

ANNEX E

Questions and Answers

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ANNEX E-1

Japan's Answers to Questions from the Panel

(6 September 2000)

Question 1: What is Japan's view of "in conformity with appropriate domestic procedures" – if the US concluded that the evidence was not appropriately received under its procedures, on what basis may the Panel consider it? Is Japan making a claim that the US authorities improperly excluded evidence that should have been included in the administrative record under appropriate domestic procedures? What violation of the Anti-Dumping Agreement (hereinafter "AD Agreement") is asserted in this regard?

Answer

1. The quote to which the Panel refers is from Article 17.5(ii) of the AD Agreement, a provision that applies only with respect to claims brought under the AD Agreement, not claims brought under GATT 1994 Article X. Therefore, to the extent the Panel is considering any of Japan's GATT 1994 Article X claims, the quote to which the Panel refers is irrelevant.

2. As for claims brought under the AD Agreement, it is for the Panel to decide, not the United States, whether evidence was made available "in conformity with appropriate domestic procedures" pursuant to Article 17.5(ii). After all, 17.6 (i) indicates that the Panel's job is to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. Japan believes that certain pieces of evidence to which the United States now objects were either (a) made available in conformity with appropriate domestic procedures, but later inappropriately removed from the record by USDOC, or (b) never placed on the record due to inappropriate domestic procedures.

3. First, NKK's and NSC's weight conversion factors are properly before the Panel because these companies corrected their previously submitted information within "a reasonable time" thus permitting USDOC to use them "in the investigation without undue difficulties," as stipulated by paragraphs 1 and 3 of Annex II. More importantly for purposes of Article 17.5(ii), the information was actually filed in accordance with a specific USDOC regulation allowing for submission of new factual information seven days before verification. This regulation is an "appropriate domestic procedure," recognizing that respondents often discover errors or new information during their preparations for verification. NKK and NSC submitted the disputed weight conversion factors in reliance on this long-standing domestic procedure. USDOC, however, ignored the procedure and excluded the correction, thus failing to establish the facts properly, ultimately leading to the inappropriate application of adverse facts available.

4. The evidence the United States seeks to exclude, therefore, is crucial to the Panel's analysis of Japan's argument that the USDOC overreacted and improperly excluded this evidence in its effort to apply adverse facts available. The Panel cannot properly evaluate the USDOC use of "facts available" without understanding what information was excluded. Importantly, Article 17.5 (ii) does not refer only to information accepted by the authorities. The drafters wisely recognized that information might be offered to authorities, but then inappropriately rejected. An authority cannot be

permitted to exclude evidence inappropriately, and then take advantage of the incomplete administrative record to defend itself in the examination of its action by a WTO panel.

5. Second, Article 17.5(ii) also recognizes that some domestic procedures for establishing the administrative record may not have been “appropriate.” Japan provided certain evidence in its First Submission precisely because such information was never placed on the administrative record. The evidence is necessary to show that the US (a) acted in bad faith by conducting a biased and non-objective investigation and/or (b) failed to establish the facts properly. If an authority has acted in bad faith, it is no wonder that evidence of such acts is not on the administrative record. It stands to reason, therefore, that if a party is to establish its case that an authority has acted in bad faith, then the Panel must consider non-record evidence. Likewise, if an authority has failed to establish the facts properly, then it is quite possible that it improperly excluded facts from the record. The Panel must be made aware of such facts to determine whether the authority has failed in its obligations.

6. Article 17.5 must not be interpreted, as the United States suggests, to prevent the Panel from determining the consistency of US actions with WTO obligations by considering all of the relevant facts. Otherwise, a member could refuse to accept a responding company’s factual submissions, secure in the knowledge that a panel would examine only record evidence.

7. Japan’s submission of 10 August 2000 details why each specific piece of evidence to which the United States objects is relevant to the Panel’s review.

8. The context in which Japan has made a specific claim with regard to excluded evidence is also in the context of its argument under Article 6.1 of the AD Agreement that the Department did not give NSC and NKK ample opportunity to submit relevant evidence.¹ However, the exclusion of certain other evidence is one way among many in which USDOC has improperly established the facts and/or evaluated facts in a biased and non-objective manner, thereby leading to several of the other claims Japan has made in this review.

Question 2: Could Japan list the exhibits challenged by the US which Japan claims were submitted to the US authorities but were subsequently rejected and not put on the administrative record?

Answer

9. This question concerns NKK’s and NSC’s submissions of weight conversion factors, which were submitted by respondent companies prior to closing of the USDOC administrative record, but subsequently expunged from the record by USDOC.² Japan referred to the inappropriate exclusion of this information in:

- **Exhibit JP-28** -- affidavit of Daniel L. Porter, Counsel to NKK
- **Exhibit JP-46** -- affidavit of Daniel J. Plaine, Counsel to NSC

None of the other exhibits in Japan’s First Submission actually contains the information expunged from the record by USDOC, largely because Japan tried to minimize the extent of the proprietary information supplied in this panel review. Japan did, however, provide exhibits showing where information was redacted, as follows:

¹ Japan’s First Submission, paras. 117-119.

² **Exhibits JP-29(f)** and **JP-45(i)** contain USDOC’s letters of 12 April 1999 to NSC and NKK, respectively, formally rejecting the companies’ conversion factor information and requiring them to resubmit the letters excluding the rejected information.

- **Exhibit JP-29(d)** contains the public redacted version of NSC's 23 February 1999 submission of the weight conversion factor and explanation of why the factor had not been submitted previously. This version was supplied after USDOC requested NSC to remove the weight conversion factor from the letter.
- **Exhibit JP-29(e)** contains the public redacted version of NSC's 2 March 1999 submission of backup data to its weight conversion factor. Again, this version was filed after USDOC demanded that NSC remove certain information from the letter, including the actual weight data used to derive the conversion factor.
- **Exhibit JP-45(g)** contains the public version of NKK's 23 February 1999 submission of the weight conversion factor, including an explanation of how the factor was calculated. Although this is the original version filed, before USDOC demanded exclusion of the conversion factor information, the public version of the submission does not contain the conversion factor that was ultimately excluded.

Upon request of the Panel, Japan offers to provide the original confidential versions of these submissions, which contain the information ultimately excluded by USDOC. The documents already provided, however, should provide enough information for the Panel to understand the information at issue.

Question 3: Could Japan explain where in its request for establishment of a panel, it requested the panel to examine the USDOC general practice of applying adverse facts available as a separate "measure" that is before the Panel? The claim in section E "Conformity" challenges the "above detailed laws, regulations, and administrative rulings" as being not in conformity. Could Japan indicate where the "general practice" of facts available is "detailed above"? Does Japan believe there is any other reason why the Panel should consider this practice, if it were not mentioned in the request?

Answer

10. The USDOC general practice of applying "adverse facts available" is reflected in a series of administrative rulings, or final determinations, made by USDOC. USDOC applied that general practice in the hot-rolled steel case, as reflected in its final determination. That final determination, which is one of the rulings being challenged in this dispute, thus reflected the specific decision to apply adverse facts available in this case as well as the general policy on adverse facts available. The United States has argued that it did not take any exceptional steps in this case, thereby essentially acknowledging that it applied a long standing general practice with respect to "facts available."

11. Japan's claim is that the US practice of applying adverse facts available is contrary to US obligations under Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement. As this claim is set out in Section E of Japan's panel request for establishment of a panel, it is within the Panel's terms of reference. The reference to Section E to "the above-detailed laws, regulations, and administrative rulings of general application" was not intended to and does not have the narrow focus implicit in the Panel's question. Rather, it refers broadly to US anti-dumping laws, regulations, and practices, which certainly include the US practice of applying adverse facts available. In this regard, although the United States insists on reading Section A and Section E in the Japanese panel request in isolation, they must be read together. Japan did not include language about bringing practices into conformity in each of the substantive requests because Japan believed the general request at the end of the panel request -- which clearly referenced the earlier discussion of specific substantive issues -- was clear and unambiguous enough.

12. Even if the Panel believes that Japan could have been more clear in its request, the United States still has not demonstrated any concrete prejudice to its ability to defend its interests with respect to this issue. Further, what we are really talking about here is whether the Panel should adopt a ruling that is limited to the facts of this case or to future cases as well. Given that the United States admits to having applied in the hot-rolled steel case its routine practice with respect to facts available, any ruling in favour of Japan on this topic should be applied not merely with respect to this case, but all future cases as well. Either way, however, Japan has made the same arguments both as regards the practice in general and as applied in this case.³

13. We refer the Panel once again to Japan's 10 August 2000 submission on this topic.

Question 4: Japan suggests that the US should have looked at the "overall level of cooperation" in determining whether to apply facts available to KSC, NSC, and NKK. Could Japan explain where in Article 6.8 AD Agreement it finds that this provision provides for the use of facts available based on the degree of cooperation. Assume, for purposes of argument, that Article 6.8 does not limit the use of facts available based on the degree of cooperation. Could Article 6.8 of the AD Agreement be understood to indicate that where necessary facts are not available, the determination can be made without "filling in the gap", but simply on the basis of the facts otherwise available. Japan seems to suggest that "facts available" should only be used to "fill in gaps" in the information provided to the investigating authority. Please comment.

Answer

14. The Panel seems to misunderstand Japan's point. We have never suggested that a party's level of cooperation should affect whether to *apply* facts available.

15. Article 6.8 does not directly address the level of cooperation provided by a party. Instead, Article 6.8 merely gives the authority for resorting to facts available, assuming the circumstances identified in Article 6.8 exist. However, both the application and choice of facts available is specifically restrained in Article 6.8 by its reference to Annex II. Annex II provides a roadmap for (a) determining whether to apply facts available at all (paragraphs 1, 3, and 5) and (b) circumscribing the sources on which an authority may rely for facts available (Paragraph 7). Once it is determined that an authority has no choice but to apply facts available, Paragraph 7 indicates that the authority must take special care in choosing the facts available. As a general matter Paragraph 7 calls on the authority to find information that most closely approximates reality. This is why Paragraph 7 calls on the authority to use "special circumspection" in choosing the facts available, and to "check the information from other independent sources." This is where Japan finds support for the notion that the whole purpose of the facts available provisions of the AD Agreement is to fill gaps caused by missing information.

16. The final sentence of Paragraph 7 does not change this overriding purpose. Rather, it provides justification for not *rewarding* a non-cooperative party for its failure to cooperate. In doing so, however, the sentence makes quite clear that only when a party *withholds* information might a less favourable result occur.

17. We reiterate, however, that by no means does the last sentence of Paragraph 7 permit an authority to choose information that is specifically aimed at punishing a party. The gap-filling purpose of the facts available provisions still applies. What changes when a party is deemed uncooperative through the withholding of information is the inferences an authority might make in its choice of facts available. (See Japan's answer to Question 7.) But still, Paragraph 7 only says that the

³ Japan's First Submission briefly notes the general practice in paragraphs 59 and 60, but then discusses the application of that general practice at length in paragraphs 61-128.

result *might* be less favourable due to an authority's application of facts available in this instance; it does not give license for an authority to purposefully punish a respondent for lack of cooperation. Rather, the authority must assess whether the facts available chosen are logical and reasonable within the requirements of Article 6.8 and Annex II, as explained in paragraph 15 above.

18. Importantly, in the hot-rolled steel investigation, USDOC did not face the situation where respondents were uncooperative and withheld information. Rather, in the case of NSC and NKK, the information was actually provided -- not withheld -- once the companies realized that they could produce it. Article 6.8, therefore, should not have even been triggered for these companies; facts available need not have even been applied. As for KSC, the information USDOC requested but which KSC did not provide was never withheld because KSC never had control of it -- as demonstrated to USDOC through KSC's repeated efforts to obtain the requested information from CSI, a petitioner in this case. Furthermore, KSC offered alternative information, which USDOC could have used. In other words, even assuming facts available might have been warranted for KSC under Article 6.8, USDOC had no reasonable basis to infer that the second highest dumping margin was the most appropriate data to fill the gap.

Question 5: Could Japan provide the Panel with specific references to, or copies of, documents or other information which in Japan's view demonstrates that the Japanese respondents requested the USDOC for assistance in providing the information requested in the USDOC questionnaire?

Answer

19. KSC: There are many examples of KSC's request for assistance. On 9 November 1998, the day after KSC received CSI's 6 November 1998, letter, refusing the visit from KSC's attorneys and accounting consultant, KSC's attorneys specifically met with USDOC to apprise the agency of the situation. See **Exh. JP-42(n)**. Following up on the meeting, KSC submitted a letter to USDOC on 10 November 1998. See **Exh. JP-42(i)**. Moreover, in a 3 December 1998 letter to USDOC, KSC reminded USDOC "we have received *no response* from the Department."⁴ That statement was made not only based on the belief that USDOC should have provided KSC a response to its meeting and its letters, but also in an effort to elicit a response from USDOC. Also, in that letter, KSC pleaded with USDOC to be a part of a meeting that USDOC staff was going to have with petitioners' counsel (*i.e.* CSI's counsel), specifically addressing CSI's refusal to provide KSC the necessary information, "so that all involved will have a complete understanding of the issues involved." Rather than provide any guidance or assurances that it would also address KSC's concerns, USDOC again did nothing in response.

20. KSC continued its efforts to persuade USDOC to provide them some guidance. In its letter to USDOC of 18 December 1998, KSC was more specific in its request for assistance. KSC stated that it had "received *no information, guidance, or response* from the Department, except for a series of questions in the Department's supplemental Section A questionnaire, which ask KSC to provide information about CSI." See **Exh. JP-42(n)** (emphasis added). KSC could not have been clearer about its difficulties in obtaining information from CSI and its need for additional assistance from USDOC.

21. NKK: NKK explicitly asked USDOC for further guidance on how to respond to the request for a weight conversion factor. Following receipt of USDOC's 4 January 1999, Supplemental Sections B, C, and D Questionnaire (**Exh. JP-45(c)**), NKK's attorneys called the relevant USDOC official for clarification of USDOC's request and were told that the supplemental question sought simply to confirm that NKK did not have a conversion factor to report. See **Exh. JP-28**. The

⁴ KSC Letter to USDOC of 3 Dec. 1998 (attached as **Exh. JP-78**).

USDOC official did not explain that a better estimate of the weight of the affected sales would suffice.⁵

22. Importantly, providing notice to the authority of a party's difficulties in supplying the requested information is all that is required under Article 6.13 to invoke an authority's responsibility to provide assistance. Article 6.13 places the burden on authorities to "take due account of any difficulties experienced by interested parties" and "provide any assistance practicable." These obligations are not dependent on a party's request for assistance. Each of the companies made it clear to USDOC that they were experiencing difficulties. It is USDOC that failed to respond.

23. Furthermore, with respect to NKK and NSC, both companies implicitly requested USDOC's assistance (*i.e.*, accommodation) in permitting it extra time to provide the requested factor. *See Exh. JP-29(d)-(e); JP-45(g)* (providing the requested conversion factors).

Question 6: Could Japan please clarify what, if any, it considers to be the difference between "adverse inferences" or use of "adverse facts available" and a "less favourable result" as referred to in Paragraph 7 of Annex II of the AD Agreement?

Answer

24. There is effectively no difference between the US nomenclature "adverse inferences" and use of "adverse facts available." "Adverse facts available" is simply a common short-hand expression for the application of facts available using inferences that are adverse to the affected party. According to the US statute, the authorities first determine that facts available are necessary. *See* 19 U.S.C. § 1677e(a) (**Exh. JP-4(k)**). Then, if a party "has failed to cooperate by not acting to the best of its ability," the authority "may use an adverse inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b) (**Exh. JP-4(k)**).

25. Read on their own, these words as set forth in the statute appear reasonable enough. As discussed in response to Question 4 above and Question 7 below, there may be instances when an authority must make inferences to respond to missing information. The words in the statute alone, however, do not fully explain what USDOC means when it makes adverse inferences. As explained in Japan's First Submission, the United States does not look for credible information; rather, it chooses facts "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information." No effort at all is made by USDOC to discern whether its choice of facts available is logical or reasonable.

26. Therefore, there is a big difference between the manner in which the United States uses of the words "adverse inference" or "adverse facts available" and the words "less favourable" in Paragraph 7 of Annex II. As Japan explained in its First Submission, the last sentence of Paragraph 7 of Annex II mentions only the possibility of "less favourable" results, simply stating that failure to cooperate "could lead to a result which is less favourable to the party." (Emphasis added.) The United States reads this sentence as giving it carte blanche to use any facts available it chooses. But, nothing about this sentence removes an authority's obligation under the first and second sentences of Paragraph 7 to use special circumspection in choosing facts available. The facts chosen and inference based thereupon must be logical and reasonable given the circumstances, the result may turn out to be less favourable, but the facts themselves must be proper.

27. The difference, then, between "adverse inference" and a "less favourable result" is that the former -- at least the way in which the United States applies it -- authorizes punishment of a

⁵ This issue is not relevant to NSC. The nature of the difficulty faced by NSC was a misunderstanding among corporate divisions rather than a lack of assistance from USDOC.

recalcitrant party; the latter warns of a more uncertain outcome for failing to cooperate. While both concepts may permit the use of an inference that may prove to be adverse, Paragraph 7 does not authorize authorities to use the highest or second highest dumping margin available without paying any attention to the reasonableness of the figure. This is the whole point of the requirement in Paragraph 7 that an authority use special circumspection in its choice of facts available. The US choice of a margin “sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information” does not honour the requirements of Paragraph 7.

Question 7: Is Japan of the view that a party that impedes the investigation should be treated exactly the same as a cooperating party with respect to use of facts available? Does Japan consider that such a party is entitled to the "neutral representative" facts available, in the same way as a party which is simply unable to provide information? What about the case of a party who refuses access to information, *i.e.* refuses to allow certain information to be verified -- does Japan consider that such a party is entitled to the "neutral representative" facts available, in the same way as a party which is simply unable to provide information? Article 6.8 provides that in all three situations, determinations may be made on the basis of facts available. In the event Japan considers that the same neutral treatment is not required in all three cases, on what basis would Japan distinguish between an interested party who "refuses access to" information, "otherwise does not provide" information, or "significantly impedes the investigation"?

Answer

28. No. Japan recognizes that a party that significantly impedes the investigation may well be treated differently. Japan's point is that Article 6.8 and Annex II do not authorize punishment.

