imports must, in and of themselves, be a cause of material injury to the industry -- not a cause that, when combined with other factors, results in material injury. This is the only logical interpretation of Article 3.5. Otherwise, the prohibition against attribution would be meaningless.

59. As other Members have argued before the DSB (including in *US -- Wheat Gluten Safeguards*), ensuring that the effects of other factors are not attributed to imports requires a sophisticated analysis that isolates the effects of each relevant factor. The USITC has undertaken such sophisticated analysis in other cases (i.e., the recent cold-rolled steel case<sup>24</sup>), but does so only infrequently.

60. In the hot-rolled steel case, other factors were critical. Though imports had admittedly increased in volume, so had domestic mill capacity, particularly that of the minimills: 17 million tons of new minimill capacity were commissioned during the period of investigation, much of which came on line by 1998. The increase alone represented 78 per cent of all domestic industry merchant market shipments in 1998.<sup>25</sup> While the USITC discussed minimills -- as well as the General Motors strike, another important factor in the market during 1998 -- absolutely no effort was made to isolate the effects of these factors versus the effects of imports. Therefore, the USITC did not ensure against the attribution to imports of the effects of other factors. The Panel should instruct the United States to change this practice, not only in this case but in other cases as well.

## CONCLUSION

61. The United States has made a valiant and lengthy effort to rebut the arguments set forth in Japan's First Submission. Yet, Brazil is unconvinced that the abuses Japan has identified are unworthy of rectification. The United States too often uses its anti-dumping and countervailing duty laws as a tool to protect politically influential US industries from import competition. If it did so in accordance with the rules agreed to by the Members to the WTO, then no one could complain about the political influence these industries maintain. The problem is that the political influence is infecting the proper adoption of international norms. We hope the Panel will help bring it to an end.

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<sup>24</sup> *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000), at 18-24.

<sup>25</sup> *Certain Hot-Rolled Steel Products from Japan*, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (Jun. 1999) at IV-12.



## ANNEX B-2

### Submission of Canada as a Third Party

(31 July 2000)

#### I. INTRODUCTION

1. This dispute arises out of the anti-dumping measure(s) imposed by the United States effective 23 June 1999 on certain hot-rolled steel products from Japan.
2. This dispute was initiated by a request by Japan on 18 November 1999 for consultations with the United States under Article 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII:1 of GATT 1994 and Article 17.2 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement). The resulting consultations were held on 13 January 2000.
3. On 11 February 2000, Japan requested the establishment of a panel pursuant to Article 6.1 of the DSU. The Dispute Settlement Body (DSB) established this panel on 20 March 2000. Pursuant to Article 10.3 of the DSU, Canada provided notice that it had a substantial interest in the matter and requested the opportunity to participate as a third party to the dispute.
4. Canada welcomes this opportunity to participate as a third party in this proceeding and provide its views on certain issues raised by Japan which are identified below. Canada has a substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement and in particular, the issues which Canada's submissions address. The fact that Canada has not made submissions with respect to all matters raised before this Panel should not be understood to imply that Canada either agrees with or objects to interpretations of the Anti-Dumping Agreement or practices of investigating authorities raised by these issues.
5. Canada's submissions will address the following issues: (i) the use of "adverse inferences" in applying the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii) the US approach to "captive production" in injury investigations.

#### II. LEGAL ARGUMENT

##### A. APPLICABLE PRINCIPLES OF TREATY INTERPRETATION

6. Article 3.2 of the DSU requires that the covered agreements be interpreted in accordance with "customary rules of interpretation of public international law."
7. For purposes of the WTO Agreement, the *Vienna Convention on the Law of Treaties* (Vienna Convention)<sup>1</sup> sets out applicable rules of international law. The rights and obligations of WTO

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<sup>1</sup> 8 ILM 679 (1969).

Members under the Anti-Dumping Agreement must therefore be interpreted in accordance with the Vienna Convention, and in particular Article 31.<sup>2</sup>

8. According to Article 31 of the Vienna Convention, an international treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. According to Article 32, supplementary means of interpretation may also be referred to, to confirm an interpretation of the agreement or to resolve ambiguities in the text.

B. ISSUES ADDRESSED BY CANADA

(i) “Facts Available”

9. Canada notes that the United States has challenged whether Japan’s claim concerning the US general practice regarding “facts available” is properly before this Panel. Canada takes no position on this jurisdictional question. However, Canada makes the following submissions with respect to Japan’s claim concerning the US general practice regarding “facts available” in the event that the Panel decides that it has jurisdiction over this claim.

10. In the investigation conducted by the United States Department of Commerce (DOC) in this matter, the margin of dumping for certain respondents was based on the use of the “facts available” provisions of US anti-dumping law.

11. Japan submits that the US “practice of applying adverse facts available to punish respondents” is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement because neither Article 6.8 nor Annex II use the word “adverse”. Japan contends that neither Article 6.8 nor Annex II contemplates the punitive use of “facts available” and that the purpose of any use of “facts available” is to fill in gaps in information in a manner consistent with existing data.

12. Canada submits that the wording of Article 6.8 makes clear the circumstances under which an investigating authority may have resort to the “facts available” provisions of the Anti-Dumping Agreement. This is possible where “any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation”. In construing the words “facts available” in their context, one must necessarily have regard to the direct link between the factual circumstances of non-co-operation or impediment by the interested party and the use of “facts available”. Canada submits that this means that the use of “facts available” is, to a large degree, predicated on actions by interested parties that are intended to hamper or have the effect of hampering an investigation by an investigating authority. Thus, Japan’s interpretation of Article 6.8, which encourages an interested party not to co-operate with investigating authorities, is clearly at odds with the wording of Article 6.8.

13. Canada further submits that Article 9.3 of the Anti-Dumping Agreement provides that anti-dumping duties may be imposed in an amount equal to the margin of dumping. Where an investigating authority has recourse to “facts available” as a result of an interested party’s refusal to co-operate or its efforts to impede the investigation, the drawing of adverse inferences is appropriate so as to ensure that the imposition of duties under Article 9.3 is not frustrated by the non-co-operating party obtaining the benefit of a dumping margin that is lower than would otherwise have been the case.

14. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-Dumping Agreement, including, in particular, paragraph 7 of Annex II. Paragraph 7 provides, in part,

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<sup>2</sup> see for instance, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, report of the Appellate Body issued 29 April 1996 at pp. 16-17; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/DS10/DS11/AB/R issued on 4 October 1996 at p. 10.

that “[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, the situation could lead to a result which is less favourable to the party than if that party did cooperate.” In other words, non-co-operation can lead to higher dumping margins.

15. Further, Canada submits that if in applying “facts available” an investigating authority is precluded from drawing adverse inferences in the face of non-co-operation or efforts to impede an investigation, then the result would be to frustrate the object and purpose of the Anti-Dumping Agreement to the extent that the Agreement provides that duties may be imposed as a result of an investigation conducted in a manner consistent with the requirements of the Agreement. If adverse inferences could not be drawn, an interested party who refuses to co-operate or attempts to impede an investigation would benefit from actions that the Anti-Dumping Agreement condemns. Canada submits that an approach to “facts available” that would clearly encourage non-co-operation, as opposed to co-operation, cannot be consistent with the Anti-Dumping Agreement.

(ii) *Captive Production*

16. As part of its final injury determination in this matter, the United States International Trade Commission (ITC) took into account section 771(c)(iv) of the *Tariff Act of 1930*, as amended. This provision provides that in investigations involving domestic producers who internally transfer significant production of like products, the ITC, when considering certain injury factors, will “focus primarily” on the domestic merchant (i.e. commercial) market for the goods involved in such investigations.

17. Japan submits that the use of the captive production provision in US law is inconsistent with Articles 3 (Determination of Injury) and 4 (Definition of Domestic Injury) of the Anti-Dumping Agreement because these provisions do not expressly allow for a “focus” on anything less than all domestic production. Japan, although apparently recognizing the existence of different segments within a domestic industry<sup>3</sup>, submits that in particular, the definition of “domestic industry” in Article 4.1 of the Anti-Dumping Agreement precludes segmentation of internal transfers from the “merchant market”. Japan bases this position to a significant extent on the phrase “domestic producers as a whole of the like products” in that definition.<sup>4</sup>

18. Canada first notes that Canadian practice with respect to investigations involving domestic producers who internally transfer significant production of like products is similar to that of the United States.<sup>5</sup>

19. In Canada’s view, the purpose of providing an investigating authority with the ability to focus on sales to the merchant market in appropriate circumstances is because it is in the merchant market that the dumped imports being investigated compete directly against domestically produced like products. For example, in the flat-rolled steel sector, domestically produced hot-rolled steel may be sold and used as an end product or may be further processed into, for instance, cold-rolled or corrosion-resistant steel. Imported hot-rolled steel does not compete with domestically produced hot-rolled steel destined for further processing into, for example, cold-rolled steel or corrosion-resistant steel.

20. Canada submits that the Anti-Dumping Agreement contains no express provision with respect to how captive production or internal transfers should be considered by investigating authorities. That

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<sup>3</sup> See, for instance, First Submission of Japan at paragraph 36.

<sup>4</sup> See in particular First Submission of Japan at paragraphs 225 and 226.

<sup>5</sup> While an analogous provision does not exist in Canada’s anti-dumping legislation (The Special Import Measures Act (R.S.C. 1985, c. S-15, as amended) this practice has been developed by the Canadian International Trade Tribunal, the investigating authority that deals with injury investigations in Canada.

being said, the fact that like product is internally transferred for further processing into different goods for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

21. Canada also submits that the Japanese position blurs the distinction between the concepts of “domestic industry” and “domestic market(s)”. This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include “...an objective examination of...the effect of the dumped imports on prices in the domestic market for like product...”

22. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products “in the domestic market for like products”, i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, this will be the merchant market.

23. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

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

### **III. CONCLUSION**

25. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with “facts available” and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

## ANNEX B-3

### Submission of Chile as a Third Party

(31 July 2000)

#### INTRODUCTION

1. Chile is exercising its right under Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the belief that the issue before this Panel is important for the proper functioning of the multilateral trading system. The increasing use of anti-dumping measures is a source of special concern to a country such as Chile whose economic development is based on an export model. Particularly worrisome is the way in which some countries are resorting to such measures to keep out imports and protect uncompetitive industries. These concerns are confirmed by Japan's complaint concerning measures applied by the United States to certain hot-rolled steel products and the latter country's long history of anti-dumping proceedings against the steel industry of Japan and the world in general.
2. What is even more serious is that some national regulations are incompatible with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement). In particular, the present case shows that certain provisions of the Tariff Act of 1930 and its amendments, many of which were intended to "adapt" it to the WTO's Anti-Dumping Agreement, are in fact inconsistent with the latter and that the Panel should therefore recommend that they be adapted as soon as possible.
3. After consultations between the parties had failed to resolve the dispute, on 11 February 2000 the Government of Japan requested the establishment of a panel pursuant to Article XXIII:1 of GATT 94, Articles 4 and 6 of the DSU, and Article 17 of the Anti-Dumping Agreement.
4. At its meeting on 20 March 2000, the Dispute Settlement Body established a panel to examine the dispute and Chile, along with other Members, declared its interest in participating in the dispute as a third party. The panel was constituted on 24 May 2000, with the standard terms of reference laid down in Article 7 of the DSU.
5. Moreover, under the general provisions of the DSU, Chile has an interest in transmitting its Government's serious concern about the way in which some Members of the WTO, important trading partners for Chile, interpret the fulfilment of their obligations within the context of the Organization and, more especially, the way in which the United States interprets the fulfilment of its obligations under the Anti-Dumping Agreement.
6. In this respect, Chile considers it essential that the WTO's Dispute Settlement Mechanism, through its rulings, should confirm the principles of transparency and fairness on which the Agreements are based. The function of the Dispute Settlement Mechanism is to provide Members of the WTO, especially the smaller economies, with a guarantee that the multilaterally agreed principles and rules will be fully respected and, in particular, that the disciplines of the Anti-Dumping Agreement will be strictly observed. Moreover, in Chile's opinion, within the multilateral trading system the application of Article VI of GATT 94 and the Anti-Dumping Agreement constitute an exceptional trade protection instrument, to be used only under the conditions laid down in the Agreement itself.