29. At the outset, as explained in response to Question 4, Japan wishes to clarify that Article 6.8 merely enumerates circumstances that may warrant facts available; it does not itself indicate what specific facts might be used once the decision to apply facts available is made. Nonetheless, the language of Article 6.8 should be read closely given the limitations it places on an authority to even apply facts available. First, facts available may be used when a party “refuses access to, or otherwise does not provide, *necessary* information within a *reasonable period*.” (Emphasis added.) Only the lack of *necessary* information justifies facts available and parties must have a *reasonable period* in which to provide such information. Second, the authority may apply facts available when a party “*significantly impedes* the investigation.” (Emphasis added.) This is very strong language. “Impede” means to “interfere with the progress of” an investigation. “Significantly” means “having or likely to have considerable influence or effect.” The provision therefore implies serious obstruction of an investigation. Finally, determinations “*may* be made on the basis of the facts available.” The absence of information therefore does not automatically result in the application of facts available. The authority must make some reasonable judgment, based on the limiting principles of Article 6.8, in deciding whether to use facts available. Once the decision is made to apply facts available, any inference to be drawn based on a respondent's behaviour must be logical and reasonable.

Question 8: The United States has suggested that, because it used information supplied by the particular respondent companies themselves as the "facts available", it was not relying on a secondary source of information. Could Japan please comment on this argument, and its implications, if any?

Answer

30. The US interpretation of Annex II, Paragraph 7 is far too broad. The United States reads “secondary source” as information from sources other than the parties themselves.⁶ However, this

⁶ US First Submission, para. B-163 (emphasis added); *see also id.* at para. B-110.

cannot be the intention of Paragraph 7. Primary information is that which is specifically requested. Any other information – even other information supplied by the party – is secondary. To interpret Paragraph 7 otherwise would limit unduly the authority's obligation to use special circumspection in selecting facts available and to corroborate those facts.

31. Paragraph 7's use of the phrase "special circumspection" emphasizes the exceptional exercise of care authorities must observe in relying on secondary information. The purpose of using such a high level of care when relying on secondary information is to ensure that the information used is reliable and as close to reality as possible. The US interpretation of Paragraph 7 defeats this purpose by creating a huge loophole.

32. Moreover, this US interpretation actually undercuts the US argument. If secondary sources means only information not provided by the affected party, the entire paragraph is limited to instances in which the authority uses information from other sources as facts available.⁷ Yet, the United States relies on the last sentence of Paragraph 7 to support its application of adverse facts available in this case. According to the United States, the reference to "less favourable" results implies that authorities can select facts that are adverse if a party is uncooperative. If Paragraph 7 does not apply to the use of information from the respondent, then the "less favourable" language does not apply and cannot be used to defend the use of adverse facts available. The United States cannot have it both ways.

Question 9: Japan states that the United States, when negotiating the AD Agreement, proposed language similar to its interpretation that only margins based "entirely" on facts available must be excluded from the calculation of the rate under Article 9.4. Could Japan please provide the relevant references, and copies of relevant documents, to support its contention.

Answer

33. Japan has located an official transmission from Japan's Mission in Geneva summarizing oral discussions held during a "Group of 8" meeting on 23 October 1991. A message sent on 5 November 1991 reports that the US negotiator argued for inserting the word "solely" after the word "established" in the relevant provision of the "New Zealand III" draft text. If the US proposal had prevailed, Article 9.4 would have read, in pertinent part:

...provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established solely under the circumstances referred to in Paragraph 8 of Article 6.

Since others did not agree, this US proposal and alternatives suggested by other countries were all rejected, and the provision remained unchanged.⁸

34. The word "solely" has the exact same meaning as the word "entirely," at least in this context, and therefore supports the point that the Members specifically rejected language that would have supported the US position on this issue.

⁷ Paragraph 7 must be read as a whole. The opening language of sentence two ("In such cases") ties that sentence to the first sentence, which contains the reference to "a secondary source." The use of "however" ties the third sentence to the rest of the paragraph, linking "less favourable" results to use of facts available from "secondary sources."

⁸ Official Transmission From Japan's Mission in Geneva (5 Nov. 1991) (original and English translation) (attached as **Exh. JP-79**).

Question 10: Assume, for purposes of argument, that the use of facts available was proper in this case. All three margins for investigated respondents were based, in part, on facts available. In such a situation, how does Japan suggest that a margin for uninvestigated producers should be calculated? If the response is that the margins of investigated producers should be recalculated to exclude the "portions" based on facts available, could Japan indicate what provision of the AD Agreement authorizes such recalculations?

Answer

35. Japan indeed suggests calculating the all-others rate based on the non-facts-available portions of the margins for the investigated producers. In the hot-rolled steel case, it would mean the following:

- Calculating KSC's margin without regard for its export sales to CSI.
- Calculating NSC's and NKK's margins without regard for their sales of product measured by theoretical weights (or calculating them *with* the conversion factors that were in fact submitted by these companies and, for NKK, verified).
- Weight averaging all three margins together, taking into consideration the lower export quantities resulting from using only a portion of KSC's and NSC's export sales (NKK's sales involving theoretical weights were in the home market, so excluding them would not affect weighting by export quantities).

36. This method is authorized by Article 9.4, which sets parameters around an authority's discretion to calculate the margin for uninvestigated producers. Some of these parameters limit the magnitude of the margin—*i.e.*, it may not exceed certain limits established in subparagraphs (i) and (ii). Other parameters are methodological—*i.e.*, the authority's calculations shall disregard margins of zero and *de minimis* as well as margins based on facts available. Since the text of Article 9.4 precludes the use of margins tainted by "facts available," and does not have the limiting word "entirely" as assumed by the United States, Japan believes its suggested approach better reflects Article 9.4. Within these parameters, Japan believes USDOC can and should calculate the all-others rate using record data that is not based on the facts available.

Question 11: (Part 1) The AD Agreement specifically provides for required preliminary determinations before provisional measures may be imposed, or undertakings offered or accepted. There appears to be no similar requirement with regard to critical circumstances. Is it Japan's view that the determination provided for in Article 10.7 cannot be made before a preliminary determination? If so, please explain.

Answer

37. Japan believes that, as a practical matter, the determination provided for in Article 10.7 generally cannot be made before a preliminary determination of dumping. Japan has reached this conclusion for three reasons.

38. The first and primary reason is that Article 10.6(ii), and the chapeau of Article 10.6,⁹ require the imports in question to be "dumped" before the authority can make a finding of critical circumstances. "Alleged dumping" is not sufficient.¹⁰ Japan believes that Article 10.6's requirement

⁹ See Brazil's Third Party Submission, para. IV.4.

¹⁰ Cf. Article 5 of the AD Agreement ("Initiation and Subsequent Investigation").

that the imports in question be “dumped” effectively prevents the determination referred to in Article 10.7 from being made until a preliminary determination that dumping has in fact occurred.

39. Second, it is difficult to imagine how an authority could determine that “massive dumped imports of a product in a relatively short time ... is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied,” as required by Article 10.6(ii), before conducting any investigation itself.

40. The third reason relates to the sufficiency of the evidence of importer knowledge of dumping. It is logically impossible to find “sufficient evidence” for importer knowledge of dumping, because USDOC made this finding before any preliminary finding of dumping and even before the USDOC asked respondents to submit questionnaire responses. USDOC concluded that importers should have been aware that they were dealing in dumped merchandise solely because the petitioners *alleged* that dumping margins for NKK and NSC exceeded 25 per cent.¹¹ This alone cannot constitute sufficient evidence, because petitioners’ alleged dumping margins are self-serving estimates made without the benefit of the respondent’s internal sales data or any external analysis by the authorities. This deficiency in petitioners’ data is demonstrated by the ultimate dumping determination with respect to NKK and NSC once their information was placed on the record and evaluated by USDOC. Ironically, USDOC then concluded that NKK and NSC -- the two companies whose estimated margins formed the basis of the “25 per cent test” -- specifically did *not* dump by margins exceeding 25 per cent.¹²

(Part 2) In paragraph 34 of its oral statement, Japan argued that "with low standards for both initiation and preliminary critical circumstances determinations, the authority can effectively block imports well before the truth comes out". Does Japan consider that the two standards are identical? Could Japan please explain in what respect, if any, "sufficient evidence" under Article 10.7 differs from "sufficient evidence" under Article 5.3?

Answer

41. Japan does not consider the two standards to be identical. “Sufficient evidence to justify the initiation of an investigation” under Article 5.3 must be a *lower* standard than “sufficient evidence that the conditions set forth in {Article 10.6 } are satisfied,” as required by Article 10.7. It is well established that

the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.¹³

Conversely, what might be sufficient to justify initiation of the investigation under the lower evidentiary standard is not sufficient to support a preliminary determination of critical circumstances. The USDOC, in this investigation, made its preliminary determination of critical circumstances based

¹¹ See US First Submission, para. 269.

¹² USDOC *Final Dumping Determination*, 64 Fed. Reg. at 24370 (Exh. JP-12).

¹³ Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, adopted 24 Feb. 2000, WT/DS132/R, at para. 7.94 (quoting Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico, 19 June 1998, WT/DS60/R, at para. 7.57 and citing United States—Measures Affecting Imports of Softwood Lumber From Canada, adopted 27-28 Oct. 1993, SCM/162, BISD 40S/358, at para. 332 (“Mexico—High Fructose Corn Syrup”).

primarily on the same evidence underlying its decision to initiate the investigation. Article 10.7 requires more.

Question 12: The USITC made a negative final critical circumstances determination and anti-dumping duties were not imposed retroactively under Article 10.6 of the AD Agreement. Can Japan explain what the "measure" is which it is challenging in this respect in light of the fact that the final measure did not include a critical circumstances finding?

Answer

42. This situation presents a classic example of a WTO-inconsistency that is capable of repetition yet evading review. To allow USITC action to prevent any review of USDOC misconduct would allow USDOC routinely to impose commercially prohibitive provisional measures, shutdown trade, but later reverse those findings in its final determination to avoid WTO review. Such an approach should not be permitted.

43. Moreover, as the Appellate Body recently made clear:

Once one of the three types of measures listed in Article 17.4 is identified in the request for establishment of a panel, a Member *may challenge the consistency of any preceding action* taken by an investigating authority in the course of an anti-dumping investigation.¹⁴

Japan identified in its panel request the definitive anti-dumping duties on imports of certain hot-rolled steel products from Japan. The preceding actions and determinations taken by USDOC in the course of its investigation are therefore properly before the Panel.

44. The USDOC adopted a new policy statement on early critical circumstances decisions, and has now applied this new policy in a number of cases.¹⁵ Pursuant to this new policy, the USDOC makes decisions prematurely and without adequate information. That new policy -- both generally and as applied in this case -- is an action that should be addressed by this Panel (in addition to the violations associated with the statute itself).

Question 13: (Part 1) In paragraph 26 of the US oral statement, the US claims that "Japan does not contest the Department's discretion to make an early determination of critical circumstances per se". Does Japan agree with this US statement?

Answer

45. The United States is theoretically correct. However, by requiring the decision to be made "as soon as possible after initiation,"¹⁶ USDOC systematically prevents its determinations from:

¹⁴ *United States—Anti-Dumping Act of 1916*, 28 Aug. 2000, WT/DS136/AB/R, WT/DS162/AB/R, at para. 73 n.39. (emphasis added) ("*US—Anti-Dumping Act of 1916*").

¹⁵ See, e.g., Preliminary Determination of Critical Circumstances: Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China, 64 Fed. Reg. 61835 (15 Nov. 1999); Preliminary Determination of Critical Circumstances: Certain Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 64 Fed. Reg. 60422 (5 Nov. 1999); Preliminary Determination of Critical Circumstances: Certain Cut-To-Length Carbon-Quality Steel Plate From Japan, 64 Fed. Reg. 20251 (26 Apr. 1999). These determinations will be provided in Japan's Second Submission.

¹⁶ USDOC Critical Circumstances Policy Bulletin, 63 Fed. Reg. at 55364 (**Exh. JP-3**).

- (a) satisfying the legal requirements of Article 10.6 that the imports are found to be “dumped” and that “massive imports,” if any, are “likely to seriously undermine the remedial effect of the anti-dumping duty to be applied,” and
- (b) being made on the basis of “sufficient evidence” as required by Article 10.7.

The timing itself was not the problem; but the rush to judgment largely created the problems. As explained in response to Question 11, by making the critical circumstances determination before the preliminary determination of dumping, the United States cannot determine that the imports in question are “dumped,” a requirement of Article 10.6. Nor could the United States determine that the imports are “likely to seriously undermine the remedial effect of the anti-dumping duty to be applied,” because nothing is yet known about the magnitude of dumping or the availability of any remedy. Japan also reminds the Panel that, on its face, the US statute does not even require either of these findings, regardless of when the preliminary decision might be made.

46. In addition, the premature finding prevents the decision from being made on the basis of “sufficient evidence.” The only evidence USDOC had was the petition. Though this might be sufficient to initiate an investigation, it alone is not sufficient to conclude that critical circumstances exist. *See* Response to Question 11. By making the decision before the Japanese mills were even asked to submit their questionnaire responses, USDOC ensured that the record would be incomplete and one-sided in favour of the petitioners. Thus USDOC violated GATT Article X:3.

(Part 2) Article 10.7 allows protective action to be taken at any time "after initiation" once the investigating authorities have "sufficient evidence" of the elements set forth in Article 10.6. This is similar in structure to the provision in Article 5.3 allowing initiation if there is "sufficient evidence" of the elements of dumping, injury and causation set forth in Articles 2 and 3. Where does Japan find a timing requirement for the preliminary decision to withhold appraisalment or take other measures under Article 10.7?

Answer

47. Although Article 10.7 does not provide a specific *deadline*, limitations on the timing of an authority’s decision under Article 10.7 are implicit in the requirement of “sufficient evidence” as well as in certain substantive requirements of Article 10.6, *i.e.*, that the import in question is found to be “dumped” and that massive dumped imports would be likely to seriously undermine the remedial effect of the definitive anti-dumping measure. Japan simply contends that USDOC, by making the preliminary determination of critical circumstances as early as it did, did not have a sufficient record before it to satisfy the requirements of Articles 10.6 and 10.7.

48. Japan does not believe there is any fixed timetable, provided there is “sufficient evidence.” The speed with which an authority can collect and analyze “sufficient evidence” will vary case-by-case.

Question 14: Could Japan please comment on the US position that the use of the words "would cause injury" in Article 10.6(i) of the AD Agreement implies that the injury might lie in the future and only be a threat at present?

Answer

49. The US interpretation of “would cause injury” to connote future events is illogical: it would limit the collection of retroactive duties only to instances of threat of injury. This would be inconsistent with the overall retroactive purpose of Article 10. Article 10.6(i) simply cannot be read to describe future events, such as the threat of injury, in light of the use of the present tense in

virtually all other verbs in Article 10 relevant to the factual predicate for what the United States terms “critical circumstances.”

50. The United States also attempts to import Footnote 9 of Article 3 into Article 10, so that it can claim an affirmative finding of threat of injury is an affirmative finding of injury pursuant to which retroactive duties may be assessed.¹⁷ As Japan established in its First Submission, Footnote 9 cannot apply to “injury” as that term is used in Article 10 generally, and Article 10.6 particularly. Article 10 consistently distinguishes between threat and injury, and Article 10.6 in particular speaks of injury in the present tense. The US position neglects the remedial purpose of critical circumstances. How can one retroactively redress that which was not yet occurred? This overall remedial purpose is confirmed by other provisions of Article 10. If the authority’s final determination is that the US industry is threatened with material injury, then Article 10.4 requires the refund of provisional measures. The same concept applies to retroactive provisional measures when the preliminary injury determination is based only on the threat of material injury.

Question 15: In paragraph 29 of its oral statement, the US argues that “[T]he 700 pages of exhibits in the petition contain very substantial information on all of the relevant points”. Would Japan admit that the exhibits in the petition contained information, in the sense of evidence, on all the points of relevance to a determination under Article 10.7 of the AD Agreement?

Answer

51. No. The Panel’s question reflects the US emphasis on the quantity of petitioners’ allegations and newspaper articles, as if *more* inconclusive newspaper articles or *longer* allegations at some point become proof. They do not.

52. As a threshold matter, the petition alone -- no matter how many exhibits might be attached to it -- can never constitute “sufficient evidence” of the elements of Article 10.6, at least not in a contested case. Even the United States acknowledges that the petition at best tells only one side of the story.¹⁸ One side of the story might be sufficient to initiate an investigation, but it is not a sufficient record upon which to determine that critical circumstances exist.

53. Second, the attachments to the petition do not satisfy two critical aspects of the Article 10.7 determination: that the imports actually be dumped (as required by Article 10.6’s references to “the *dumped* product in question” and “massive *dumped* imports”), and that the massive imports, if any, are “likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.” These two determinations must be made by the authority alone, and they cannot be made until the preliminary determination of dumping. See Responses to Questions 11 & 13.

54. Third, as a factual matter the petition’s exhibits do not establish the importer-knowledge elements of Article 10.6(i): that “there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury” The Panel should note Paragraph B-273, footnote 288, of the US First Submission, in which the United States has quoted from selected newspaper articles that it apparently believes best illustrate the existence of “sufficient evidence.” They do not. To the contrary, they prove Japan’s point. Most of the articles are dated September 1998, just a few weeks before the petition was filed and five months *after* the date USDOC concluded that importers knew or should have known about dumping and injury (*i.e.*, April 1998). The articles are vague (*e.g.*, “1998 is shaping up to be a bad year” or “World prices are well below US prices”). They do not identify (a)

¹⁷ See US First Submission, para. B-256.

¹⁸ See US First Submission, para. B-72.

dumped imports of (b) hot-rolled steel from (c) Japan as (d) injuring US mills during (e) the period in which USDOC concluded importers should have known this.

Question 16: In this case, the final injury determination was of current material injury. Therefore, and assuming the other conditions were satisfied, retroactive duties could have been imposed. However, it is argued that without an earlier action, taken under Article 10.7, to secure the potential for imposition of retroactive duties, collection of retroactive duties would, for many Members, be impossible. Does Japan recognize any difference between the decision under Article 10.7 to preserve the possibility of retroactive duties, and the decision to actually apply duties retroactively under Article 10.6?

Answer

55. Japan believes that the strict standards of consistency with the obligations of the AD Agreement must be met at each stage in the process, not just at the end of the process. A Member may act pursuant to Article 10.7 when it has met those requirements. Article 10.7 should not be read loosely early in an investigation in order to facilitate relief under Article 10.6 later in the investigation.

56. Moreover, this argument is particularly inappropriate in a US context. Under US practice, adopted by the US Customs Service on 26 May 1997,¹⁹ US Customs withholds making any final determination of duty liability for 314 days after entry precisely to permit retroactive collection of anti-dumping duties. So, it is unnecessary to make an early determination of critical circumstances to secure the potential for imposition and collection of retroactive duties. That potentiality already exists as a matter of law -- as reflected by USDOC's previous policy of waiting until the preliminary determination of dumping to issue its critical circumstances determination. The US argument is simply disingenuous. There is no reason for the United States to ignore its obligations under Article 10.7.