7. Anti-dumping duties may not be imposed until there has been an investigation to determine the existence, degree and effects of the alleged dumping which, moreover, must be based on the principles mentioned above. The Government of Chile is concerned about the way in which some Members of the WTO habitually resort to such measures, even though all the circumstances envisaged in Article VI of GATT 94 and the Agreement are not always present, thereby giving the impression that the intention is to protect a local industry rather than to remedy real and effective injury.

8. Consequently, Chile's participation in this dispute is an expression of a systemic interest, under Article 10 of the DSU, and a result of the way in which in its legislation and practice the United States interprets the provisions of Article VI of GATT 94 and the Anti-Dumping Agreement, which, in Chile's opinion, deviates not only from their true meaning and scope but also from the letter and spirit of the Agreement.

### **SUMMARY OF CHILE'S LEGAL ARGUMENTS**

9. In its first written submission, in the opinion of the Chilean Government, Japan clearly established how in this dispute the United States has violated:

- (a) Articles 2, 6, 9 and 10 of the Anti-Dumping Agreement in conducting its USDOC investigation;
- (b) Articles 3 and 4 of the Anti-Dumping Agreement in conducting its injury investigation;
- (c) Article VI of GATT 94 in determining dumping, injury and causation;
- (d) Article X:3 of GATT 94 in not carrying out a complete investigation and not making its determinations in a uniform, impartial and reasonable manner, as required by that provision, and
- (e) Article XVI:4 of the Agreement establishing the WTO and Article 18.4 of the Anti-Dumping Agreement, by maintaining a law, regulations and administrative procedures that do not conform with its obligations under the WTO Agreements.

10. In this submission Chile wishes to concentrate its arguments on the following aspects which merit closer consideration:

- (a) The "captive production" provision was not considered in determining injury, in accordance with Articles 3 and 4 of the Anti-Dumping Agreement.
- (b) In its investigation USITC did not consider all the factors relating to the determination of injury, in accordance with Article 3 of the Anti-Dumping Agreement.
- (c) In calculating the normal value, USDOC deliberately excluded certain home market sales between related enterprises which were subsequently replaced by the higher resale price made by affiliates for unaffiliated customers, in open contravention of paragraphs 1, 2 and 4 of Article 2 of the Anti-Dumping Agreement.
- (d) USDOC accused one of the enterprises investigated of not cooperating with the investigation, applying duties higher than those which would have been appropriate. This was questionable due to the fact that the information requested could not be provided since the North American affiliate was one of the petitioners. Thus,

USDOC failed to apply the provisions of Articles 6.13 and 2.3 of the Anti-Dumping Agreement.

- (e) A determination of "critical circumstances" based solely on the information supplied by one of the petitioners cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement.

#### "CAPTIVE PRODUCTION" PROVISION

11. Under Articles 3 and 4 of the Anti-Dumping Agreement, the determination of injury must relate to the whole of domestic production, irrespective of whether it is sold on the domestic market or used by the petitioner to produce a product with greater value added. In determining injury to the domestic industry, the United States considered only the production sold on the domestic market, excluding production for own consumption. On the one hand, this approach infringes a basic principle that follows from both Article VI of GATT 94 and the Anti-Dumping Agreement, according to which in determining injury the entire domestic industry affected or threatened by increased imports must be considered. On the other hand, it necessarily leads to a finding of greater injury than would have been the case if the whole of production had been considered. Consequently, if captive production had been included, the imports would have had less effect.

12. It is important to note the discretionary nature of the United States' analysis of the figures. Thus, as Japan points out, if the import penetration figures and the operating margins for the years 1993 and 1999 are analysed, it becomes apparent that in 1993 the United States enterprises were reporting losses while import penetration was very similar (6 per cent and 9.3 per cent, respectively) to the year 1999 when there were no operating losses.<sup>1</sup>

#### USITC DID NOT CONSIDER ALL THE FACTORS RELEVANT TO THE DETERMINATION OF INJURY

13. In focusing on only two years rather than three, USITC chose to ignore alternative injury-causing factors such as non-subject imports, contradictions in demand and technological developments. This violated Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement. Likewise, by taking only one three-year period it disregarded many industry performance indices that had improved and which might therefore have led to the conclusion that there had been no injury. Thus, the provisions of Article 3.1 were infringed by not basing the determination of injury on "positive evidence" and not undertaking an "objective examination".

14. For example, the effect on prices of increased production from new-generation plants ("mini-mills"), the General Motors strike and the recession in the pipe and tube industry caused by the collapse in steel prices was not taken into account.

#### EXCLUSION OF CERTAIN HOME MARKET SALES AND THEIR REPLACEMENT BY SALES TO UNAFFILIATED ENTERPRISES

15. Chile considers that in calculating the normal value USDOC excluded certain home market sales between related enterprises. Thus, those sales to affiliates whose weighted price was less than 99.5 per cent of the price for sales to unaffiliated customers were not considered. These excluded sales were replaced by the higher resale price made by affiliates for unaffiliated customers. All of this is inconsistent with Articles 2.4, 2.1 and 2.2 of the Anti-Dumping Agreement.

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<sup>1</sup> "United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" (WT/DS/184).

16. On the one hand, the 99.5 per cent test used by the United States only treats low prices as abnormal since high prices can be extremely high and still be normal. This test affects the comparison between the normal value and the export price. In this respect, a 0.5 percentage point differential is too small for deciding whether sales to affiliates are or are not made in the ordinary course of trade.

#### "ALL OTHERS" RATE

17. USDOC's treatment of investigated enterprises which, for legitimate reasons, could not cooperate and which, as a result, had a much higher rate applied to them than would have been the case if they had not been so treated clearly contravenes Article 6.13 of the Anti-Dumping Agreement, according to which "the authorities shall take due account of any difficulties experienced by interested parties...". Likewise, Article 9.4 of the Agreement was violated by including in the calculation of the margin of dumping for all other exporters or producers the rate calculated with information that was insufficient and "adverse" with respect to the enterprise accused.

#### DETERMINATION OF "CRITICAL CIRCUMSTANCES"

18. Chile considers that a determination of "critical circumstances" based solely on information supplied by the complainant cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement. There was no preliminary determination of dumping by USDOC or preliminary determination of injury by USITC whose action was based merely on the allegations made by the United States petitioners. Authorizing the retroactive imposition of provisional measures prior to an affirmative preliminary determination of dumping and consequent injury was a violation of Article 10.

#### **CONCLUSIONS**

19. In the light of the above, Chile requests that the Panel find that certain provisions of the United States legislation conflict with WTO Agreements, in particular the Anti-Dumping Agreement, and that their application is undermining the foundations of the multilateral trading system by creating disguised restrictions on trade, and more especially that:

- (a) The provisions of United States law and USDOC's administrative practices make it possible to exclude "captive production" in determining injury, which affects the impact of imports, in clear violation of Articles 3 and 4 of the Anti-Dumping Agreement.
- (b) In considering the injury to its industry, USITC focused on only two years instead of three and ignored other injury-causing factors such as non-subject imports, in violation of paragraphs 1, 4 and 5 of Article 3 of the Anti-Dumping Agreement.
- (c) In calculating the normal value, USDOC deliberately excluded certain home market sales between related enterprises which were subsequently replaced by the higher resale price made by affiliates for unaffiliated customers, in open contravention of paragraphs 1, 2 and 4 of Article 2 of the Anti-Dumping Agreement.
- (d) In its investigation, USDOC accused one of the Japanese enterprises of not cooperating in the investigation. This was very questionable, especially as that enterprise could not provide the price information requested concerning the affiliate in the United States because the latter was one of the petitioners and completely outside the Japanese enterprise's control, and constituted an infringement of Articles 6.13 and 2.3 of the Anti-Dumping Agreement.



- (e) A determination of "critical circumstances" based solely on information supplied by one of the petitioners cannot constitute sufficient evidence under Article 10.7 of the Anti-Dumping Agreement.

## ANNEX B-4

### Submission of Korea as a Third Party

(31 July 2000)

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## **I. INTRODUCTION**

1. This submission is made by the Government of the Republic of Korea with respect to the challenge by the Government of Japan to the US imposition of anti-dumping measures on Hot-Rolled Flat-Rolled Carbon-Quality Steel Products (“hot-rolled steel”) from Japan. In general, Korea supports the views put forth by Japan in its submission dated 3 July 2001.<sup>1</sup> The purpose of this submission is to provide the Korean Government’s views with respect to certain select legal issues in the case as summarized and discussed below.

## **II. LEGAL ARGUMENTS**

### **A. SUMMARY OF LEGAL ARGUMENTS**

#### **1. Fair Comparison**

2. Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”) stipulates that “{a} fair comparison shall be made between the export price and the normal value”. The Anti-Dumping Agreement’s requirement in Article 2.4 that dumping margins will be established based on a “fair comparison” has been violated by the United States in the case with respect both to the Commerce Department’s application of Facts Available and to Commerce’s use of the Arm’s Length Test to determine whether sales to affiliated parties are “outside the ordinary course of trade”. The Commerce Department also erred in excluding affiliated party sales and using instead the sales by resellers to calculate normal value without making appropriate cost and profit adjustments to those sales.

#### **2. Critical Circumstances**

3. The US improperly found critical circumstances to exist, in violation of Article 10.6 of the Anti-Dumping Agreement. Article 10.6, read together with Article 10.2, clearly limits retroactive application of duties to circumstances where a determination of current injury, not just a threat of injury, has been made. Furthermore, the US finding of critical circumstances does not comport with the limited purpose of the provision allowing for a retroactive effect. In the case of threat of injury, prospective final duties to prevent future injury are sufficient.

#### **3. Injury to the Industry As a Whole**

4. Articles 3.4, 3.5 and 4.1 of the Anti-Dumping Agreement require that the domestic industry as a whole be analyzed for purposes of determining injury and causation from dumped imports. This analysis of injury and causation must be based on all relevant economic factors, including conditions of competition in particular market segments, but always within the context of the industry as a whole.

### **B. THE ARTICLE 2.4 “FAIR COMPARISON” REQUIREMENT IS A GENERAL OVERARCHING OBLIGATION GOVERNING ALL ASPECTS OF THE DETERMINATION OF DUMPING**

5. The “fair comparison” requirement of Article 2.4 is a free-standing obligation that requires that any comparison between export price and normal value be “fair”. The fair comparison requirement by its own terms is not conditioned on any other provision of the Anti-Dumping Agreement; it is not limited to particular adjustments or specific situations.

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<sup>1</sup> First Submission of the Government of Japan in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184 (3 July 2000) (“Japan’s First Submission”).