Question 17: Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade, although it disagrees with the test the US applies in determining whether they are or are not. In paragraph 42 of its first oral statement, Japan refers to the language of Article 2.2 of the Agreement as setting out the mandatory and exhaustive list of alternative methods for determination of normal value. As Japan notes, Article 2.2 prefaces the alternatives set forth (constructed value and third country export price) with the statement that these alternatives shall be applied "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or "when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison." Would Japan agree that in this case, there were sales of the like product in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison? If yes, does Japan contend that the stated alternatives are nonetheless the mandatory and exclusive alternatives for determination of normal value?

Answer

57. Japan agrees that in this case there were home-market sales of hot-rolled steel in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison. These ordinary-course sales included both the sales by the respondents to their "affiliates" (which, Japan again notes, simply denotes a company in which the respondent owns as little as 5 per cent of its stock, or which owns as little as 5 per cent of the respondent's stock), as well as sales to "unaffiliated" customers. Japan contends that USDOC should

¹⁹ Memo from Director, Office of Trade Compliance, File ENT-1 FO:TC:C:E AD (26 May 1997), available at www.cebb.customs.treas.gov/public (attached as **Exh. JP-80**).

have used all these ordinary-course sales – including sales to companies that did not survive the 99.5 per cent test – in its calculation of normal value. Then there would be no need to reach the alternatives specified in Article 2.2; Article 2.1 would be sufficient.

58. The alternatives specified in Article 2.2 become relevant in only one situation: if USDOC concludes that there are *no* sales in the home market in the ordinary course of trade. Then, its only choices are to use third-country sales or constructed value. Japan does not argue that authorities must resort to third country sales or constructed value whenever *any* home market sales are found to be outside the ordinary course of trade.

59. What USDOC may *not* do, when it determines that sales to any *individual* affiliated customer are outside the ordinary course of trade, is replace those sales with the affiliated customer's downstream resales. Japan is using Article 2.2 to explain that USDOC has only three choices for calculating normal value when it determines that sales to an individual customer are outside the ordinary course of trade: use the respondent's home-market sales to other customers, or, if there are *no sales* in the ordinary course (or one of the other situations described in Article 2.2 exists) then it must use third-country sales or constructed value. It may not use downstream resales.

Question 18: Assume that the information for the entire period of investigation shows different trends from that for the latter period -- for instance, less steep declines over three years than from the second to the third year, or an improvement when comparing the first and third years, but a significant decline from the second year (much improved as compared to the first) to the third year. Is it Japan's view that an investigating authority, in considering the question of injury, is precluded from considering that the information for the more recent period is more relevant and from according it more weight in the analysis?

Answer

60. Japan does not argue that an authority is precluded from emphasizing the latter part of its period of investigation as more relevant. Japan does argue, however, that the USITC's emphasis of the last two years of the period in this case goes far beyond a mere discretionary emphasis. The AD Agreement requires authorities to examine explicitly all relevant trends over the period of investigation. Indeed, the USITC traditionally examines the volume, prices and impact of the subject imports on the domestic industry over the entire period of investigation. Trends between the first and third years of a period that conflict with trends between the second and third years of a period would be especially relevant. Yet these are precisely the trends that the USITC ignored, instead focusing its analysis of impact on the last two years of the period.

61. Articles 3.4 and 3.5 of the AD Agreement obligate authorities to examine trends over the entire period of investigation, even if an authority chooses to emphasize the final two years of the period. Article 3.4 requires "an evaluation of all relevant economic factors and indices." Trends over an entire period of investigation unquestionably have a bearing on the state of an industry. Even if an authority finds the last two years of a period especially probative, its analysis of impact must nevertheless include an explicit analysis of both.

62. Article 3.5 provides that "{t}he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." The Panel in *Argentina—Footwear*, in which an analogous provision of the Safeguards Agreement was considered, held that the Argentine authority had impermissibly focused its causation analysis on the first and fifth years of its period of investigation, thereby ignoring relevant trends over the intervening years when "the *relationship* between the movements in imports (volume and market share) and the movements in injury factors. . . must be

central to a causation analysis and determination.”²⁰ The panel recognized that the causal relationship between subject imports, alternative causes of injury, and industry performance are only apparent when viewed dynamically, over a period of years, rather than statically, between two points.

63. When industry trends differ as between the first and third years of a period of investigation, and the second and third years, an authority cannot focus on the latter to the exclusion of the former without ignoring “relevant economic factors” in violation of Article 3.4 as well as relevant evidence concerning the causal relationship between dumped imports and injury, in violation of Article 3.5. Though the authority may deem the final two years of the period more probative -- as most indicative of present material injury, for example -- this does not relieve the authority’s obligation to examine specific trends viewed over the entire period of investigation -- especially conflicting trends -- and to make this consideration apparent in its final determination.

64. The USITC’s examination of *impact* in this case focused on the last two years of its period of investigation, and slighted its analysis of the first through third years of the period. The contrast between the paragraph at the bottom of page 17 and the top of page 18 of the USITC decision is quite dramatic. The USITC inexplicably shifts from a three-year analysis to a two-year analysis. This unexplained shift for financial performance -- one of the most important factors to be considered -- does not constitute an “objective examination” as required by Article 3.1.

65. As in the Panel’s hypothetical, industry trends differed markedly between the two periods. While industry profits and shipments declined between the second and third years of the period, these measures both increased between the first and third years of the period.²¹ In other words, these objective measures of the domestic industry’s performance improved over the entire period of investigation, despite a 420 per cent increase in subject import volumes.²² Thus, the USITC abrogated its obligation to analyze these highly relevant trends in its analysis of impact, especially given their conflict with its conclusions, in violation of Articles 3.1, 3.4 and 3.5.

Question 19: Can Japan please clarify to the Panel whether it is arguing that the USITC did not gather information for all three years of the period of investigation and did not at all consider data for the industry as a whole or is it Japan’s submission that although this information was recited in the USITC determination, the USITC in its analysis ignored the data?

Answer

66. Japan does not deny that the USITC gathered data over its entire three year period of investigation and that the USITC at least mentioned domestic producers as a whole by referencing overall industry data. Rather, Japan argues that the USITC failed to adequately factor this information into its determination. Specifically, the USITC failed to relate its merchant market findings to producers as a whole, as required by Articles 3 and 4, and failed to make its examination of relevant three year trends explicit in its analysis of impact, in violation of Articles 3.4 and 3.5.

67. As discussed in answer to Question 18, Articles 3.4 and 3.5 together require an authority to examine relevant trends over the entire period of investigation, notwithstanding its emphasis on certain trends over a portion of the period as more probative. The USITC traditionally examines

²⁰ *Argentina—Safeguard Measures on Imports of Footwear*, 25 June 1999, WT/DS121/R, at para. 8.237 (emphasis in original) (“*Argentina—Footwear*”).

²¹ Between 1996 and 1998, total industry shipments increased from 63.6 million tons to 64.0 million tons, operating profits increased from \$430.8 million to \$560.5 million, and operating profit margins increased from 2.0 per cent to 2.6 per cent. *USITC Final Injury Determination*, USITC Pub. 3202 at III-6, VI-6 (**Exh. JP-14**).

²² *Id.* at 12 (**Exh. JP-14**).

trends pertaining to volume, price and impact of the subject imports on the domestic industry over the entire period of investigation. In this case, however, the USITC focused its impact analysis on the final two years of the three-year period of investigation. The USITC unquestionably possessed information covering the entire period, identified market share and price trends over the entire period in its analysis of volume and price,²³ and even briefly cited market share and capacity utilization trends over the entire period at the beginning of its impact analysis.²⁴ Yet the USITC expressly refused to analyze the industry's performance between 1996 and 1998,²⁵ rejecting respondents' objection to its use of 1997 as the baseline of its analysis:

{W}e disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which US consumption reached record levels, and the US industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry.²⁶

Even accepting this justification, the USITC had an obligation under Articles 3.4 and 3.5 to analyze industry performance, and the impact of subject imports and alternative causes of injury, over the entire three year period. The USITC's determination that certain relevant factors -- including trends -- are less probative than others does not relieve it of the responsibility to make its analysis of such factors explicit in its determination. To the contrary, trends over the entire three year period of investigation were especially relevant as they conflicted with trends over the last two years of the period.

68. Just as the USITC was obligated to relate trends over the last two years of the period to trends over the entire period, it was also obligated to relate trends in the merchant market segment to trends for producers as a whole. In light of this overarching requirement, the Panel in *Mexico—High Fructose Corn Syrup* considered the manner in which authorities may analyze an industry segment as a relevant economic factor under Article 3.4. As a preliminary matter, the Panel expressly held:

{W}hile an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from making the determination required by that Agreement — whether dumped imports injure or threaten injury to the domestic industry as a whole.²⁷

The Panel further held that two Safeguards Panel reports, *Argentina—Footwear* and *Korea—Dairy*, were applicable to an authority's analysis of an industry segment in the antidumping context. Both Panel reports concluded that “the failure of the investigating authorities to either consider all sectors, or to relate their conclusions concerning specific sectors to the industry as a whole, resulted in injury determinations that were not based on injury to the industry ‘as a whole’, inconsistent with the requirements of the Safeguards Agreement.”²⁸ Thus, an authority may analyze an industry segment separately but must relate its findings to producers as a whole.

69. The USITC made no effort to relate its analysis of the merchant market segment to producers as a whole, instead passively reciting overall industry statistics following merchant market segment statistics. In particular, the USITC did not consider as a condition of competition that the industry's

²³ *USITC Final Injury Determination*, USITC Pub. 3202 at 12-13 (**Exh. JP-14**) (volume trends analyzed over the entire period), 13-16 (price trends examined over the entire period).

²⁴ *Id.* at 17-18 (**Exh. JP-14**).

²⁵ *Id.* at 18-20 (**Exh. JP-14**) (Analysis of industry performance was limited to trends between 1997 and 1998.).

²⁶ *Id.* at 18 (**Exh. JP-14**).

²⁷ *Mexico—High Fructose Corn Syrup*, para. 7.160.

²⁸ *Id.* at para. 7.155 n.625.

substantial captive production was shielded from import competition, or how direct import competition in the merchant market segment impacted the industry's captive segment. In this regard, the USITC essentially double-counted the impact of merchant market segment performance on producers as a whole: once directly, in merchant market segment data, and again indirectly, in overall industry data embodying the merchant market segment.

70. To fully appreciate the impact of the merchant market segment on producers as a whole, the USITC should have analyzed the merchant market *and* captive segments separately, and then considered how both related to the industry as a whole. Captive segment performance is no less of a relevant economic factor than merchant market segment performance.

Question 20: Could Japan please clarify its apparent view that a change in policy applicable to all subsequent cases demonstrates biased administration of the Member's laws, in violation of Article X of the GATT 1994? Is Japan of the view that the application of a longstanding and consistently applied policy in one case can demonstrate failure to impartially administer that policy? If so, could Japan please explain?

Answer

71. Contrary to the Panel's assumption, Japan is not arguing that a change in policy applicable to subsequent cases automatically demonstrates biased administration of the Member's laws in violation of Article X. It is not the change in practice or non-application of a longstanding policy *per se* that results in an Article X violation, but rather the manner in which those changes or decisions not to apply existing policies are made. In this case, the United States anti-dumping authority changed its policy or refused to carry out longstanding rules and practices in a non-transparent and biased manner in at least four ways.

72. The first way pertains to USDOC's unprecedented acceleration of the case. The acceleration prejudiced respondents by effectively shortening the amount of time they had to prepare for the initial questionnaire and by curtailing the authorities' time for analysis, thereby resulting in error-ridden determinations.

73. The second way pertains to NKK's specific request for a correction of a substantial ministerial error that inflated its margin by 12 percentage points. USDOC's own regulations instruct USDOC officials to correct such errors upon request within thirty days.²⁹ In this case, however, USDOC officials chose not to do so. While the failure to apply a long-standing policy might not always rise to the level of an Article X violation, the factual circumstances surrounding this particular administration of USDOC rules illustrate a non-transparent, non-uniform, and impartial administration of USDOC's practice of correcting ministerial errors. Here, USDOC ignored a 4-page written request from NKK detailing USDOC's error and specifically asking USDOC to make a ministerial correction.³⁰ Moreover, the US authority then used this incorrect, inflated margin as part of its basis for a preliminary finding of critical circumstances. That finding was, not surprisingly, later overturned.

74. The third instance pertains to USDOC's change in its critical circumstances policy. This change did not apply only to "subsequent" cases. Rather, USDOC applied it *retroactively* to the hot-rolled steel investigation. A fundamental element of due process is notice. Here, USDOC's issuance of a policy bulletin was intended to serve that purpose. Yet, USDOC acted in bad faith when it applied that new policy retroactively to specific WTO Members in a specific investigation that had already been initiated.

²⁹ 19 C.F.R. 351.224(e) (Exh. JP-5)

³⁰ See NKK Letter to USDOC of 18 Feb. 1999 (Exh. JP-70)

75. Finally, USITC changed its policy in a manner inconsistent with Article X when it failed to apply its longstanding policy of examining a three-year period for its injury determination. Here, USITC adopted a non-uniform method of analysis in order to reach an affirmative determination. Anti-dumping agencies cannot tailor their methodologies so as to exact an affirmative determination in particularly controversial cases.

76. The US conduct in this case therefore violated the fundamental requirement of due process (demanded by the Appellate Body in *US—Shrimp*), constitutes *abus de droit* and violates the GATT Article X:3(a) requirement of “uniform, impartial and reasonable” administration by the US of its anti-dumping regime.

77. In short, the manner in which the United States administers its anti-dumping law cannot be assessed in a vacuum. The manner in which decisions are made and actions are taken is crucial to determining whether the US administration of its anti-dumping law is uniform, impartial and reasonable. Partiality may occur, or be discerned, in many different situations. For example, the existence of a long-standing policy that is consistently applied may nonetheless show bias – it may be consistently applied in a biased fashion and yet one single application could lead to a revelation of such bias. Thus, a panel may have to look beyond the text of a seemingly consistent regulation. And, as discussed above, where a Member alters a long-standing policy during the course of a significant proceeding and applies the new policy to disadvantage the respondent in the proceeding, this too is evidence of bias.

Question 21: How does Japan believe the "political context" should be taken into account by the Panel? For instance, if an action is consistent with WTO obligations, does it matter if that action was taken in a context of intense political pressure?

Answer

78. Japan is not proposing that "political context" alone can create a WTO violation. Rather, Japan is arguing that political context is an important part of assessing the consistency of actions with a Member's WTO obligations.

79. Article 17.6(i) underscores the importance of the context of an authority's actions. Panels are to determine whether the "establishment of the facts was proper." The panel cannot make this judgement without looking at both the action and the context of that action. This provision also refers specifically to "whether the evaluation of those facts was unbiased and objective." One must consider the context of certain actions and certain decisions to judge whether or not the evaluation was biased or unbiased.

80. Likewise, in considering under GATT 1994 Article X whether a Member administered its measures in a uniform, impartial, and reasonable manner, the political context in which such administration occurred will shed light on whether it met the requirements of Article X. To that extent, the panel should take into account the political context. A decision or action that, in the abstract, might appear to be neutral clearly is uncovered as being biased where the context shows it was not made in a reasonable or equitable manner.

81. Therefore, the political context to which Japan referred in this proceeding was provided as supplementary evidence that the establishment of the facts in this case was not proper, that the evaluation of the facts was not unbiased and objective, and that the administration of US anti-dumping law was not uniform, impartial, and reasonable, as required by Article 17.6(i) of the AD Agreement and Article X:3 of GATT 1994.

Question 22: With reference to paragraph 12 of Japan's oral statement – if a Member's regulations provide for a procedural action not required by the AD Agreement, on what basis would Japan argue that a change in policy in this regard, or a failure to effectuate that action in a particular case, is a violation under the AD Agreement?

Answer

82. In paragraph 12 of its opening statement, Japan was making points in connection with its Article X claim. Japan has never argued that the failure to correct the NKK clerical error itself created any *violation* of the AD Agreement. Japan does believe, however, that the failure to correct the NKK clerical error provides important context for whether the USDOC was properly establishing facts, and evaluating those facts in an objective and unbiased manner.

83. GATT Article X requires that Members promptly publish “laws, regulations, judicial decisions and administrative rulings of general application” (hereinafter “laws”) in such a manner as to enable governments and traders to become acquainted with them. Article X also requires Members not to enforce such laws before they have been officially published; and, it requires a Member to administer its laws in a “uniform, impartial and reasonable manner.” These obligations are not limited to laws specified by the Anti-Dumping Agreement (or another WTO agreement). They extend to all laws “pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . .” Here, the US failed to comply with GATT Article X. Its published a regulation that provides for correcting clerical errors. But, in contrast to its practice in other cases, it failed to follow its regulation and correct the error, and thereby treated NKK unfairly in the process.

QUESTIONS TO BOTH PARTIES

Question 39: Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

Answer

84. No. By its terms, Article 17.5(ii) applies only to claims under the AD Agreement. Thus, it is explicitly inapplicable to Japan's claims under GATT 1994 Article X:3. The text of Article 17.5(ii) also makes clear that it is inapplicable to "on its face" claims against an anti-dumping law. The phrase “facts made available . . . to the authorities” refers solely to specific anti-dumping proceedings. It has no meaning in the context of a challenge to the facial consistency of the US law itself.

85. A related issue arose in the recent Appellate Body decision in *US—Anti-Dumping Act of 1916*, which found that Article 17.4 does not limit facial challenges to anti-dumping laws and regulations.³¹ Although the Appellate Body did not directly address Article 17.5(ii), the logic of its reasoning extends to Article 17.5(ii).

Question 40: Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted even if they were not made available under the appropriate domestic procedures as required by the AD Agreement? Could there be other reasons apart from the requirements of Article 17.5(ii) of the AD Agreement to exclude certain documents submitted by Japan to the Panel?

³¹ US—Anti-Dumping Act of 1916, para. 74.

Answer

86. All exhibits relevant to Japan's GATT 1994 Article X claims are admissible and indeed must be considered by the Panel. In its preliminary objections, the United States relied on only Article 17.5(ii) of the AD Agreement to challenge evidence submitted by Japan in support of its Article X claims. This is not an appropriate legal basis for two important reasons. First and foremost, the AD Agreement does not apply to challenges made under the GATT 1994. Article 17.5 establishes dispute settlement procedures *only for* disputes involving the AD Agreement. It cannot be read to apply to claims raised under other international agreements.

87. Second, and as importantly, the Panel is obligated to consider the proffered evidence because of the nature of GATT 1994 Article X claims. Japan's main claim under Article X is that the United States did not administer its anti-dumping law in a uniform manner. The examination of this claim requires a comparison of the application of the US law in this case with the application of the same US law in other cases. The Article X claim therefore necessarily involves facts that could not possibly have been made available during this specific anti-dumping investigation. Therefore Article 17.5(ii) cannot logically extend to Japan's Article X claim.

88. The Panel must examine the behaviour of the US Government in administering its laws within this investigation, or as between investigations, which requires facts that may or may not have been part of the record. For example, in the hot-rolled steel investigation, the background behind USDOC's acceleration of this case is important because it shows the non-uniform, partial, and unreasonable nature of the investigation. The Panel must hear all the evidence and then determine the probative weight of that evidence, but there is no basis upon which the panel can *a priori* exclude evidence. Indeed, if the Panel chooses to exclude evidence, the Panel runs the risk of violating its own obligations under Article 11 of the DSU, including an objective assessment of the facts and the conformity with the relevant covered agreements.

89. Other than Article 17.5(ii), there is no basis to exclude these documents. DSU Article 11 requires an "objective assessment," and thus requires consideration of any evidence Japan offers to establish its prima facie case of a violation of Article X. Japan notes that in *Hormones*, the Appellate Body explained that the refusal to consider "evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts" under Article 11 of the DSU.³²

Question 41: Do the parties consider that documents which were submitted to the USITC but not to USDOC were made available "in accordance with appropriate domestic procedures" and can therefore be considered by the Panel even when those documents are submitted to the Panel with regard to claims concerning determinations made by USDOC? According to the parties, should the Panel consider as relevant this internal US distinction between proceedings before the USITC and USDOC when considering the question of admissibility of evidence under Article 17.5(ii) of the AD Agreement?

Answer

90. Japan views this as a hypothetical question because the US has not raised a claim regarding specific evidence. The answer to the first question is, in general, yes. The answer to the second question is, in general, no.

91. The US cannot insulate itself from scrutiny simply by bifurcating the administration of US anti-dumping law.³³ For WTO purposes, the bifurcation is irrelevant. The structure of the "authority"

³² *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 Jan. 1998, WT/DS26/AB/R, WT/DS48/AB/R, at para. 133 ("*Hormones*").

selected by the US to administer its anti-dumping law cannot excuse the US from its obligations, whether they are substantive or procedural. A Member cannot be permitted to use a structural artefact as an excuse allowing a branch or division of its government to disregard evidence submitted to another branch or division.³⁴ The language used in Article 17.5 (ii) also does not spell out any special consideration for governmental structure within each Member. The key here is that the Japanese respondent companies submitted the evidence to the Member, in this case, the United States government.

92. Moreover, in fact the ITC does share information with DOC, and did so in this case. US law requires the ITC, within five days of its preliminary determination of injury or threat, to “transmit to the administering authority {i.e., DOC} the facts and conclusions on which its determination is based.”³⁵ As is evident from the internal memorandum issued by USDOC in making its preliminary critical circumstances determination,³⁶ USDOC had full knowledge of USITC’s negative preliminary determination with regard to current injury.

Question 42: Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

Answer

93. Japan agrees that the permissive term "may" in Article 2.3 means that authorities can, but need not, construct a price based on downstream prices to unrelated parties. Authorities would therefore be well within their discretion simply to accept the price to an affiliated party as sufficient for purposes of the analysis. Indeed, in this particular case USDOC did not express any specific concerns on the reliability of the KSC price to CSI, and never tested those prices for reliability. Since anti-dumping investigations are usually a surprise, in many cases there will be no reason to suspect that the price between affiliated parties has been manipulated to evade anti-dumping measures.

Question 43: Could the parties please clarify their position concerning the degree of cooperation required under Article 6.8 and Annex II of the AD Agreement?

³³ Article 27 of the Vienna Convention on the Law of Treaties states: “A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.”

³⁴ See Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico, 2 Nov. 1998, WT/DS60/AB/R, at paras. 69-72; United States—Sections 301-310 of the Trade Act of 1974, 22 Dec. 1998, WT/DS152/R, at para. 7.80; Brazil—Export Financing Programme for Aircraft, 9 May 2000, WT/DS46/RW, at para. 6.16 n.23 (Report of the Panel under Article 21.5); see also Ian Brownlie, *Principles of Public International Law* 35-37 (4th ed. 1990) (excerpts attached as **Exh. JP-83**); Restatement (Third) of the Foreign Relations Law of the United States § 207(c) (1987) (“A state is responsible for any violation of its obligations under international law resulting from action or inaction by ... any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.”) (excerpts attached as **Exh. JP-84**).

³⁵ *Antidumping and Countervailing Duty Handbook*, USITC Pub. 3257, at II-12 (Nov. 1999) (excerpts attached as **Exh. JP-82**).

³⁶ Memorandum From Roland L. MacDonald and Edward C. Yang to Joseph A. Spetrini Regarding Antidumping Duty Investigations of Certain Hot-Rolled Carbon Steel Flat Products from Japan and the Russian Federation—Determination of Critical Circumstances, 23 Nov. 1998, at 2 (**Exh. US/B-42**).

Answer

94. This question was answered in response to Questions 4 and 7 above.

Question 44: Was information submitted to and accepted by the USITC after applicable deadlines?

Answer

95. The USITC accepted corrected questionnaire responses submitted by domestic producers over two months after the applicable deadlines, after failing to compel the more timely correction of questionnaire responses that were grossly and flagrantly distorted. This is not to say that the USITC lacked advance notice of these irregularities: a mere four days after the USITC had released its public prehearing staff report, Japanese and Brazilian respondents filed a submission enumerating the irregularities in meticulous detail.³⁷ While domestic producers had been instructed to provide the results of operations for merchant market and captive shipments, valuing internal transfers at fair market value, most valued internal transfers at anything but fair market value.³⁸ Respondents demonstrated that these distortions were calculated to depress industry performance, and manufacture the appearance of injury. Further, domestic producers had allocated most all SG&A (sales general & accounting) expenses to merchant market sales, and none to internal transfers, thereby depressing merchant market profits and contriving the appearance of injury in the merchant market segment.³⁹

96. The Japanese and Brazilian respondents strongly urged the USITC to apply “facts otherwise available” to draw inferences that would allow the USITC to plug the holes in the offending domestic producers’ questionnaire responses.⁴⁰ At the very least, Japanese and Brazilian respondents requested an opportunity to comment on any submission of revised data,⁴¹ and an opportunity to address the distortions and omission at an in camera session of the USITC’s hearing, where confidential information could be discussed.⁴² The games domestic producers were playing with the record could not have been clearer, and the seriousness of the Japanese and Brazilian respondents’ accusations certainly demanded immediate action.

97. Immediate action, however, was not forthcoming. As of the date of the hearing, on 4 May, no revised questionnaire responses had been submitted. In fact, both Chairman Bragg and Vice Chairman Miller were motivated to take the highly unusual step of publicly admonishing petitioners for their lack of cooperation.⁴³ Vice Chairman Miller stated:

Let me begin on not such an easy note, however. Chairman Bragg mentioned in her opening statement some problems and difficulties we've had with basically

³⁷ The USITC released its prehearing staff report on 22 April 1999. Japanese and Brazilian respondents filed their submission on 26 April 1999.

³⁸ Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 3-4 (excerpts attached as **Exh. JP-85**). While the staff attempted to correct these distortions where it could, several companies had to be omitted from the staff report, pending confirmation of their financial information. *Certain Hot-Rolled Steel Products From Brazil, Japan, Russia: Prehearing Report to the USITC of Investigation Nos. 701-TA-384 and 731-TA-806-808 (Final)*, at VI-7 (22 Apr. 1999) (excerpts in **Exh. JP-72**).

³⁹ Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 5-7 (excerpts attached as **Exh. JP-85**).

⁴⁰ *Id.* at 8-9 (excerpts attached as **Exh. JP-85**).

⁴¹ *Id.* at 11-12 (excerpts attached as **Exh. JP-85**).

⁴² *Id.* at 12-13 (excerpts attached as **Exh. JP-85**).

⁴³ USITC Hearing Transcript (4 May 1999), at 9 (Chairman Bragg in her opening stated, “I would like to emphasize to all counsel that responses to Commission questionnaires are mandatory, and I request your assistance in ensuring that your clients respond to Commission requests for information fully and within the time frame specified.”), 65-66 (Vice Chairman Miller.) (excerpts provided in **Exh. JP-73**).

companies that are part of the petitioners' group on getting certain data that we've requested, and I have to just say that I find it very troubling and I'm disappointed that we're having the problem in getting the industry to submit certain information that we need for the purpose of our analysis . . . And I guess in particular I've been very troubled by the fact that it's essentially most, if not all, of the petitioning companies that chose not to provide the information that we needed with respect to internal transfers while other companies were able to do so. So I guess I want to emphasize to you as the chairmen of your companies the difficulty that I think this poses for the Commission, and that I don't really understand why it's worth the risk to your case of posing this problem to the Commission at this point.⁴⁴

98. Still, rather than drawing the inferences, as urged by respondents, the USITC patiently awaited domestic producers' clarifications, and received revised questionnaire responses from eight domestic producers in time for their inclusion in the final staff report, issued 28 May 1999.⁴⁵ Domestic producers had succeeded in distorting the record concerning industry profitability until the bitter end of the investigation, when respondents literally had less than a week to comment on the corrected figures, and then only briefly, as final comments are strictly limited to fifteen pages in length per respondent country.⁴⁶

99. Thus, domestic producers only submitted corrected domestic producers' questionnaire responses in time for the 28 May final staff report -- over two months after the domestic producers' questionnaires had been due, on 22 March. By then, the damage wrought on respondents' rights and the USITC's analysis by the distorted record was arguably irreversible.

Question 45: Is the captive production provision relevant to the USITC's analysis of causation?

Answer

100. Japan argues that the captive production provision distorts the USITC's consideration of causation in violation of Article 3.5. Specifically, Article 3.5 provides that "it must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement . . . based on an examination of all relevant evidence before the authorities." In light of footnote 9 and Article 4.1, Article 3.5 requires an authority to demonstrate causation between imports and injury to domestic producers as a whole of the like product, and not merely an industry segment.

101. The captive production provision forces the USITC largely to ignore the attenuated nature of competition in the captive market, and accentuate injury indices from the merchant market segment, where import competition is most acute. It would be logically inconsistent for USITC to both recognize that captive production shields a significant portion of domestic production from import competition while at the same time "primarily focusing" on merchant market data that amplifies import penetration. This is the only explanation for why USITC omitted any mention of the shielding effect of captive production in its decision in this case,⁴⁷ which is otherwise a time-honoured fixture of its anti-dumping determinations.⁴⁸ By contrast, both Commissioners Crawford and Askey, who did

⁴⁴ *Id.* at 65-66 (excerpts provided in **Exh. JP-73**).

⁴⁵ *USITC Final Injury Determination*, USITC Pub. 3202 at VI-1 (**Exh. JP-14**) ("USX's verification and LTV's and six other producers' revised financial data were incorporated in this final report. The financial data were changed to revise the sales values, costs, and SG&A expenses of the transfers for these eight producers.").

⁴⁶ 19 C.F.R. § 207.30(b) (to be provided in Japan's Second Submission).

⁴⁷ *USITC Final Injury Determination*, at 9-21 (**Exh. JP-14**).

⁴⁸ *See, e.g., 1993 Flat-Rolled Steel Case*, at 22 (excerpts in **Exh. JP-59**).

not apply the captive production provision or endorse the majority opinion as did Commissioner Bragg, expressly noted that substantial captive production attenuated subject import competition.⁴⁹

102. The significance of this condition of competition has been demonstrated in numerous other cases. USITC recognized the shielding effect of captive production in its contemporaneous cold-rolled steel determination, in which it found a similar degree of captive production, but did not apply the captive production provision.⁵⁰ The 1993 hot-rolled steel case hinged on the degree to which substantial captive production mitigated causation between subject imports and the domestic industry's widening financial losses.⁵¹ By forestalling such a finding, the captive production provision prevents USITC from complying with Article 3.5.

Question 46: Could the parties please comment on the relevance of the Panel's decision in *US-Wheat Gluten* for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

Answer

103. The recent Panel report in *US—Wheat Gluten* held that authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury caused by imports rises to the level of “serious injury.” Specifically, the Panel considered whether USITC’s consideration of each alternative cause of injury satisfied Article 4.2(b), which “prohibits the attribution to increased imports of injury caused by other factors.”⁵² It found that the USITC “weighed each other factor individually against imports to determine whether such factor was ‘a more important cause of injury’, and then excluded such other factor as a ‘cause of injury’ when it did not. . . .”⁵³ After dismissing all other alternative causes, USITC only presumed that the injury caused by imports alone remained “serious.”⁵⁴ The Panel held this approach to be inconsistent with the Safeguards Agreement:

In our view, under USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause “serious injury” to the domestic industry. We consider that USITC’s causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.⁵⁵

⁴⁹ USITC Final Injury Determination, at 44, 51 (**Exh. JP-14**).

⁵⁰ *Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000), at 19 (excerpts attached as **Exh. JP-86**) (“{T}he extent of competition between domestic production and subject imports is somewhat limited, given the domestic producers’ large volume of internal transfers and contractual sales.”) (“*Cold-Rolled Steel Case*”).

⁵¹ USITC begins its determination with a four-page section devoted to considering and rejecting petitioners’ request that captive production be excluded from the Commission’s analysis. *1993 Flat-Rolled Case* at 15-18 (excerpts in **Exh. JP-59**). The Conditions of Competition section contains an entire paragraph devoted to the shielding effect of captive production. *Id.* at 21 (excerpts in **Exh. JP-59**). In the heart of its analysis of impact, USITC devotes over a paragraph to the shielding effect of captive production. *Id.* at 53 (excerpts in **Exh. JP-59**).

⁵² United States—Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities, 31 July 2000, WT/DS166/R, at para. 8.151 (“US—Wheat Gluten”).

⁵³ *Id.* at para. 8.151.

⁵⁴ *Id.* at para. 8.151.

⁵⁵ *Id.* at para. 8.152 (emphasis in original).

This echoes and amplifies the Panel Report in *Argentina—Footwear*, which found that authorities must perform an analysis separating the effects of alternative causes of injury from the effects of subject imports.⁵⁶

104. By extension, anti-dumping authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury rises to the level of “material injury.” Article 3.5 of the AD Agreement is perfectly analogous to Article 4.2(b) of the Safeguards Agreement: both provide that authorities must establish a causal link between imports and the requisite degree of injury, and that injury caused by factors other than subject imports must not be attributed to subject imports.⁵⁷ Indeed, the wording is almost identical: “causal link” versus “causal relationship”; and “shall not be attributed” and “must not be attributed.” Moreover, the Panel Report in *US - Wheat Gluten* specifically cites to prior panel decisions under the Tokyo Round Anti-dumping Code in support of its decision,⁵⁸ showing that the panel recognized the close analogy between the language in the two agreements.

105. With respect to this case, to the extent USITC considered alternative causes of injury at all, it held that each only “partly explained” the industry’s declining performance in 1998, concluding that subject imports “materially contributed” to the industry’s declining performance.⁵⁹ A finding that subject imports “materially contributed” to injury, however, is not the same as a finding that the injury *caused* by subject imports alone is “material.” As it had in *US—Wheat Gluten*, USITC only found subject imports to be a more important cause of injury than any other, without considering whether the injury caused by subject imports alone was material, as required by Article 3.5 and footnote 9.

Question 47: When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipment times for steel exports from Japan to the US?

Answer

106. According to US Commerce Department statistics, imports of subject hot-rolled steel from Japan peaked in November 1998 at 399,927 metric tons, before declining steeply to a negligible 14,437 metric tons in January of 1999.⁶⁰

107. USITC’s Prehearing Staff Report found, and the Final Staff Report confirmed, that “[l]ead times for Japanese product averaged 122 days from Japan in 1996-1997 and 113 days in 1998.”⁶¹

⁵⁶ *Argentina—Footwear*, para. 8.267 (“{A} sufficient consideration of ‘other factors’ operating in the market at the same time must be conducted, so that any such injury caused by such factors can be identified and properly attributed.”).

⁵⁷ Article 4.2(b) provides: “The {affirmative determination} shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” Article 3.5 similarly provides: “It must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports.”

⁵⁸ *US—Wheat Gluten*, at para. 141 and 8.142.

⁵⁹ *USITC Final Injury Determination*, at 20-21 (**Exh. JP-14**) (“Having taken these {other economic factors} into account, however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry’s declining performance...”).

⁶⁰ Japanese Respondents’ USITC Prehearing Brief (29 Apr. 1999), at 25, Exhibit 3 (excerpts attached as **Exh. JP-87**).

“Lead time” was defined in the importers’ questionnaires as the number of days between order placement with the importer and receipt of the shipment by the customer.⁶² Alluding to these three to four month lead times, Japanese respondents observed that although Japanese imports peaked in October and November of 1998, these imports would have been ordered sometime in July and August, long before the antidumping petition’s filing on 30 September.⁶³

108. Typical shipment times from Japan to the United States is one month to the west coast and one and one half months to the east coast.

⁶¹ *USITC Final Injury Determination*, at II-11 (**Exh. JP-14**); Japanese Respondents’ USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**).

⁶² USITC Importers’ Questionnaire, *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808, at 15 (excerpts attached as **Exh. JP-88**).

⁶³ Japanese Respondents USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**); *USITC Final Injury Determination*, at I-1 (**Exh. JP-14**) (Petition filed on 30 September 1998.).

ANNEX E-2

Japan's Answers to Questions from the United States

(6 September 2000)

Question 1: Does Japan claim that, even if it prevails on all of the facts available issues and the Department's 99.5 per cent test, that KSC, NKK and NSC will not, nevertheless, have dumping margins over 15 per cent?

Answer

1. Japan believes this question is legally irrelevant. The issue in this dispute is not the level of alleged Japanese dumping. The issue is whether the US Government adhered to its WTO obligations in determining the level of anti-dumping duties. Even if the Japanese mills were "dumping" in the technical sense of the concept, that does not mean the Japanese mills are not entitled to fair treatment, consistent with US obligations under the WTO.

Question 2: Does Japan dispute that the increase in hot-rolled steel exports from Japan to the United States prior to the Department's investigation was massive?

Answer

2. As a factual matter, Japan does not agree with the value laden word "massive." Percentage increases from a small base can lead to large percentage increases. Moreover, increases need to be viewed in terms of the size of the market, and the rate at which demand is increasing.

3. More importantly, from a legal perspective, this question is irrelevant. Japan is not challenging the US Government findings about the size of the increase in imports. Japan's claim focused on other aspects of the US determination of critical circumstances, and the sufficiency of the evidence to support those conclusions at the time they were made. Meeting one requirement for invoking critical circumstances does not justify essentially ignoring the other requirements.