6. The “fair comparison” requirement of Article 2.4 is set forth in a separate, mandatory sentence. This is in stark contrast to the more limited “fair comparison” language of the prior Tokyo Round Anti-Dumping Code:

In order to effect a fair comparison . . . the two prices shall be compared at the same level of trade . . . and in respect of sales made at as nearly as possible the same time.<sup>2</sup>

7. The language of the Tokyo Round Anti-Dumping Code thus arguably linked the “fair comparison” requirement to the requirements that the comparison be made between sales at the same level of trade and at the same time. However, whether or not one could have argued before the Uruguay Round that a comparison that simply complied with the level of trade and timing requirements of the Anti-Dumping Code was “fair”<sup>3</sup>, unquestionably that is no longer the case.

8. The “fair comparison” requirement is set forth independently of the other requirements of Article 2.4 in the current Anti-Dumping Agreement and must be read this way in conformity with its plain meaning, in light of its context. Thus, the “fair comparison” requirement of the first sentence of Article 2.4 imposes a general obligation, in addition to the specific disciplines set forth in the remaining provisions of Article 2 of the Anti-Dumping Agreement. It interposes a general “fairness” requirement in the administration of anti-dumping proceedings which is consistent with the overall purpose of the Anti-Dumping Agreement to combat unfair trade. It would be absurd to conclude otherwise and permit signatories to knowingly engage in “unfair” comparisons in anti-dumping proceedings.

9. Finally, any interpretation that ignored this independent fair comparison requirement would render the first sentence of Article 2.4 of the Anti-Dumping Agreement useless and superfluous, which is contrary to Article 31 of the Vienna Convention on the Law of Treaties and previous decisions of the Appellate Body.<sup>4</sup>

C. THE USE OF FACTS AVAILABLE AGAINST A RESPONDENT EXPORTER, WHERE A US PETITIONER COMPANY AFFILIATED WITH THAT RESPONDENT EXPORTER REFUSED TO COOPERATE WITH THE INVESTIGATION, VIOLATES THE ARTICLE 2.4 REQUIREMENT FOR A FAIR COMPARISON

10. The Commerce Department applied Facts Available to Japanese Respondent Kawasaki Steel Company (“KSC”). The details are described in paragraphs 61-89 of Japan’s First Submission, but the essential elements for purposes of this discussion are the following:

- KSC was a Japanese Respondent which exported a portion of its exports to the United States to California Steel Industries (“CSI”), a company which was 50- per cent owned by KSC and 50- per cent owned by the Brazilian mining company Companhia Vale de Rio Doce (“CVRD”).
- CSI not only was affiliated with KSC, it was also a petitioner in the anti-dumping case, and CSI testified against KSC and the other Respondents at the US International Trade Commission’s Injury Hearing.

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<sup>2</sup> Tokyo Round Anti-Dumping Code, Article 2:6.

<sup>3</sup> See *EC--Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 Oct. 1995, para. 492 (“the wording of Article 2:6 [of the Tokyo Round Anti-Dumping Code] ‘in order to effect a fair comparison’ made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be ‘fair.’”).

<sup>4</sup> See, e.g., *US -- Standards for Reformulated and Conventional Gasoline* (20 May 1996), WT/DS/AB/R at 23.

- Because CSI is “affiliated” with KSC under Commerce Department rules governing affiliation, Commerce required CSI to report its further manufacturing and re-sale price data for hot-rolled coil imported from KSC. This data was in the exclusive possession of CSI -- KSC did not have access to it.
- KSC not only made substantial efforts to obtain the data, it documented its efforts to cooperate and CSI’s refusal to do so. KSC also reported all cost and price data in its possession, including its prices to CSI.
- Commerce applied Facts Available against KSC for CSI’s failure to cooperate with the investigation. Commerce selected as Facts Available “the second-highest margin” calculated from among KSC’s other US sales.
- The resulting anti-dumping margin for KSC of 67.14 per cent was a single margin composed of actual transaction-to-transaction comparisons and, for sales to CSI (which composed a sizeable portion of all of KSC’s US sales), KSC’s second-highest margin from these price-to-price comparisons as Facts Available.

11. The US application of Facts Available in this situation in no way satisfies the fair comparison requirement. Article 6.8 provides that, in cases in which “any interested party refuses access to . . . necessary information”, Facts Available may be used in conformity with Annex II. The question in this case goes to the heart of the issue of fairness -- which interested party “refused” access to data and against which party were Facts Available applied. CSI, who was the party who refused to cooperate, had no reason to cooperate with the Commerce Department. As a Petitioner, it had an interest in seeing the highest possible margin imposed on KSC.

12. The party who Commerce punished, of course, was KSC. KSC was penalized by an anti-dumping duty margin which was improperly inflated by the application of Facts Available to the CSI sales, and then this inflated duty rate was applied to all of KSC’s imports. KSC tried to cooperate with the information request but could not do so due to CSI’s refusal. Thus, the “less favourable” result was not applied against the party which did not cooperate in accordance with Annex II.7.

13. Moreover, Annex II.5 of the Anti-Dumping Agreement provides that “Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it provided the interested party has acted to the best of its ability.” There were a number of reasonable and fair alternatives available to Commerce that would have been consistent not only with US law, but also with US obligations under the Anti-Dumping Agreement, including the obligation to conduct a “fair comparison.” For example, Commerce could have used KSC’s prices to CSI. Since it was clear from CSI’s actions in this matter that it acted independently from KSC, there was no obvious reason to assume that KSC’s price to CSI was not at arm’s length. Commerce also could have used the weighted-average margin on the sales to unaffiliated parties as a surrogate margin for the sales to CSI. This was certainly a valid source of secondary information in accordance with Annex II.7.

14. At a minimum, Commerce should have established two separate margins applicable to KSC: (1) a margin for its sales to CSI, based on the application of Facts Available to CSI; and (2) a separate margin for KSC applicable to its other US sales. While this result would still have punished the Respondent for the failure of a Petitioner to cooperate in the investigation, it at least would have minimized the effect and focused the impact on the party that withheld information.