Question 3: In paragraph 47 of its opening statement, Japan appears to retreat from the absolute position taken in paragraphs 57 through 60 of its written submission that an administering authority may never use an adverse inference in selecting the facts available. Has Japan, in fact, retreated from this position? Can Japan give a single example of a situation in which an administering authority would be permitted to make an adverse inference?

Answer

4. Japan has not retreated from its position. Japan has never embraced the absolutist position which the United States tries to attribute to Japan. This is why Japan challenged the way in which USDOC applies the US statutory provision on facts available in practice, rather than the statutory provision itself. In practice, USDOC does not merely make inferences that may prove to be adverse, but rather specifically seeks to punish respondents.

5. Japan believes that the AD Agreement never authorizes the use of punishment. Authorities may find it necessary to turn to "facts available," and those facts may in many instances be "less favourable" than the result that would have obtained if the parties had provided information to the authorities. But, the United States insists on reading the concept of "less favourable" much too broadly -- not just as authorizing the use of inferences which may prove to be adverse, but as allowing broad discretion to punish foreign respondents.

Question 4: In paragraph 51 of its opening statement, Japan states: *Implicit* in all of its letters to USDOC was a request that USDOC provide some guidance as to what it should do. (Emphasis supplied.) Yet in at least two places in its first submission, Japan states that KSC had specifically asked USDOC for its guidance (Japan 1st sub. & 67) and KSC asked USDOC for its guidance (Japan 1st sub. & 76.) Is Japan, in its opening statement, retreating from its position in its first submission that KSC explicitly asked Commerce for guidance on the CSI matter? If not, will Japan provide record citations for the assertions in its first submission that KSC did request guidance from USDOC? (Currently, the first submission has no such citations.)

Answer

6. We answered this question in response to Panel Question 5.

Question 5: In its first submission, at paragraph 140, Japan stated that its interpretation was that Article 9.4 required the Department to disregard *the facts available portions of these margins* for purposes of calculating the all-others rate and should have used *only that portion of the margins* not based on facts available.

At paragraph 56 of its opening statement, in contrast, Japan no longer mentions removing facts available portions of the margins. Instead, Japan now states that a plain reading of the phrase is that a margin established using facts available, whether partially or entirely, cannot be used to calculate the all-others rate.

1. Has Japan conceded that the Agreement does not call for removing portions of the calculated margins?
2. As Japan also acknowledges in para. 140 of its first submission, all mandatory respondents' margins were based on partial facts available. Under Japan's new reading of Article 9.4, would the Department then be required to disregard the margins for all three mandatory respondents?

Answer

7. Japan has not changed its position. Japan believes that the authorities should base the "all others rate" on those portions of margins for responding companies that reflect actual information, not "facts available."

Question 6: Paragraph 23 of the Japanese statement says that nothing stops the United States from considering as a condition of competition the merchant market v. captive portions of an industry; the problem in this case, according to Japan, is that the statute mandates the approach. Does this mean that an investigating authority's analysis is in accordance with the Agreement if, as a matter of discretion, it looks at the merchant market v. captive sales as a condition of competition?

Answer

8. The US hypothetical is a far cry from the actual operation of the captive production provision.
9. Japan agrees that the authorities are to consider all relevant economic factors, and that the distinction between the merchant market and the captive market could be one of those relevant economic factors. For this analysis to be consistent with the AD Agreement, it would need to have several features very different from the current captive production provision.
10. First, the authority would need to have discretion to evaluate the particular relevance in a particular case, and should not be shackled by a mandatory instruction to consider.
11. Second, the authority should be free to accord this factor balanced consideration, no more or less than other factors. The authorities should not be instructed to elevate this one factor as the "primary focus" at the expense of other relevant factors.
12. Third, the authority should have the discretion to consider as a condition of competition the "shielding effect" of captive consumption, and should not be forced to focus on the potential effects in the merchant market to the exclusion of the shielding effect in the captive segment.

ANNEX E-3

Responses of the United States to Questions from the Panel

(6 September 2000)

Question 23. Does the US consider that the Panel is limited by Article 17.6(ii) [*sic.* 17.5(ii)] of the AD Agreement in the consideration of evidence with respect to claims under Article X of GATT 1994?

1. The Panel should first consider the scope of the new evidence referred to in this question. Of all the new evidence offered by Japan in this dispute, the only new evidence cited in Japan's Article X argument (paras 282 - 324) are two news reports of Department of Commerce Secretary Daley's statements to the Congressional Steel Caucus. (JP-19 and JP-20). These are offered to show "partiality" in two instances: the decision to accelerate the investigation (First Submission of Japan, at para. 299) and the adoption of the new critical circumstances policy (*id.*, para. 309). None of the other new evidence that is the subject of the United States' preliminary objections are cited or referred to in any way in Japan's Article X argument.

2. So, the issue is whether the Panel should consider these two press reports -- allegedly showing "partiality" -- in considering Japan's Article X claim. Under Article 17.5(ii) of the Anti-Dumping Agreement, this Panel is to examine this matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Under Article 17.6(i), in assessing the facts of the matter, this Panel "shall determine whether [the authorities'] evaluation of those facts was unbiased and objective."

3. The Japanese respondents in the underlying antidumping investigation could have submitted these press reports to the administering authority during the course of the investigation, if they thought they were relevant. This would have permitted the Commerce Department to take this information into account in conducting its investigation, and would have permitted the other interested parties to the investigation (including US steel companies) an opportunity to comment and to "have a full opportunity for the defence of their interests" under Article 6.2 of the Anti-Dumping Agreement. The Japanese respondents chose not to do so. At the same time, they did choose to submit a letter in this proceeding and in the companion hot-rolled steel from Brazil case, protesting alleged bias by the Department in the conduct of the anti-dumping investigations, especially with regard to the expedited schedule. *See* US Response to question number one from Japan, concerning the fact that this evidence of alleged bias is on the Department's administrative record.

4. As discussed further below, the very nature of the proceeding under examination by this Panel -- an investigation, on an administrative record, by national authorities -- means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities. Article 17.5(ii) reflects this principle with respect to the Anti-Dumping Agreement, but this principle has also been applied in the context of disputes under the Safeguards Agreement, where there is no "Article 17.5(ii)". *E.g., United States - Measures Affecting Imports of Woven Wool Shirts*

and Blouses from India (United States -- Shirts and Blouses), WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30; *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities*, WT/DS166/R, Report of the Panel (July 31, 2000), para. 8.6.

5. That this Panel should disregard extra-record evidence in examining Japan's Article X claim is underscored by the particular claim at issue here. It would defy law and logic for this Panel to find that the authorities' decision was "unbiased and objective", based on the standards of the Anti-Dumping Agreement, but not "impartial" under Article X. This could not have been the intention of those who negotiated the specific provisions applicable to the review of antidumping investigations, Articles 17.5 and 17.6 of the Antidumping Agreement. To the contrary, it would suggest that there is a conflict, with respect to this issue, between the Anti-Dumping Agreement and Article X. In the event of such a conflict, the Anti-Dumping Agreement prevails to the extent of the conflict, under the general interpretive headnote to Annex 1A. Therefore, this Panel should not consider, for purposes of Article X, evidence that could have been presented to the administering authorities during the investigation, but was not.

Question 24. The USDOC has a system for the disclosure of confidential information under administrative protective order. Under that system, are the questionnaire responses of one respondent made available to other respondents in the investigation? If the answer is yes, was such disclosure made in this case, and, if so, when was this disclosure made?

6. Under Commerce's procedure for disclosure of confidential information under administrative protective order ("APO"), the questionnaire responses of one *respondent* are not made available to other *respondents* in the investigation. However, the questionnaire responses of a respondent are made available to other respondents' *representatives* (generally, legal counsel) that are authorized under the APO to receive such information. See 19 C.F.R. §§ 351.103, 351.105, 351.304-351.306, and 354.19; see also www.ia.ita.doc.gov/apo/index.html. In this case, the representatives for all three Japanese respondents (NSC, NKK, and KSC) were covered by the APO and, therefore, were entitled to receive any questionnaire responses that were filed. For example, the representatives for NKK were entitled to and did receive the confidential versions of the questionnaire responses of KSC and NSC. See Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version); Certificate of Service for NSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version).¹ Disclosure of the questionnaire responses was made at the time that the information was filed with Commerce. The USDOC's regulations require that when a respondent files a document, such as a response to a questionnaire, with the Department, it must simultaneously serve that document on all persons on the service list for the proceeding, and must include a certificate to this effect. 19 C.F.R. § 351.303(f).

Question 25. Could the US list the exhibits of Japan it considers should not be accepted by the Panel and mention for each of those exhibits the reason why it should not be accepted?

7. *Affidavit of Daniel L. Porter, Counsel to NKK (Exh. JP-28)*: The Panel should not accept this sworn testimony by Mr. Porter because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its

¹ It should be noted that KSC's representatives opted not to receive the confidential versions of the responses of NSC or NKK. See Letter from Howrey & Simon to USDOC (18 Nov. 1998) at 1 (Public Document). In addition, it is the United States' understanding that the representatives for NSC requested not to receive the confidential versions of KSC's questionnaire responses. See Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (APO Version).

domestic procedures. The affidavit includes Mr. Porter's testimony about undocumented, alleged conversations with Commerce officials. It is impossible for the Panel to establish the veracity of these allegations without conducting a mini-trial *de novo* before the Panel, calling the persons involved before it for examination and cross-examination. If these conversations had been important to NKK, it could have submitted evidence of them to the Department during the investigation, so that they could have been analyzed, addressed by the other parties, and made part of the administrative record. Mr. Porter's affidavit also includes testimony about his firm's judgment of the impact on NKK's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Moreover, Mr. Porter has not even clearly stated what changes were made to the Department's computer program to calculate these values. Finally, the remainder of Mr. Porter's affidavit constitutes an indiscriminate blend of factual information already on the record with argument, most of which has already been set forth in Japan's first submission. For example, the statement at paragraph 17 of the affidavit that NKK's conversion factor was submitted "within the limits established by USDOC regulations" constitutes argument on a disputed point, yet is presented as if it were fact.

8. *Affidavit of Daniel J. Plaine, Counsel to NSC (Exh. JP-46)*: The Panel should not accept this sworn testimony by Mr. Plaine for the same reasons for which it should not accept Mr. Porter's affidavit. In particular, the Department notes the indiscriminate blending of fact and argument on disputed points, such as at paragraph 11 regarding what allegedly happened at verification, at paragraph 19, where it is not clear what conversion factor, if any, was used in calculating the "actual margins" referred to in that paragraph, and at paragraph 26, where it is apparently assumed that *all* of NSC's home market sales to affiliates were made in the ordinary course of trade.

9. *Affidavit of Robert H. Huey, Counsel to KSC (Exh. JP-44)*: The Panel should not accept this sworn testimony by Mr. Huey because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. The affidavit consists of Mr. Huey's testimony about his firm's judgment of the impact on KSC's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Even if we assume that Mr. Huey's firm ran the computer programs accurately -- *i.e.*, in the same way that the Department would have done had it made the assumptions Mr. Huey made (such as the assumption that *all* home market sales to affiliates were in the ordinary course of trade), the fact remains that his testimony constitutes extra-record evidence and may not be considered by the Panel.

10. *Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians (Exh. JP-56)*: The Panel should not accept this sworn testimony by Messrs. Heiden and Pisarkiewicz because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. If the Japanese respondents had thought it was important to present their arguments concerning the appropriate statistical test using the testimony of these statisticians, they could perfectly well have done so during the investigation, when that testimony could have been analyzed, addressed by the other parties, and placed on the record. Instead, Japan chose to present this post-determination testimony to the Panel, where the statisticians may not be examined or cross-examined.

11. *Newspaper and Other Articles*: The Panel should not consider the following articles, appended to Japan's First Submission: **Exh. JP-16 through 23, 25 through 27, 32(a) through (e), 33, 36 through 38**. As we explained in our First Submission at paragraph 68, Japan could have, but failed to, put this information on the record during the investigation. Japan cannot now supplement, or belatedly attempt to buttress, that record before the WTO. Indeed, even Japan appears to concede this point, by admitting in its Response to the Preliminary Objections that at least some of its articles are "alternative sources for substantive arguments made during the investigations" (paragraph 26) or sources which "make the same argument" as that made during the investigation (paragraph 27). If

material from the record is adequate to make Japan's points, the Panel should insist that only such materials be used. Otherwise, parties in future WTO anti-dumping cases will be given the green light to append to their submissions whatever evidence or facts they think will strengthen points not made as strongly as they would have liked before the investigating authority, during the proceeding. Moreover, Japan now has provided other articles and materials that Japanese producers provided to the USITC which Japan regards as making the some of the same points that it attempts to make before this Panel. The United States has no objection to Japan's substituting documents that make equivalent points but were on the USITC's record.

12. In addition, some of Japan's exhibits challenged by the United States in its first submission were, in fact, on the record before the USITC. In paragraph 24 of the Response of Japan to the Preliminary Objections of the United States of America, Japan provides a chart listing citations challenged by the United States as being extra-record and citations to the administrative record where those documents appeared in the USITC's proceeding. As Japan's first written submission did not provide us with the location of these documents in the administrative record, we apparently missed some of these documents in our search of the record. We thus withdraw our request to have the panel disregard the documents listed in that chart for all the documents except the Paine Webber article,² insofar as these documents involve issues concerning the USITC. However, **Exh. JP-32(f), JP-34, and JP-35** are all cited in the "Economic Context" portion of Japan's First Submission, at notes 36, 40, and 42. It is unclear to what, if any, of the issues of the case these articles pertain. To the extent that they may concern Commerce issues, the United States would still urge the Panel to disregard them, given that they were not before the Department, and because of the bifurcation of the administrative proceedings, as we explain further in our response to the Panel's question number 41.

13. As to the Paine Webber article,³ we note that Japan lists its citation as "cited at Respondents' USITC Prehearing Brief, n.127-28." Thus, although Japanese producers made statements to the USITC based on that article, they chose not to provide the article, itself, to the USITC. The Article therefore was not part of the record before the authority, and the authority had before it only respondents' representations. As a result, we submit that Japan should not put the article, itself, before this Panel, but it should provide to the panel what it provided to the USITC -- the portion of the text of Respondents' Prehearing Brief

Question 26. The United States changed its policy concerning the timing of determinations of sufficient evidence of critical circumstances to justify taking measures necessary to collect anti-dumping duties retroactively. However, it appears that this change in policy was for all future cases. Could the United States verify whether this is in fact so? Could the United States please clarify the status of USDOC "Policy Bulletins" under US law?

14. Yes, the change in US policy concerning the timing of preliminary critical circumstances determinations set forth in Policy Bulletin 98/4 was for all ongoing and future cases. The Policy Bulletin in question, which is entitled "Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations," states that "{t}his policy is effective 7 October 1998 with respect to *all ongoing and future investigations.*" Exhibit JP-3 (emphasis added). Indeed, the USDOC has applied its revised policy not only in the investigation at issue here, but also in the investigation of

² The articles listed in that chart are: *Preston Pipe & Tube Report* (Nov. 1998) and *Preston Pipe & Tube Report* (Sept. 1998), **Exh. JP-67**; Scott Robertson & Frank Haflich, "US mills lift slab purchases," *American Metal Market* (8 Feb. 1999), **Exh. JP-32(f)**; Charles Yost, "Thin Slab Casting/Flat Rolling: New Technology to Benefit US Steel Industry," in USITC, *Industry Trade and Technology Review*, 1996 ITC Lexis 428 (Oct. 1996), **Exh. JP-34(b)**; Donald Barnett and Robert Crandall, "Steel Decline and Renewal," in *Industry Studies* (2d ed. Larry Duetsch, ed. 1998), **Exh. JP-35**.

³ Paine Webber, "Steel: A Gauntlet for All, Rewards for the Select," *Steel Strategies* # 24 (June 1998), **Exh. JP-34(a)**.

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation and in at least three other cases. See *Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China*, 64 Fed. Reg. 61835 (15 Nov. 1999) (prelim. crit. cir. determ.); *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422 (5 Nov. 1999) (prelim. crit. cir. determ.); *Certain Cut-to-Length Carbon-Quality Steel Plate From Japan*, 64 Fed. Reg. 20251 (26 Apr. 1999) (prelim. crit. cir. determ.); *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan and the Russian Federation*, 63 Fed. Reg. 65750, 65751 (30 Nov. 1998) (prelim. crit. cir. determ.).

15. Policy Bulletins are official documents which define or explain the Department's interpretation of law, or method of analysis, of a topic under the antidumping or countervailing duty law. Policy bulletins are publicly available statements of policy, which may be found at the Department's website. See www.ia.ita.doc.gov/policy/iapolicy/htm. Under US law, Commerce has the authority to change its policies, either before or during an investigation, as long as it clearly explains the reasoning for the change in position, parties have the opportunity to comment on the new position within the context of specific proceedings, and the new position is consistent with the anti-dumping laws. See *Association Colombiana de Exportadores de Flores v. United States*, 19 F. Supp.2d 1116 (20 July 1998); *Hoogovens Staal BV v. United States*, 4 F. Supp.2d 1213 (13 Mar. 1998). Policy Bulletins are particularly useful for providing the public with notice of *general* statements of practice (or change in practice) as developed during the course of administrative proceedings (as compared to *regulations*, which are promulgated less often and require more significant administrative process). However, the Department may similarly make statements of policy in case-specific determinations. In this case, Commerce's change in policy was consistent with the statute and the AD Agreement, and the parties had ample opportunity to comment on and provide evidence pertaining to the new policy within the context of this proceeding.⁴

Question 27. Is the US of the view that a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested necessary information with respect to use of facts available? Article 6.8 provides that in all three situations mentioned in Article 6.8, determinations may be made on the basis of facts available. In the event the US considers that the treatment should be different in all three cases, on what basis would the US distinguish between an interested party who "refuses access to" information, "otherwise does not provide" information, or "significantly impedes the investigation"?

16. The treatment of parties in the application and selection of facts available depends upon the situation. For example, with respect to responses to Commerce dumping questionnaires, a party may be substantially or largely cooperative, as was the case with the Japanese respondents in this case, but may not be cooperative in part, by impeding the investigation, or by refusing access to, or not timely providing, some of the necessary information. As it did in this case, Commerce takes into account those actions, or lack of actions, in determining whether to apply facts available and, if so, whether to take an adverse inference. Thus, whether a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested information would depend upon the facts of the case – *i.e.*, to what extent the party impeded the investigation, or failed to provide the requested information and the reasons for that failure, and the extent of the party's cooperation as to the rest of the requested information.

17. In this regard, the US statute, which applies to both USDOC and USITC, breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). The US statute directs the investigating authority to use facts otherwise available where certain circumstances apply,

⁴ See Preliminary Critical Circumstances Memo, at 3 (Exh. US/B-42).

such as whether the party has withheld information, failed timely to provide it, or significantly impeded an investigation. *Id.* § 1677e(a). The statute separately permits the authority to take an adverse inference against a party if the authority finds that the party has failed to cooperate by not acting to the best of its ability. *Id.* § 1677e(b). Thus, our statute does not direct the investigating authority to make distinctions between a party which "refuses access to" information, "otherwise does not provide" it, or "significantly impedes the investigation," in considering whether to apply facts available, and, if so, in considering whether to take an adverse inference.

Question 28. The US seems to suggest that the term "injury" for the purposes of a determination under Article 10.7 of the AD Agreement also includes threat of injury, but that the same term "injury" for a final determination under Article 10.6 of the AD Agreement only relates to current material injury. Can the US please explain this apparent difference in interpretation of that same term?

18. The United States does not mean to suggest this difference in interpretation of the same term. The term "injury," as used in Article 10.6 and applicable, by reference, to Article 10.7 of the AD Agreement, has the same meaning for purposes of both preliminary and final determinations of critical circumstances. Under the definition provided in Article 3, footnote 9 of the Agreement, the term "injury" includes threat of injury "unless otherwise specified." Neither Article 10.6 nor Article 10.7 excludes threat from the definition of the term "injury." Thus, under Article 10.6, a *final* affirmative determination of critical circumstances would be proper if an administering authority finds: (1) that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury *or threat thereof*; and (2) that the material injury *or threat thereof* is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. Sufficient evidence of these same factors is also necessary when making an affirmative preliminary critical circumstances determination under Article 10.7.

19. Confusion on this point may have arisen because of the separate and distinct requirements under Articles 10.2 and 10.4 of the Agreement, regarding the retroactive imposition of anti-dumping duties for the period of provisional measures once there is a *final* determination regarding injury (under US law, a final determination of injury issued by the USITC). Under Article 10.2, retroactive duties may only be applied if: (1) there is a final determination of current material injury (but not threat thereof), *or* (2) there is a final determination of threat of injury *and* the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury. Thus, if the final injury determination in this case had been a finding solely of "threat of injury," an additional finding under 10.2 may have been necessary. Additionally, Article 10.4 requires that (except as provided under Article 10.2), where there is no finding of current injury, definitive anti-dumping duties may be imposed only from the date of the determination of threat of injury. However, because the USITC Final Determination in this case *did* indeed find current material injury, these provisions are not applicable here.

Question 29. The US appears to argue that the use of the words "would cause injury" in Article 10.6(i) of the AD Agreement suggests that the injury might also lie in the future and thus only be a threat of injury at the time of making the determination. In this line of argument, however, the term "injury" seems to be limited to current material injury and does not appear to include "threat of injury". Can the US clarify its position in this respect in light of its overall argument that unless otherwise specified, the term "injury" means both current material injury and threat thereof?

20. As expressly set forth in Article 3, footnote 9 of the AD Agreement, unless otherwise specified, the term "injury" means both current material injury and threat thereof. The term "*would*

cause injury" in Article 10.6(i) is no exception. Because the term "injury" in Article 10.6(i) is not qualified or limited, it must be read to mean "material injury or threat of material injury." Thus, irrespective of the words "would cause," Article 10.6(i) refers to both "injury" and "threat thereof." A contrary reading would be proper only if the provision stated, "would cause injury (but not threat thereof)," as it does in Article 10.2.

21. The use of the words "*would cause* injury" clarifies the question to be resolved under Article 10.6(i) and further establishes that the term "injury" in that provision includes threat of material injury. Article 10.6(i) does not impose a general requirement that there be injury to the domestic industry (or a finding of such). Rather, Article 10.6(i) inquires into whether importers had knowledge (or should have had knowledge) that dumping existed and that such dumping "would cause injury." Because the question under Article 10.6(i) relates to knowledge by importers (an imprecise fact), it is appropriate that the inquiry be simply whether the importers knew or should have known that dumping practices "would cause" injury (or threat thereof). In other words, it would be difficult, if not impossible, for importers to know precisely whether dumping was, at that time, causing injury to the domestic industry, or whether it was threatening the industry. Importers are not expected to know the exact state of the domestic industry (*i.e.*, whether dumping practices are presently threatening the industry or causing current material injury) at a given time. Rather, the question under Article 10.6(i) simply inquires as to whether importers should have been aware that the dumping *would* ultimately cause injury. Thus, although the term "injury" within the Agreement includes both current material injury and threat of injury, the use of the phrase "*would cause*" within Article 10.6(i) actually clarifies that the question is whether importers should have known that the domestic industry *would be injured* (*i.e.*, was being *threatened*) by dumping practices.

Question 30. The Panel understands that in making its critical circumstances determination, USDOC considered it necessary to rely on other information such as newspaper articles and the information contained in the petition because USITC had preliminarily found threat of injury. Why would USDOC feel it needs more information in a case in which USITC finds only threat of injury if, as the US argues, it is clear that the term injury in Article 10.6 of the AD Agreement also includes threat of injury and Article 10.7 of the AD Agreement thus also only requires sufficient evidence of such threat of injury?

22. Article 10.6(i) involves a question of importer knowledge.⁵ In cases where the USITC makes a preliminary finding of *current* material injury, under US practice, the Department presumes, based upon the finding of current injury, that importers *knew or should have known* that the dumping would cause injury. However, in instances in which the USITC makes a preliminary finding that the domestic industry is *threatened* with injury as a result of dumping, but is not facing current material injury, the threat of injury may be less apparent to the importers. Thus, where there is a USITC preliminary finding of threat, but no present material injury, the US looks to other evidence in the record to determine whether importers should have known that the dumping was impacting (*i.e.*, threatening) the domestic industry. In this case, the record contained extensive information suggesting importer awareness of injury (or threat thereof), including: (1) the ITC preliminary determination of threat; (2) various national and international news articles and press reports (*e.g.*, the Wall Street Journal, American Metal Market, etc.) discussing massive dumped imports and plummeting domestic prices; (3) the evidence supporting the high margins in the petition; (4) the 101 per cent increase in imports over the short period of time; and (5) the injury information in the petition.

⁵ Note that, although Article 10.6(i) directs administering authorities to determine whether "the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury," it does not prescribe a specific method for making such determination.

Question 31. The US argues that in US practice there is no difference between the requirement of a "reasonable basis to believe or suspect" and the standard of "sufficient evidence" of the AD Agreement. Can the US further expand on this argument and provide examples from its practice that would support this argument?

23. As a practical matter, the Department uses the two phrases interchangeably, as we detail below. Under US law, the phrase "reasonable basis to believe or suspect" is used in several contexts which arise during early stages of anti-dumping or countervailing duty proceedings. For example, the phrase is utilized in the statutory provisions governing determinations of whether to initiate sales-below-cost investigations, determinations of whether to initiate on certain allegations in countervailing duty investigations, and preliminary determinations of whether critical circumstances exist. *See, e.g.*, 19 U.S.C. §§ 1671(e), 1673b(e)(1), 1677b(b). The use of the phrase, "reasonable basis to believe or suspect" does not mean that there is not "sufficient evidence" of the required conditions leading to initiation or preliminary determinations.

24. Thus, where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition. This evidentiary requirement is explicit in Department determinations. Most significantly, the Department has consistently determined that the "reasonable basis" standard requires a finding of sufficient evidence, and has used the two phrases interchangeably in the context of preliminary critical circumstances determinations.⁶ In addition, the Department has made similar determinations in the context of initiating countervailing duty investigations.⁷ Furthermore, the Department's reviewing court, the US Court of International Trade ("CIT"), has addressed this issue on two occasions. In *Huffy Corp. v. United States*, the CIT found that, "{i}n reviewing the record, . . . even if the appropriate statutory standard is applied, plaintiffs failed to present to the ITA *sufficient evidence to create reasonable grounds to believe or suspect* that sales were being made at below cost in the home market." 632 F. Supp. 50, 58 (Mar. 27, 1986) (emphasis added). Additionally, in a recent case, the CIT found that Commerce had not based its determination to conduct a below-cost test on sufficient evidence. The Court explained, "Commerce did not point to the 'reasonable grounds,' if any, it had to

⁶ *See, e.g.*, Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 64 Fed. Reg. 60776, 60779 (8 Nov. 1999) (Section 733(e)(1) of the Act provides that if a petitioner alleges critical circumstances, the Department will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise Based on the recent existence of this order, there is sufficient evidence to determine that there is a history of dumping of the subject merchandise and a history of material injury as a result thereof.) (emphasis added); Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 64 Fed. Reg. 60422, 60423 (5 Nov. 1999) ("Section 733(e) of the Act provides that the Department will determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping The existence of an antidumping order on ammonium nitrate in the EC is sufficient evidence of history of injurious dumping.").

⁷ *See, e.g.*, Notice of Initiation of Countervailing Duty Investigations: Certain Pasta From Italy and Turkey, 60 Fed. Reg. 30280, 30284 (June 8, 1995) ("The Department does not consider the creditworthiness of a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy. . . . Because petitioners have not provided sufficient evidence of the Turkish pasta producers' uncreditworthiness, we are not including a creditworthiness allegation in our investigation at this time."); *See Notice of Initiation of Countervailing Duty Investigations: Oil Country Tubular Goods From Austria and Italy*, 59 Fed. Reg. 37965, 37967 (July 26, 1994) ("For the purposes of initiation, in determining whether petitioners have provided sufficient evidence of competitive benefit, the Department will determine whether a petitioner has provided a reasonable basis to believe or suspect that [certain conditions have been met]."); *see also Initiation of Countervailing Duty Investigation: Porcelain-on-Steel Cooking Ware from Spain*, 51 Fed. Reg. 26730 (July 25, 1986) (Department stated that "a simple assertion, such as that made by petitioners . . . does not provide sufficient evidence to support an allegation," and thus, does not provide "reasonable grounds within the meaning of {the Act}.").

suspect . . . below-cost sales Moreover, {the statutory provisions} define what constitutes sufficient evidence with which to form a reasonable suspicion, and there is not evidence in the Final Results that Commerce relied on the type of information required to form the 'reasonable grounds to believe or suspect' that below-cost sales existed before it initiated the investigation."⁸ *RHP Bearings Ltd. v. United States*, 2000 Ct. Intl. Trade LEXIS 95, at 35 (Aug. 3, 2000). In other words, both the Department and the CIT have recognized that where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition.

25. It is important to note that, the fact that the phrase "reasonable basis to believe or suspect" is utilized in US law for both initiations of certain types of investigations and preliminary critical circumstances determinations does not mean that the type of evidence for the two types of inquiries is the same. Rather, it merely indicates that, consistent with Article 10.7, the determination may be made at an early stage, prior to the receipt of all potential evidence. In other words, a finding that there is a "reasonable basis to believe or suspect" that certain conditions exist must be based upon sufficient evidence of those conditions for purposes of the particular type of determination at issue. Thus, consistent with Article 10.7, the US statute utilizes the phrase "reasonable basis to believe or suspect" to indicate that preliminary critical circumstances determinations made be made at any time after initiation (*i.e.*, once there is sufficient evidence, but potentially prior to the receipt of all record evidence).

Question 32. On page 10 of its oral statement, Japan quotes from the US first submission that the US acknowledges that "it is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party". Does the US believe that such "likely adverse" information may constitute the sufficient evidence necessary for a determination under Article 10.7 of the AD Agreement? Please explain.

26. Yes. The information contained in a petition *may* constitute sufficient evidence to establish that withholding of appraisal or assessment (or other necessary measures as described by Article 10.7) is necessary. The US agrees that information submitted in a request for initiation is likely, in many cases, to be adverse to the interests of the responding party. It is impossible, however, at initiation, for an investigating authority to know whether the data in the petition are more adverse or more favorable to the respondents than their own data. In fact, in this case, the dumping margins calculated in the petition were actually less than the final dumping margin calculated by the Department for KSC. *Compare Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (6 May 1999) (final determ.) with *Petition for the Imposition of Anti-Dumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan* (30 Sept. 1998) at 21, 21-22 n.33 (Public Version). Nevertheless, although a petition may contain data that are adverse to the interests of the responding party, the data must be based on and supported by the available evidence. Indeed, the petition often reflects *actual* data that are *within the range* of margins for exporters and producers, albeit potentially in the top of the range. As such, the information in a petition may constitute the sufficient evidence necessary for a determination under Article 10.7.

27. It is also important to take note of the purpose and instruction of Article 10.7. In making a determination under Article 10.7, an administering authority is not making a precise finding of

⁸ Note that, the relevant statutory provision (relating to below-cost allegations) details the facts that must be considered for that analysis, but does not discuss the meaning of sufficient evidence in general, nor does it describe the type of evidence to be relied upon. The Statement of Administrative Action ("SAA"), however, does provide guidance on what constitutes "sufficient evidence" for purposes of the COP inquiry. The SAA states, "{r}easonable grounds" will exist when an interested party provides *specific factual information* on costs and prices, observed or constructed indicating that sales in the foreign market in question are at below-cost prices." SAA at 163.

dumping and consequent injury. Rather, an administering authority is determining whether there exists sufficient evidence of critical circumstances (*i.e.*, knowledge by importers of the existence of dumping and that such dumping would cause injury, and massive dumped imports within a relatively short period of time) to warrant immediate action - withholding of appraisement or assessment, or other necessary measures. The US would not propose that a final margin of dumping (an extremely precise calculation containing many variables) be calculated based solely upon facts contained in a petition without first providing the respondents with an opportunity to provide their own data. The Agreement does not provide for such. However, Article 10.7 does provide that measures may be necessary after initiation in order to preserve the ultimate anti-dumping remedy. Thus, a petition containing sufficient evidence establishing importer awareness and massive dumped imports over a short period of time that has been scrutinized for accuracy, as was the case here, may properly provide a basis for a preliminary critical circumstances determination under Article 10.7.

Question 33. In paragraph 42 of its first oral statement, Japan refers to the language of Article 2.2 of the Agreement as setting out the mandatory and exhaustive list of methods for determination of normal value. As Japan notes, Article 2.2 prefaces the alternatives set forth (constructed value and third country export price) with the statement that these alternatives shall be applied "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or "when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison." Does the US consider that, in this case, there were sales of the like product in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison, and that therefore the stated alternatives are not the mandatory and exclusive alternatives for determination of normal value?

28. Yes. The United States does consider that, in this case, even after certain sales to affiliates were eliminated from the home market because they were found to be "not in the ordinary course of trade," other home market sales of the like product which were made in the ordinary course of trade remained.

29. Article 2.1 of the Agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product from affiliated resellers to the first unaffiliated buyer for consumption in Japan were made in the ordinary course of trade and clearly come within this definition. No party disputes that the downstream sales in question are of the "like product." Moreover, because these sales are to unaffiliated parties, there is no suspicion of unreliability by virtue of affiliation. Indeed, no party has suggested that the downstream sales are "outside the ordinary course of trade" for any reason.

30. Furthermore, there was no contention that a particular market situation or low volume prevented a proper comparison from being made between these downstream home market sales and the US export sales. Article 2.2 provides that when "there are no sales" in the home market meeting the above criteria, the alternative bases for normal value are third country sales or constructed value. Because in this case there are sales meeting the criteria for the preferred option of using home market sales as the basis for normal value for each of the products sold to the United States, the Department was not permitted under the Agreement to reach those secondary alternatives. Thus, the question of whether they are "mandatory and exclusive" secondary alternatives is irrelevant.

Question 34. Suppose that sales were made in the home market to, among others, two customers, one of whom is an affiliated customer, while the other is not. Assume also that the weighted average price of the sales to those two customers is identical. It seems it would be possible, under the US 99.5 per cent test, that the sales to the affiliated customer will be

disregarded in the determination of normal value, while sales to the unaffiliated customer having the same weighted average price would not be disregarded, if the weighted average price of all sales to all unaffiliated customers were more than 0.5 per cent higher than the weighted average price to the affiliated customer. Is this a correct understanding of the implications of the 99.5 per cent test in operation? If so, please explain how the US can conclude that sales that are, on average, identically priced may be considered as having been made in the ordinary course of trade when they are made to an unaffiliated customer and outside the ordinary course of trade when made to an affiliated customer?

31. The Panel is correct that, when it applies the 99.5 per cent test in the above-described situation, the Department would disregard sales to an affiliated customer whose sales were made at the same weighted average prices as those to an unaffiliated customer which purchased at prices which were more than 0.5 per cent below the weighted average for the group of all unaffiliated customers.⁹

32. As an initial matter, it should be noted that the margin calculation, which is prescribed by the Agreement, operates in the same fashion. Just as affiliated customer sales fail the arm's length test when their prices fall below the weighted-average sales price to all unaffiliated customers, export sales are considered "dumped" when their average prices fall below the weighted-average price of all home market sales used to calculate normal value. The fact that there may exist a single home market price that is identical or lower than the export price does not eliminate the dumping.

33. We do not disregard sales to the unaffiliated company because they are, by definition, made at arm's length and are appropriately considered, along with other arm's-length sales, in determining the normal value of the merchandise. However, because sales to affiliated parties are inherently suspect with respect to the extent to which the prices are based on market influences, the United States presumes that such sales should be disregarded. It could reasonably have disregarded all such sales in the home market, regardless of price levels to affiliates, as Canada and Mexico do, and relied solely on arm's-length sales to unaffiliated parties.

34. The current test is designed to make limited exceptions to this presumption to increase the volume of sales available for comparison and reduce the need to rely on downstream sales. But this purpose must be balanced against the need to avoid undermining an accurate calculation of normal value—which otherwise would be based on prices to unaffiliated customers in the market *as a whole* and in most instances on *average* prices in the market as a whole. Thus, if pricing to an affiliate appears not to understate pricing in the home market *as a whole* (as reflected in average prices to all unaffiliated customers), we can have a sufficient level of confidence that normal values will not be significantly distorted by including these sales.

35. Because there is no requirement that sales to affiliates *ever* be considered in the ordinary course of trade, there is certainly no requirement that such sales be deemed "ordinary" when made at the level of the lowest-priced sale to an unaffiliated party, rather than at the level of the average of sales to unaffiliated parties. The logical extension of such a practice would be to include all sales to affiliates that were priced at the level of the lowest-price sales to an unaffiliated customer. This plainly would allow respondents to distort the normal value by making targeted low-priced sales to an unaffiliated customer and overweighting the low end of the price range to affiliated customers. Normal value could no longer be assumed to reflect arm's-length prices in the market as a whole.

⁹ This situation could occur because the overall weighted average, across all unaffiliated customers, would, by the very nature of an average, include values both above and below that average. Sales to some unaffiliated companies will be characterized by higher-than-average prices, and sales to other by lower-than-average prices. It is possible that the difference between the average and the rate for the lowest-price company will be greater than 0.5 percent, thus producing the situation described above.