15. Unfortunately, the approach which the Commerce Department did select -- *i.e.*, to punish a respondent and reward a petitioner for that petitioning company’s failure to cooperate in an investigation of the respondent-- and then give maximum effect to that “penalty” by applying it to all sales, was not “fair” and violated the requirement of Article 2.4. Commerce should have used one of

the available reasonable approaches that fully complied with the US obligations under the Anti-Dumping Agreement.

D. THE US FAILURE TO USE REASONABLE AND AVAILABLE DATA FROM SECONDARY SOURCES FOR SALES COMPARISONS VIOLATED THE OBLIGATION UNDER ARTICLE 2.4 TO MAKE A FAIR COMPARISON.

16. The Commerce Department also applied Facts Available to certain transactions by NKK Corporation (“NKK”) and Nippon Steel Corporation (“NSC”). Commerce determined that a single variable -- the factor to convert theoretical weight to actual weight for a small number of sales in the home market to make them comparable to the US sales -- was deficient because the companies failed to submit that conversion factor in what Commerce considered to be a timely manner.<sup>5</sup> Commerce decided not to obtain the specific missing data from a secondary source (*e.g.*, KSC provided a conversion factor that Commerce verified and used.<sup>6</sup>) and then calculate margins based on a fair comparison. Rather, Commerce simply substituted the margin (a very high margin) calculated for another sale by these companies as Facts Available for sales where the conversion factor was required.

17. The Government of Japan addresses numerous errors committed by the US with respect to this issue. For example, Japan effectively demonstrated that the necessary data was presented and in a timely fashion.<sup>7</sup> The Government of Korea’s comments address only the US failure to conduct a fair comparison of the sales in accordance with Article 2.4 of the Anti-Dumping Agreement and its failure to comply with Annex II.

18. The US decision to rely on a high margin from another sale as Facts Available rather than seeking a secondary source for the single factor needed to convert sales volumes to a common weight measure does not meet the requirements of Article 2.4 or Annex II.

19. Most fundamentally, Commerce never offers any reason why secondary information, for what was a very minor sales adjustment, could not have been used to obtain a conversion factor and therefore make an actual sales comparison. But even apart from the fundamental error of not using as Facts Available specific information available from a secondary source, the dumping margin Commerce selected as the surrogate simply is not comparable. It appears the US made no attempt to determine whether the margin chosen was derived from a sale that was in any manner comparable to the sales in question, nor was any such justification offered.

20. Article 2.4 requires a “fair comparison” between the export price and normal value in order to calculate the margin of dumping. Furthermore, Article 2.4 provides that “[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability . . . .” In this case, by not seeking a secondary source for the weight conversion factor and instead, resorting to a high margin on sales that were not justified as comparable, Commerce failed to make a fair comparison and failed to assure price comparability.

21. The Government of Korea does not dispute that, when a respondent fails to produce a piece of information which is a necessary part of a proper price comparison for a certain sale or group of sales, the authority may use surrogate information in the form of Facts Available to fill the gap (Article 6.8 and Annex II). Moreover, if the interested party does not cooperate and relevant information is withheld, the authority may use surrogate data that “could lead” to a “less favourable” result for the interested party (Annex II.7). However, nothing in Annex II either implicitly or explicitly permits the

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<sup>5</sup> *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329, 24,363 (Dep’t Commerce 6 May 1999) (final determination of sales at less than fair value).

<sup>6</sup> Japan’s First Submission at paragraph 97.

<sup>7</sup> See Japan’s First Submission at paragraphs 91-99, 105-108.

investigating authority to abandon its obligation to make a fair comparison between export prices and normal value when it resorts to a secondary source of data.

22. To the contrary, Annex II, read as a whole, supports the view that the authorities are to make every effort to assure that the information relied on results in a fair comparison. For example, Annex II.5 requires the use of less than ideal information rather than Facts Available, if the interested party has acted to the best of its ability. Even if a resort to secondary sources is justified, the source selected must also be chosen with “special circumspection” and the secondary information should be checked against independent sources (Annex II.7).

23. In the instant case, therefore, Commerce, in order to fulfill its obligations to conduct a fair comparison, should have looked for data from a secondary source to replace the single variable which was allegedly not timely provided -- the factor to convert theoretical weight to actual weight. A possible and obvious source for such data was the conversion factor provided by KSC in the investigation.<sup>8</sup>

24. Finally, the Commerce Department’s punitive purpose for not engaging in a transaction-by-transaction comparison for those sales, and instead applying a margin from other sales is neither recognized nor permitted by Annex II nor the Anti-Dumping Agreement as a whole. Commerce did not seek secondary information on a conversion factor in order to make a fair comparison because it “sought a margin that is sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information”.<sup>9</sup>

25. As noted, the Anti-Dumping Agreement allows an authority to use secondary data to make a fair comparison, even when the result may be less favourable to the party (Annex II.7). However, the distinction is that here the US sought unfavourable data for the sole objective of inflating the margin to serve some “punitive” purpose. Even when other secondary data which would have permitted a fair comparison was available, the US did not use it in clear violation of the Anti-Dumping Agreement.

E. COMMERCE’S ARM’S-LENGTH TEST, AND THE APPLICATION OF THE TEST TO DETERMINE THAT SALES TO AFFILIATED PARTIES ARE “OUTSIDE THE ORDINARY COURSE OF TRADE,” ARE INCONSISTENT WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT.

26. The United States disregarded most home market sales of the Japanese Respondents to affiliated parties after determining that those sales were “outside the ordinary course of trade”.<sup>10</sup> The basis of this decision was the application of the so-called “Arm’s-Length Test” to home market sales. This test requires that, in order for sales to an affiliated party to be used in the calculation of normal value, the weighted-average price for all sales to that affiliated party equal at least 99.5 per cent of the weighted-average price of all sales to non-affiliated customers. Since most sales to affiliated parties did not meet this standard in this case, those affiliated party sales were not used.