Thus, when an affiliate does not pass the test, we simply choose not to deviate from our preference for using downstream sales to unaffiliated customers to avoid possible distortions. Given the inherent concern with respect to the influence affiliation has on pricing, Commerce's interpretation of Article 2.2, through the use of the 99.5 per cent test, is a permissible interpretation.

Question 35. Could the US explain whether, when sales are found to be outside the ordinary course of trade for having failed the 99.5 per cent test, the US will in all cases replace those sales to affiliated customers with re-sales by those affiliated customers? If not, what other methodologies may be applied according to the US?

36. In most, but not all, cases, when home market sales are found to be outside the ordinary course of trade because they have failed the 99.5 per cent test, the Department will rely on sales to downstream unaffiliated customers, or to downstream affiliated customers that pass the 99.5 per cent test. In addition, the Department's regulations, at 19 C.F.R. § 351.403(d), permit it to exclude downstream sales from the normal value calculation if sales to affiliated parties are less than five per cent of the total value of the exporter or producer's home market sales. During the investigation, the Department granted requests from both NSC and KSC that they be excused, pursuant to this provision, from reporting small amounts of home market downstream sales. See *Preliminary Determination*, at 64 Fed. Reg. 8296 and *Final Determination* at Comment 12. We also make exceptions when respondents can demonstrate that they are unable to obtain downstream sales information by allowing them to avoid having to report downstream sales.

Question 36. The US argues that if sales to an affiliated customer pass the 99.5 per cent test, the prices of all sales to that customer will be used in the determination of normal value. Can the US explain how the fact that the prices of all sales to that affiliated customer are used in the determination of normal value demonstrates the reasonableness of the 99.5 per cent test under the AD Agreement?

37. The fact that we use all sales to an affiliate that passes the test demonstrates that the 99.5 per cent test has no predictable or necessary effect on the calculated dumping margin. For any given affiliate that passes, there typically will be some products sold to that affiliate at prices less than the average price to unaffiliated customers as well as other products sold at prices higher than the unaffiliated average. The products actually used for comparison purposes – to determine normal value for exported subject merchandise – may in fact be those products sold to the affiliate at lower than average prices. Conversely, when sales to an affiliate are disregarded because the affiliate did not pass the test, the sales disregarded may include some sales of products at higher than average prices that would otherwise have been used for comparison purposes. Thus, application of the 99.5 per cent test may increase or decrease normal value. The test does not bias the analysis; it may in fact benefit certain respondents.

38. The fact that all sales to a customer which passes the arm's length test are used in the margin calculation is a natural consequence of the fact that the Department's arm's length test is based on an average which is customer-specific, *i.e.*, it is based on the pricing policies that are the result of relationships between customers. The alternative test proposed during the investigation, on the other hand, was sale-specific; some sales would be deemed affected by the affiliation and others not. Because affiliation is a relationship between customers and not between products, the focus on a customer-specific outcome is one aspect of the reasonableness of the 99.5 per cent test.

39. In addition, the focus on the average price relationships of the affiliated customer is permissible because "averaging" is itself one reasonable way to look at overall pricing behaviour between buyer and seller. In situations involving the sale of multiple products, furthermore, it diminishes the likelihood of data manipulation by "bunching" sales of products to a given customer,

providing some products at lower-than-usual prices as compensation for providing other products at higher-than-usual prices.

Question 37. In paragraph 37 of its first oral statement, Japan has proposed an example of what it asserts is bias in the United States 99.5 per cent test to determine whether sales to an affiliated customer are outside the normal course of trade. Could the US please comment on this example, with specific reference to how the United States would, under the applicable statutory and regulatory provisions, and its established policies, respond to such a situation.

40. The situation described by Japan is one in which a producer sells to its very profitable affiliate at an unusually high price in order to reduce the profits, and thus the tax liability, of the affiliate. Japan complains that the United States "never takes this situation into consideration," and argues that by not discarding such sales, in which the price is distorted but higher than the market average, the United States' arm's length test is "biased."

41. As an initial matter, Section 773 of the Department's statute and section 351.403(b) of its regulations provide that home market sales can only be used in the calculation of normal value if they are made in the ordinary course of trade. If sales are not made in the ordinary course of trade for some reason other than because of affiliation, they can be excluded for that reason. If a respondent were to demonstrate, for example, that a reported "sale" was merely a token vehicle for a transfer of funds to avoid taxes, the sale might be disregarded.

42. A more usual approach is for respondents simply to report the high-price home market sale as being "ordinary." Commerce would apply its 99.5 per cent test, the affiliate to which the higher-price sales were made would pass the test, and these sales would be retained in the database. The retention of such higher-price sales in the home market database, however, in no way constitutes "bias" toward the respondent. Were the Department to disregard higher-price sales to affiliates, it would normally require that the respondent report the downstream sales, which would normally be at even higher prices. In most situations, therefore, the Department's lack of concern with higher-price sales to affiliates may have the effect of reducing margins, compared to the margins that would have resulted from margins based on downstream sales.

43. Nor is the respondent cheated of the benefit it might have had from a comparison to a lower-priced downstream sale. In those infrequent situations where downstream prices are below prices to the affiliated reseller (as when losses are sought to be shifted to the affiliated reseller for tax purposes), the respondent can simply report the downstream prices in the first place. As noted in paragraph 207 of USG's first submission, Commerce instructs respondents that "if you sold to an affiliate who resold the merchandise, report the affiliate's resales to unaffiliated customers [*i.e.*, home market downstream sales] rather than your sales to the affiliate." Where an affiliated customer resells at a price below its acquisition cost, respondents are free to report those lower downstream sales prices even if the sales to that affiliated reseller would have passed the 99.5 per cent test.

Question 38. In paragraph 30 of its oral statement, the US states that "In order to be inconsistent with an international agreement, a domestic law must require actions that are inconsistent with the agreement". Please explain.

44. Japan is arguing that the US statutory provision on critical circumstances is, on its face, inconsistent with the Anti-Dumping Agreement, because it does not explicitly repeat the obligations of the Anti-Dumping Agreement. A statute is not on its face WTO-inconsistent, however, if it permits an interpretation that is WTO consistent. The statute does not have to mimic the words of the relevant agreement. In *United States - Measures Affecting the Importation, Internal Sale and Use of*

*Tobacco*¹⁰ the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*¹¹ found that "the mere existence" of the anti-circumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision.¹² The Panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."¹³

45. That the US statutory provision on critical circumstances does not specifically address some of the Agreement's criteria for the imposition of retroactive measures does not mean that those criteria are not addressed by the administering authority. The statute does not prevent the Commerce Department from considering those factors -- to the contrary, the Commerce Department's policy specifically recognizes those factors. Therefore, the statute itself is not contrary to the Anti-Dumping Agreement. The same analysis would apply to Japan's challenges to the "captive production" and "all-others" provisions of the US anti-dumping statute.

QUESTIONS TO BOTH PARTIES

Question 39. Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

46. With respect to Japan's Article X GATT claim, please see the US response to question 23 above.

47. With respect to Japan's "on its face" claims, in which the Panel is considering the WTO-consistency of a statute "on its face", and not as applied in a particular investigation, the United States believes that Article 17.5(ii) does not limit the evidence that the Panel may consider with respect to those claims. Japan does not offer this new evidence, however, to support its claim that the US statute is WTO-inconsistent on its face. Rather, most of this evidence -- i.e., the press and other public reports and the attorney affidavits -- is offered in support of Japan's claim that the application of the law in this particular investigation was WTO-inconsistent. The only exception to this -- and the only exception offered by Japan -- is the affidavit by so-called "experts" (i.e., statisticians) that the 99.5 per cent test "can be unfair" and can lead to anomalous results. The 99.5 per cent test, however, is not statutory, nor is it regulatory; indeed Commerce specifically declined to incorporate this test into its regulations, because it wanted to leave itself open to considering other "arm's length" tests in the future. Nothing requires the Commerce Department to apply this test in individual investigations. Indeed, the Commerce Department has specifically kept open the possibility that a different approach might be taken in individual investigations, if the 99.5 per cent test produces anomalous results. If the Japanese respondents thought that the evidence of the statisticians was important to show that the 99.5 per cent test operates inappropriately, they had an obligation to present that evidence to the decision-makers. Since they did not, this Panel should not base its examination of this matter on that affidavit.

¹⁰ Panel Report on United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, BISD 41S/131 ("US -- Tobacco").

¹¹ Panel Report on EEC -- Regulation on Imports of Parts and Components, adopted 16 May 1990, BISD 37S/132 ("EEC -- Parts").

¹² *Id.*, paras. 5.9, 5.21, 5.25-5.26.

¹³ *Id.*, para. 5.25.

Question 40. Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted even if they were not made available under the appropriate domestic procedures as required by the AD Agreement? Could there be other reasons apart from the requirements of Article 17.5(ii) of the AD Agreement to exclude certain documents submitted by Japan to the Panel?

48. Please see the US response to question 23 above. For the reasons in that response, the exhibits cited by Japan in its Article X argument (JP 19 and 20), should not be considered by this Panel.

49. There are reasons other than Article 17.5(ii) that this Panel should disregard "extra-record" documents submitted to it by Japan. The very nature of the proceeding before this Panel – an investigation, on an administrative record, by national authorities – means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities.

50. The Safeguards Agreement, Article 3, requires that safeguard measures be applied only after an investigation by the national authorities, which includes opportunities for all interested parties to present evidence and views, and respond to the evidence and views of other interested parties. It does not, however, have a provision explicitly limiting a Panel's examination to the facts presented to the national authorities, as does Article 17.5(ii) of the Anti-Dumping Agreement. Nevertheless, in a number of disputes arising under the Safeguards Agreement, panels have emphasized that their review of Members' determinations to take safeguard measures is limited to the evidence used by the importing Members in making its determinations. *E.g.*, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30. Most recently, the Panel in *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities*, WT/DS166/R, Report of the Panel (31 July 2000), para. 8.6, stated that

With the framework established by the Agreement on Safeguards, it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determination of serious injury and causation. It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not.

Thus, it is not only Article 17.5(ii) of the Anti-Dumping Agreement, but also the nature of the antidumping investigation itself, that directs that the Panel not consider extra-record evidence.

Question 41. Do the parties consider that documents which were submitted to the USITC but not to USDOC were made available "in accordance with appropriate domestic procedures" and can therefore be considered by the Panel even when those documents are submitted to the Panel with regard to claims concerning determinations made by USDOC? According to the parties, should the Panel consider as relevant this internal US distinction between proceedings before the USITC and USDOC when considering the question of admissibility of evidence under Article 17.5(ii) of the AD Agreement?

51. Under the "appropriate domestic procedures" in US antidumping duty investigations, there are two separate administrative records: one for the investigation of dumping by the Commerce Department and one for the investigation of injury by the US International Trade Commission. With very limited exceptions, information is not shared between the agencies. *See* sections 334 and 777(b) of the Tariff Act of 1930. In conducting its investigation and making its determinations, the Commerce Department relies exclusively on the information presented to it and placed on its administrative record; the same is true of the International Trade Commission. Under US procedures, these administrative records are separate, and are not shared between the two agencies. Therefore, when examining this matter "based upon . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", this Panel should disregard documents that are submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record. This is so even if those documents were put on the International Trade Commission administrative record. To do otherwise would be to examine a decision of the Commerce Department based on facts that were not made available to the Commerce Department under its procedures. This would be contrary to Article 17.5(ii).

Question 42. Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

52. The United States agrees with the Panel's suggestion that the use of the word "may" in Article 2.3 may permissibly be construed as meaning that the authority is not *required* to construct an export price on the basis of the resale price to the first independent purchaser in any case. Indeed, as occurred in this case, there are situations where an authority might not construct export price in this manner. For example, as we noted at paragraph 122 of the United States' first submission, Commerce will construct export price in a manner other than on the basis of the resale price to the first independent purchaser, if the value added by the affiliated person is likely to exceed substantially the value of the subject merchandise, when sold to the unaffiliated party. KSC urged that Commerce apply this methodology (the "special rule") to its sales through CSI, but the value added by CSI's further manufacturing did not meet the threshold for application of this rule. Japan did not contest this finding. In addition, as we noted at paragraph 19 of the United States' first submission, Commerce did not construct an export price for the US sales through KSC's affiliate, VEST. Instead, Commerce disregarded those sales altogether, because they accounted for such a small part – less than five per cent – of KSC's US sales.

53. Generally, however, Commerce interprets Article 2.3 in a manner causing it to seek to construct export price on the basis of the resale price to the first independent purchaser. This interpretation ensures that the investigating authority will be using sales and prices of the actual products sold to the United States, even though they must be adjusted for costs incurred in further manufacturing and/or resale. Such information is likely to result in a more accurate construction of the export price, without the problem of searching for surrogate product matches. In addition, this interpretation precludes exporters from manipulating dumping margins by sheltering low-priced sales through their affiliates.

Question 43. Could the parties please clarify their position concerning the degree of cooperation required under Article 6.8 and Annex II of the AD Agreement?

54. Neither Article 6.8 nor Annex II of the AD Agreement addresses the matter of *degree* of cooperation, nor whether that cooperation may be with regard to some or all of the requested information. In fact, the word "cooperate" appears only at the end of paragraph 7 of Annex II, which provides that "if an interested party does not *cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable than if the party did *cooperate*." (Emphasis added.) As we explained in response to question 27 above, the US statute breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). With regard to the second part of the statute -- deciding whether to take an adverse inference against a party -- the investigating authority will consider whether the party has failed to cooperate by not acting to the best of its ability to provide the requested information. *Id.* § 1677e(b). This determination of cooperation will depend upon an analysis of all the facts and circumstances of the case. For example, in this case, all three Japanese respondents – NSC, NKK, and KSC – cooperated by timely producing large amounts of information. It was only with regard to part of the requested information that Commerce determined they did not cooperate by not acting to the best of their ability, such that an adverse inference was warranted as to the facts available for that information.

Question 44. What information was submitted to and accepted by the USITC after applicable deadlines?

55. No information was submitted to and accepted by the USITC after applicable deadlines in the investigation. The deadline for submission of factual information was 3 June 1999, the deadline for parties' final comments was 7 June 1999.¹⁴

Question 45. Is the captive production provision relevant to the USITC's analysis of causation?

56. Article 3.5 of the Antidumping Agreement provides that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury within the meaning of this Agreement" (emphasis added). As a result, all elements of Article 3.2 (volume and effect of prices) and Article 3.4 (impact of dumped imports on the domestic industry) are relevant to an analysis of causation. The captive production provision pertains to the analysis of Article 3.4 factors. When the captive production provision applies, certain of the factors in Article 3.4 (*i.e.*, those considered in determining market share and those affecting financial performance) are considered as they relate to the merchant market as well as to the industry as a whole. The captive production provision therefore is relevant to the USITC's analysis of causation.

57. The captive production provision, itself, however, does not have any special effect on the causation analysis. It is merely a tool used in analyzing some of the factors listed in Article 3.4 to obtain a more complete picture of the affects of dumped imports on the domestic industry as a whole. Using a segmented analysis in this way does not have any particular affect on the causation requirement listed in Article 3.5.

¹⁴ See Transcript of 4 May 1999 Hearing at 334 (Statement of Chairman Bragg). (**Exh. US/C-20**) The Proposed Work Schedule (**Exh. US/C-21**) identifies 3 June 1999, as the "[c]losing of the record and final release of data to Parties," and 7 June 1999 as the date "[f]inal comments of Parties due." The USITC notice, pursuant to § 207.21 of its regulations (19 C.F.R. § 207.21, **Exh. US/C-22(a)**), scheduling the final phase of the investigation similarly explained that, "[o]n 3 June 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment [and] [p]arties may submit final comments on this information on or before 7 June 1999." 64 Fed. Reg. 10723 (5 March 1999) (included as Appendix A of USITC Views, **Exh. US/C-1**). See also 19 C.F.R. § 207.30 (closing of record to parties submissions) (**Exh. US/C-22(b)**), 19 C.F.R. § 207.25 (posthearing brief to include information adduced at or after hearing and answers to Commissioner questions) (**Exh. US/C-22(c)**).

Question 46. Could the parties please comment on the relevance of the Panel's decision in US-Wheat Gluten for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

58. The *Wheat Gluten* panel's decision, insofar as it addresses the consideration of other factors of injury under the Agreement on Safeguards, is not relevant to this case. The United States has announced its intention to challenge the panel's decision to the appellate body, and, therefore, the Dispute Settlement Body has not adopted the decision. In brief, the *Wheat Gluten* panel wrongly interprets the Agreement on Safeguards, without explicit analysis of the relevant language or history of that agreement, as requiring an authority to "ensur[e] that it was the increased imports alone which were causing *serious* injury."¹⁵ So interpreting the Safeguards Agreement, the *Wheat Gluten* panel held that the extent of injury due to increased imports must be "isolated". This interpretation of the Safeguards Agreement, as the United States will demonstrate before the Appellate Body, is (1) contrary to the ordinary meaning of the terms of Article 4 of the Safeguards Agreement and the context of the relevant provisions, which recognize that increased imports may interact with other factors to cause serious injury, (2) contrary to the negotiating history of the Safeguards Agreement, which shows that the members declined to adopt the causation standard that the *Wheat Gluten* panel views as required, and (3) renders the Safeguards Agreement impracticable of application, as it imposes a requirement that cannot in principle be met in most cases.

59. The United States will, if the Panel so desires, expand upon those arguments in this proceeding. It believes, however, that the Panel should decide this case on the terms and history of the Anti-Dumping Agreement, not on that of the Safeguards Agreement. It should remit consideration of the *Wheat Gluten* panel's decision to the Appellate Body.

60. If the panel, however, decides that it may properly consider the *Wheat Gluten* report, it can only conclude that the reasoning of that decision does not apply to the Anti-Dumping Agreement. The *Wheat Gluten* panel itself did not intend its analysis to provide precedent for interpretation of the non-attribution requirement of the Anti-Dumping Agreement. As that panel noted, "significant differences exist between" the legal context for anti-dumping and safeguards cases.¹⁶ The *Wheat Gluten* panel regarded these differences as limiting the relevance to the Safeguards Agreement of *Atlantic Salmon*,¹⁷ cited in the United States' first written submission herein. That decision interpreted the terms of the parallel non-attribution provision of the Anti-Dumping Agreement's precursor, the Tokyo Round Anti-Dumping Code, and was adopted by the Code Committee Members.

61. Accordingly, it is *Atlantic Salmon*, and not the decision in *Wheat Gluten*, that properly forms the background for this Panel's interpretation of the non-attribution provision of the Anti-dumping Agreement. As that *Atlantic Salmon* panel found, the Code parties did not regard it as requiring an authority to demonstrate that dumped imports be the sole cause of material injury to a domestic industry.¹⁸ Although negotiation of the Anti-Dumping Agreement concluded after the *Atlantic Salmon* decision, the Anti-Dumping Agreement, largely modelled on the Code, does not create a "sole cause" requirement, nor has Japan so argued.