27. The volume of affiliated party sales was significant for each Respondent, so Commerce used instead the resale prices by those affiliated home market customers to unaffiliated customers as normal value. Under the Commerce Department’s methodology, no adjustments are made for differences in price comparability due to the additional costs and profit for resellers.

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<sup>8</sup> See discussion in Japan’s First Submission at paragraph 97.

<sup>9</sup> *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329, 24,369 (Dep’t Commerce 6 May 1999) (final determination of sales at less than fair value).

<sup>10</sup> Japan’s First Submission at paragraph 154.

28. In this case, the United States violated the requirement of Article 2.4 of the Anti-Dumping Agreement when it disregarded the home market sales to affiliated parties as outside the ordinary course of trade on the arbitrary basis of the Arm's-Length Test.

29. The Anti-Dumping Agreement only recognizes one basis for disregarding sales as "outside the ordinary course of trade." Article 2.2.1 of the Anti-Dumping Agreement provides that sales at prices below the cost of production, plus administrative, selling and general costs, "may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value," but only under certain prescribed conditions.

30. The conditions that must be met under this Article for finding sales below cost to be outside the ordinary course of trade are that: (1) they are made within an extended period of time; (2) they are in substantial quantities; and (3) they do not provide for the recovery of all costs within a reasonable period of time. In particular, the Anti-Dumping Agreement, at Footnote 5, provides that sales below cost cannot be treated as outside the ordinary course of trade unless, by quantity, they represent at least 20 per cent of the volume of sales under consideration.

31. It is significant that even below cost sales cannot be excluded under the Anti-Dumping Agreement unless certain specified requirements are met. (Of course, if there were below cost sales to affiliated parties that met the requirements of Article 2.2.1, they would also be excluded.) Logically, given this careful attention to the treatment of below cost sales and consistent with the overall requirement that comparisons be "fair," above cost sales cannot be excluded in an arbitrary manner.<sup>11</sup>

32. The application of the Arm's-Length Test in this case was arbitrary. Commerce's Arm's-Length Test compared all sales to each affiliated party to the weighted-average price of all sales to unaffiliated parties. Thus, the Arm's-Length Test indiscriminately mixed together all models of subject merchandise sold to affiliated and unaffiliated parties. The US took no account of the differences in prices and/or product that existed independent of the factor of affiliation which could have caused the weighted-average prices between an affiliated party and unaffiliated parties to vary more than 0.5 per cent.

33. In essence, the Arm's-Length Test arbitrarily assumes that such a difference in the weighted-average price is due solely to affiliation, and Commerce disregarded all sales to the affiliated party on that basis. Thus, the test is logically flawed and is not a fair ("apples-to-apples") comparison and cannot be sustained.

34. Finally, the test has a bias because Commerce disregards only those affiliated party sales which have weighted-average prices lower than the weighted-average price to unaffiliated customers. Affiliated party sales that equal or exceed 99.5 per cent of the weighted-average price to unaffiliated parties are included in the database. This guarantees that only higher-priced sales remain in the database for the calculation of normal value, and margins of dumping are increased.

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<sup>11</sup> The US theory is that all its interpretations are permissible as long as the Anti-Dumping Agreement is silent with respect to a certain methodology (*See* First Submission of the Government of the United States of America in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184 at A-29-31 (July 24, 2000)). Such a broad interpretation cannot be accepted since the illogical result of such a theory would be that the more creatively arbitrary the methodology is, the less likely it is to come within the specific terms of the Anti-Dumping Agreement and, therefore, would be a permissible interpretation. In any event, the free-standing requirement of Article 2.4 that a "fair comparison" must be made between export price and normal value also prevents such an absurd result.



F. COMMERCE'S FAILURE TO MAKE ADJUSTMENTS TO THE RESALE PRICE OF AFFILIATED PARTY SALES VIOLATED THE FAIR COMPARISON REQUIREMENTS OF ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT.

35. Another independent legal error with respect to this issue of the treatment of affiliated party sales is that when Commerce disregarded the sales to affiliated parties as outside the ordinary course of trade and used the downstream sales of these affiliated parties to calculate normal value, Commerce did not make adjustments for differences in costs incurred for such sales for purposes of price comparability. Specifically, Commerce deducted neither the costs incurred by the affiliated reseller in the resale of the merchandise, nor its profits. Yet, both costs and profits directly affected price comparability. As a result, the normal value for these affiliated party resellers is arbitrarily inflated.

36. It is noteworthy that Article 2.3 provides that an authority concerned that an affiliation between the exporter and importer reduces the reliability of the export price to the affiliated importer may use the constructed export price (CEP) to the first unaffiliated buyer. In addition, the fourth sentence of Article 2.4 provides that when such sales are used, the authorities should make allowances for costs incurred between importation and resale, and for profits accruing to the affiliated reseller.

37. Obviously, these provisions in the Anti-Dumping Agreement with respect to export sales are not directly applicable to home market sales and the Anti-Dumping Agreement makes no provision for excluding affiliated party sales in calculating normal value. Yet, if Commerce uses the resale price for affiliated party sales in the home market, then it must recognize that the sales require cost adjustments to make them comparable. Article 2.4 of the Anti-Dumping Agreement explicitly requires that due allowances be made "for differences that affect price comparability." Furthermore, the failure to follow a complete and accurate methodology for the treatment of these sales in the home market, when such adjustments are explicitly provided for and made for constructed export price, falls far short of a "fair" comparison. By not making comparable adjustments for costs and profit on sales by affiliated resellers in the domestic market as it does in the export market, Commerce's methodology is in violation of Article 2.4 of the Anti-Dumping Agreement.

G. THE COMMERCE DEPARTMENT IMPROPERLY BASED A DETERMINATION OF CRITICAL CIRCUMSTANCES SOLELY ON A THREAT OF INJURY DETERMINATION BY THE ITC RATHER THAN THE REQUIRED CURRENT INJURY DETERMINATION

38. On 23 November 1998, the Commerce Department announced its preliminary critical circumstances finding pursuant to the Policy Bulletin that Commerce had issued on 8 October 1998, which announced its new critical circumstances policy. At the time of the preliminary critical circumstances determination, the only US injury finding that was in effect was an affirmative threat determination -- the USITC did not find current injury in its preliminary determination. Also, at the time of the critical circumstances finding, Commerce had yet to issue a decision regarding the level of dumping, if any -- Commerce's critical circumstances finding preceded its announcement of preliminary dumping margins by almost three months.

39. For the Panel to sustain Commerce's finding of critical circumstances, Article 10.7 requires that the record must contain "sufficient evidence" to support a finding of injury. In this case, Commerce's preliminary announcement of critical circumstances violated the provisions of Article 10.6 of the Anti-Dumping Agreement since the USITC made a negative preliminary determination of current injury and an affirmative preliminary determination of threat of injury only.<sup>12</sup> Therefore, this determination of critical circumstances was nothing more than an obvious and

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<sup>12</sup> *Certain Hot-Rolled Steel Products from Brazil, Japan and Russia*, USITC Pub. 3142 (Nov. 1998) (preliminary determination) at 1.

effective means of chilling imports even before the preliminary determination of dumping and violated the Agreement.

40. Article 10.6 of the Anti-Dumping Agreement, read together with Article 10.2, establishes the limited conditions under which anti-dumping duties may be applied retroactively. Article 10.2 provides the circumstances under which duties can be applied back to the provisional duty period. Article 10.6 provides the additional circumstances under which definitive duties can be applied during the provisional duty period and 90 days prior to the provisional duty period.

41. Article 10.2, which provides authority for retroactive application during the provisional period, explicitly states that it can only be applied in the case of a determination of injury; threat of injury is not a sufficient basis. Therefore, Article 10.6, which covers that same provisional period as well as the 90 days that precede it, must be read in conjunction with Article 10.2, and thus, the provision can only apply when a finding of current injury is made. For retroactive application of duties, present injury is required; threat of injury is insufficient.<sup>13</sup>

42. The plain language of Article 10.6 also supports this interpretation. The grounds for critical circumstances apply only where importers know both that dumping is occurring and that the dumping would cause injury. Thus, if dumping is occurring but no injury is being caused, then the Anti-Dumping Agreement's requirements for critical circumstances are not met.

43. This is not a new or unique interpretation of the requirement of Article 10.6. To the contrary, until late 1997, the Commerce Department endorsed it, stating:

When {USITC} has preliminarily found no reasonable indication that a US industry is experiencing present material injury by reason of the dumped subject merchandise, but only a threat of injury, {Commerce} has determined that it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury.<sup>14</sup>

44. Finally, such an interpretation that only a present injury finding can support a critical circumstances determination, also comports with the limited object and purpose of Article 10.6, which is to assure that the remedial effects of final duties are not eviscerated. If only threat of injury exists, the remedial effect of the final dumping duty is not undermined since its prospective application will prevent injury from occurring (Article 10.6(ii)). It is only in the case of present injury that the remedial effects of a final anti-dumping duty could be undermined.

45. Commerce's invocation of critical circumstances in this case, therefore, did not serve its stated purpose nor did not conform to the requirement of Article 10.6. It pre-empted the normal timing of the investigative process and resulted in an impermissible action intended solely to chill and disrupt the flow of trade which should be beyond the reach of anti-dumping measures. That, in fact, appears to have been the purpose both of Commerce's announcement of the policy bulletin changing Commerce's practice concerning critical circumstances less than ten days following the filing of the petition and of Commerce's announcement of critical circumstances almost three months in advance of the preliminary dumping determination and in the absence of a preliminary determination of current injury or dumping margins.

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<sup>13</sup> A limited exception provided in Article 10.2 allows retroactive duties to be levied after finding threat of injury, but only if there would have been a final injury determination absent provisional measures. There was no finding in this case to support the application of this exception.

<sup>14</sup> *Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9160, 9164 (28 Feb. 1997) (final determination of sales at less than fair value).

46. Thus, regardless of the Panel's determination regarding the merits of the evidence of current injury employed by Commerce in its determination of critical circumstances, the Panel should find that, for a critical circumstances determination to be valid, there must be "sufficient evidence" of current injury upon which the determination is based.

H. ARTICLES 3 AND 4 OF THE ANTI-DUMPING AGREEMENT REQUIRE THAT INJURY AND CAUSATION DETERMINATIONS BE BASED ON AN ANALYSIS OF THE INDUSTRY AS A WHOLE

47. The Japanese Government asserts that the USITC's injury analysis did not properly consider injury to the "domestic producers as a whole of the like product" in accordance with Article 4.1 of the Anti-Dumping Agreement.<sup>15</sup> While the Korean Government does not comment generally regarding the particular facts of the USITC's analysis in this case, it urges the Panel to carefully examine the merits of Japan's claims and the legal and factual support for the USITC's injury finding.

48. We highlight Article 3.4 which requires an analysis of "all relevant economic factors and indices bearing on the state of domestic industry," *i.e.*, the industry as a whole (Article 4.1). Thus, where there are divergent trends in different segments of the industry, an

49. Authority may not unduly emphasize a particular segment of the industry at the expense of the industry as a whole while all relevant conditions of competition are considered. In addition, Article 3.5 states that "{t}he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities". Article 3.6 clarifies that this determination must be made "in relation to the domestic production of the like product" where, as in this case, such data was available.

### III. CONCLUSION

50. The Government of the Republic of Korea respectfully requests the Panel's careful consideration of its comments.

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<sup>15</sup> Japan's First Submission at paragraphs 253-255.