¹⁵ United States -- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Panel, 31 July 2000, WT/DS166/R, ¶ 8.151 (emphasis in original).

¹⁶ *Wheat Gluten*, ¶ 8.142.

¹⁷ United States--Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel Adopted by the Committee on Antidumping Practices on 27 April 1994 (ADP/87).

¹⁸ *Atlantic Salmon*, ¶¶ 546, 549.

62. Moreover, *Atlantic Salmon* and not *Wheat Gluten* is instructive in the current case because, as the *Wheat Gluten* panel itself noted, price is not listed as a relevant factor required to be considered in an injury determination under the Safeguards Agreement.¹⁹ In contrast, the express obligation to examine price effects that existed under Articles 3:1 and 3:2 of the Tokyo Round Anti-Dumping Code has been continued by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Japan's arguments in this case concern whether the USITC's analysis of price effects was adequate in view of other factors that it regards as having placed downward pressures on US prices. The *Atlantic Salmon* decision interpreted the obligation not to attribute to dumped imports injury due to other factors in precisely this context.

63. In particular, in *Atlantic Salmon*, the panel and the United States agreed that there was a factor other than dumped imports that might have put pressure on prices in the US market -- low-cost imports that were not subject to the anti-dumping investigation. The panel held that it was adequate for the USITC to have determined that dumped imports accounted for a large portion of increased imports and played a role in the price decline experienced by the US industry. The panel concluded that "it could not ... reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries."²⁰ As to other asserted factors, the panel held that the USITC's findings established that the increased availability of Pacific salmon "could have had only a limited effect on domestic prices."²¹ Similarly, the panel held that the USITC satisfied its obligation to examine other factors in finding that the domestic industry's performance was worse than could be explained by internal industry problems.²²

64. As is discussed in the United States' first written submission, the USITC's determination in this case, particularly with respect to price effects, parallels the analysis upheld in *Atlantic Salmon*. It would be extremely anomalous to hold that the USITC's determination here violated the Anti-Dumping Agreement because of a panel decision purporting to interpret the Safeguards Agreement. The *Atlantic Salmon* panel held that the non-attribution requirement,

"did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than those imports."²³

65. As indicated by its use of the term "somehow", the panel was sceptical as to whether the extent of injury due to other factors could be isolated, and the Anti-dumping Agreement does not state that, in its examination of other factors, an authority should do so.

66. Rather, Article 3.5 of the Anti-dumping Agreement sets forth an analysis that follows the *Atlantic Salmon* panel's description closely. First, Article 3.5 states, "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." This sentence is drawn virtually verbatim from Article 3:4 of the Tokyo Round Code. As the *Atlantic Salmon* panel discussed concerning the Tokyo Round Code

¹⁹ *Wheat Gluten*, ¶¶ 8.109, 8.110.

²⁰ *Atlantic Salmon*, ¶ 557.

²¹ *Atlantic Salmon*, ¶ 558.

²² *Atlantic Salmon*, ¶ 559.

²³ *Atlantic Salmon*, ¶ 555.

provision,²⁴ this sentence, through its cross-reference to the articles setting forth specific factors, requires a specific form of analysis for demonstrating causation.

67. Second, the second sentence of Article 3.5 of the Antidumping Agreement characterizes the required demonstration as establishing "a causal relationship between the dumped imports and the injury to the domestic industry." Thus, the necessary demonstration need not establish that other factors do not also have a causal relationship to the injury.

68. Third, the third sentence of Article 3.5 states that "the authorities shall also examine any known factors other than the dumped imports which at the same time are injury the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." This provision differs from the Tokyo Round Code only in making explicit what the *Atlantic Salmon* panel stated, namely, that such an examination is required. Article 3.5 does not, any more than the Tokyo Round Code equivalent, specify how such an examination shall be conducted. Rather, it is entirely consistent with the *Atlantic Salmon* panel's conclusion that, in conducting the required analysis of causation factors, an authority must examine other known causes of injury to assure that it has not attributed to dumped imports effects that were due to other causes. Had the negotiators of the Anti-dumping Agreement intended to require the "isolation" of the various causes of injury, and thus a more exacting "standard" for the examination of other causes, they could have done so. Instead, they adopted a provision that was consistent with prior precedent expressly rejecting such a requirement.

69. The United States believes that the *Wheat Gluten* panel should have reached a similar conclusion in its construction of the Safeguards Agreement. The non-attribution provision of that agreement was drawn virtually verbatim from the Tokyo Round Anti-Dumping Code. Accordingly, the United States believes that, properly interpreted, the non-attribution requirements of the Safeguards and Anti-Dumping Agreements are consistent. However, even if the *Wheat Gluten* panel was correct in its interpretation of the Safeguards Agreement, the terms and history of the Anti-Dumping Agreement are so different from those of the Safeguards Agreement, as construed by the *Wheat Gluten* panel, that that panel's analysis cannot be properly applied to determinations under the Anti-Dumping Agreement.

Question 47. When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipments times for steel exports from Japan to the US?

70. Neither annual nor monthly data show Japanese steel exiting the US market over the period of investigation. Dumped imports from Japan were highest in the final quarter of the period of investigation, the fourth quarter of 1998. Thereafter they declined significantly.²⁵ Lead times for

²⁴ *Atlantic Salmon*, ¶¶ 549-551.

²⁵ Imports from Japan totaled 240,976 short tons in 1996, 548,822 short tons in 1997, and 2,684,756 short tons in 1998. USITC Pub. 3202 at IV-2 (based on official statistics and questionnaire responses). *See* US imports for consumption by source and by month (public portion of confidential memorandum INV-W-124 (9 June 1999)) (Exh. US/C- 23).

Japanese product, including shipment times, "averaged 122 days from Japan in 1996-97 and 113 days in 1998."²⁶

²⁶ USITC Views at II-11.

ANNEX E-4

Responses of the United States to Questions from Japan

(6 September 2000)

Question 1. Does the USG believe an authority would ever knowingly leave evidence of bias on the administrative record? If not, does not this mean that evidence of bias will in most cases need to come from extra record evidence?

1. Yes, under US law an authority must leave evidence of bias, or alleged bias, on the record, so long as such evidence is timely and appropriately filed with the Department. Section 351.104(a)(1) of the Department's regulations calls for it to "include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by" it during the course of a proceeding that pertains to the proceeding. Section 351.104(a)(2) provides for Department personnel to return to the submitter documents which contain untimely-filed new factual information and documents which do not meet the requirements with respect to business proprietary information. There is no provision for purging documents from the record on a discretionary basis, because of allegations of bias or for any similar reasons.

2. For example, the respondents in this case and in the companion case on hot-rolled steel from Brazil made a joint public submission on 13 November 1998 protesting the manner in which the Department was conducting the investigation, especially with respect to the expedited schedule for those investigations. The letter alleged that this approach constituted evidence of bias, twice suggesting that the Department's decision to expedite the investigation indicated that it had prejudged the outcome of the investigation. That letter, which was timely and properly filed, remains part of the official record. Japan, however, has not included it in its exhibits for this case. The United States would be glad to provide the Panel with a copy of it, should the Panel request.

3. Finally, this question has no relevance to this dispute. Apart from data on conversion factors (which have no relevance to alleged bias), Japan is not alleging that any evidence whatsoever, whether related to alleged bias or not, was improperly excluded from the administrative records in these proceedings. By arguing that evidence of bias would have been improperly excluded from the administrative record, Japan is simply attempting to justify the failure of its companies to submit information for the record during the course of the antidumping duty investigation. If this information had been submitted for the administrative record, it would now be properly before the Panel.

Question 2. Does the USG believe that objective assessment of the facts in DSU Article 11 sets forth a broader standard of review than AD Agreement Article 17.6?

4. We do not understand what is meant by a "broader standard of review". The "standard of review" generally refers to the amount of deference that is accorded the national authorities when a Panel reviews their decisions. It is not clear what the "breadth" of that deference means. We note, however, that, in the context of safeguards measures, a number of panels have found that Article 11 does not provide for de novo review of the authorities' decision, and does not provide for review based on facts not made available to the authorities:

We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue.¹ However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected.²

Question 3. The US oral statement in para 6 indicates that panels must determine whether facts are established properly, yet argues in para 7 that panels are not fact finding bodies. How can the panel fulfill its obligation to determine whether particular facts have been properly established without considering the factual circumstances, and the evidence of those circumstances, through which those facts were established?

5. The procedures used by the United States to establish the facts in this proceeding are clear from the relevant regulations governing the collection of facts and evidence, found at 19 CFR parts 201, 207 and 351, and from the record of the proceeding itself, which details the process of soliciting and accepting information and views from interested parties. Japan has not challenged those procedures. The only information that Japan has alleged was improperly excluded from the administrative record is the information on conversion factors, submitted by NSC and NKK. Although these data themselves are not on the administrative record, the fact that they were rejected, and the reasons for their rejection, are on the administrative record for review by this Panel. These data themselves are not relevant to whether facts regarding their untimely submission were properly established. In short, the United States believes that there is no need to rely on extra-record evidence, not presented to the authorities during the investigation, to determine whether the establishment of the facts in this investigation was proper.

Question 4. The US has been quite vocal in its support of the admissibility of amicus briefs in panel proceedings. Since such amicus briefs are by definition facts that were not considered by the authorities, does the US believe that no amicus briefs may be submitted to panels considering anti-dumping measures?

¹ We recall that in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("US - Underwear"), (adopted on 25 February 1997, WT/24/R), paras. 7.53-54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil - Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, adopted on 28 April 1994, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.

² *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30.

6. Amicus briefs are not "by definition facts that were not considered by the authorities". Japan confuses the appropriateness of considering amicus briefs with the consideration of new facts that were not presented to the authorities during the antidumping investigation. An amicus brief, like the submission of a party, may well present legal and factual analysis based entirely on the facts made available to the authorities during the antidumping investigation. It is not itself a new "fact" any more than Japan's first written submission is a new "fact". Taking into account an amicus brief, therefore, is different from asking this panel to consider new facts that could have been put on the authorities' administrative records, but were not.

Question 5. In its closing statement, the US claims it does not know whether particular "facts available" is adverse or not. Yet in this case, the US determination shows the US believed its choice of "facts available" was sufficiently adverse to teach respondents a lesson. Did the US believe that its choice of "facts available" in this case was adverse or not?

7. As the US explained in its closing statement, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. This uncertainty is reflected in paragraph 7 of Annex II, which refers to the fact that use of adverse facts available "could," rather than "would" lead to a result which is less favorable to the party than if it did cooperate. Nevertheless, in this case, Commerce's choice of facts available for KSC, NSC, and NKK was presumed to be sufficiently adverse, based on a judgment involving all the facts and circumstances of the case, as to be likely to prevent respondents from obtaining a more favorable result by failing to cooperate.

Question 6. The US statute refers to two types of "facts available" --- with adverse inferences and without adverse inferences. Under the US practices, is it not true that either type of "facts available" could lead to results "less favorable" than the actual information? For "facts available" without adverse inferences, what steps does the USDOC take to ensure that such information is not "less favourable?"

8. As we explained in response to question 5 above, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. Thus, it is theoretically possible that either type of facts available (neutral or adverse) could lead to results less favorable than the unknown, actual information, just as it is theoretically possible that either type could lead to results more favorable. Nevertheless, an examination of all the facts of record can usually give Commerce a fair idea of whether its choice of information is likely to be adverse or neutral.

Question 7. If the information about KSC sales to CSI was so crucial to the investigation, why did USDOC not ask CSI for the information?

9. Commerce did not ask CSI directly for the information, because Commerce properly concluded that KSC had ample means to provide the information from its 50 per cent-owned affiliate and because KSC repeatedly told Commerce that CSI would not provide the information and that KSC wished to be excused from providing it. KSC simply failed to employ the means available to it to obtain the information requested by Commerce, and Commerce applied adverse facts available for that failure in a manner consistent with Article 6.8 and Annex II of the Agreement. The administrative record does reflect consideration of the idea that Commerce obtain the CSI information under separate protective order, so that KSC would not have access to it. However, KSC officials advised Commerce at verification that CSI had rejected this idea. *See* Verification Report at 23, **Exh. US/B-21/bis.**

Question 8. What is the difference between "logical inferences" and "adverse inferences" in the context of determinations about "facts available?"

10. The US statute and practice do not make a distinction regarding these terms and, in fact, do not talk about "logical inferences." Neither does the Anti-Dumping Agreement. Japan may be recalling the Oral Statement by the European Communities, delivered before the Panel at the Third Party Session on August 23, 2000. At paragraph 7 of its statement, the EC said:

When selecting "facts available" the investigating authorities may take into account, among other circumstances, the degree of co-operation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive". (Footnote omitted.) Indeed, strictly speaking, they are not even "adverse." *They are just logical inferences*, based on the assumed rationality of the exporter's behaviour: a rational exporter would co-operate, if it could expect to obtain a better result by doing so than on the basis of "facts available". (Emphasis added.)

See also the Appellate Body's recent decision in the Canadian Aircraft case, cited at the US First Submission, paragraphs 70 of Part B, as well as US discussion at paragraph 79 of Part B, regarding that case and the taking of a logical inference.

Question 9. Why does USDOC believe the information on NSC/NKK conversion factors was too burdensome to include in the determination once it was provided? Why was this information different from the other types of corrections/clarifications routinely submitted pursuant to the special regulation allowing such submissions seven days prior to verification?

11. Japan's question is based on several misconceptions with respect to the facts of this case.

12. First, the Department did not reject the NSC and NKK conversion factor data because it was "too burdensome to include," but rather because it was first presented long after the reasonable deadlines established for providing this information. If administering agencies were compelled to accept any information, no matter when provided, unless they could demonstrate, on an item-by-item basis, that it was "too burdensome" to incorporate particular data elements into their analysis at that time, the right of such agencies to establish and enforce reasonable deadlines for submission of information requested in questionnaires would be entirely gutted and the law would not be administrable.

13. Second, there is no regulation "allowing such submissions seven days prior to verification." The so-called "Seven-Day Rule," codified at 19 C.F.R § 351.301(b)(1), does not govern the submission of data requested in questionnaires, as the conversion factor data were. Instead, section 351.301(c)(2), regarding questionnaire responses and other submissions made on request, requires that data requested in questionnaires be submitted by the questionnaire deadline.

14. Third, the conversion factors and their supporting data did not constitute "corrections/clarifications" to information previously timely submitted in response to a questionnaire. Instead, they were entirely new databases that both NSC and NKK had previously maintained were both unnecessary and impossible to provide.

Question 10. Why does USG believe "neutral gap filler" will be information favorable to respondents? Since respondents don't know what information will be used, how could

respondents possibly know in advance whether information would be favorable or unfavourable?

15. The Department cannot know for certain, for the reasons explained in the responses to questions 5 and 6 above, whether "neutral gap filler" will be favorable, unfavourable, or neutral to respondents. However, when Commerce chooses such information as facts available (because it is declining or not able to take an adverse inference), it does not do so with the intention of selecting information favorable to respondents. Rather, it does so with the aim of filling in information which is likely neither favorable nor unfavourable, but rather neutral, or approximately what the information would have been, had it been available, as best as Commerce can judge from the record. Nevertheless, it can be said that, if an investigating authority used neutral facts available in all situations, this would put respondents in a position of being able to know that they are likely to be better off if they withheld certain unfavourable information. In Commerce cases, respondents have the greatest incentive to withhold information that is least favorable, or adverse, to them, and Commerce reasonably presumes that is why they did not cooperate in providing the information. Therefore, using neutral facts available - information which is judged to be, to the extent possible, neither favorable nor disfavoured - likely would benefit the respondent in most instances. Though respondents might not know exactly what would be used in lieu of the information withheld, the likelihood that they would benefit by withholding adverse information would increase substantially and result in enormous incentives to withhold information.

Question 11. Why does USG read ADA 6.13 as meaning the authority should provide no assistance to large companies? How does USG reconcile this with the mandatory language in ADA 6.13 that authorities "shall take due account" and "shall provide any assistance practicable?"

16. The United States does not read Article 6.13 as meaning that the authority should provide no assistance to large companies. As we stated at paragraph 103 of Part B our first submission, the provision, which includes the phrase, "in particular, with regard to small companies," should be given particular force and effect with regard to small companies. As we pointed out at paragraph 104 of Part B of our first submission, KSC is not a small company. Its sales revenue for fiscal year 1998 exceeded \$9 billion. Nevertheless, if it were appropriate that KSC should be provided assistance in a given situation, Commerce would provide any assistance practicable, as Article 6.13 requires. It was not appropriate or practicable in this case, as we have explained, because KSC did not seek any assistance, but repeatedly requested that it be excused altogether from providing the information. Moreover, as we also explained in our first submission, advising KSC on how to manage its own joint venture was beyond any "assistance" which the Department might have been required to provide.

Question 12. Why does USDOC believe an isolated margin for a single product category, such as used for KSC, is somehow more representative than the average transfer prices for various product categories?

17. The issue was not one of representativeness, because Commerce had already decided that it would take an adverse inference with respect to KSC. It therefore chose a margin which it believed (although it could not know for certain) was likely to ensure that KSC would not benefit by its failure to cooperate, in light of the inference that the missing information was withheld because it was adverse. If the Department had decided not to take an adverse inference with respect to KSC, and instead to apply "neutral gap filler" facts available, it would have looked for a margin that might represent approximately what Commerce could estimate that the non-adverse margin resulting from KSC's constructed export price through CSI, to unaffiliated US purchasers, would have been. (In fact, as may be noted in paragraph 32 of Mr. Huey's affidavit, Exh. JP-44, should the Panel consider that affidavit, KSC's own data suggests that that margin was quite high.) In any event, Commerce would not consider reliable or representative the three average transfer prices which KSC provided for

CSI (*see* Exh. US/B-24/bis) because the affiliation between KSC and CSI made these prices suspect. In addition, they were average transfer prices for three very broad product categories, and thus too imprecise to form a basis for comparison to normal values for particular models. It was far more reasonable to look to margins resulting from actual, verified sales by KSC to the U.S., in choosing either "neutral gap filler" or adverse facts available.

Question 13. USG argues that Section 351.301(b)(1) does not apply to data requested in questionnaires. But is not all information collected in an investigation provided pursuant to questionnaires? To what information does the regulation apply?

18. No. Not all information collected in an investigation is provided pursuant to questionnaires. Although most information provided by respondents in investigations is that requested in questionnaires, the domestic industry and importers (neither of which receive questionnaires in antidumping investigations before the Department of Commerce), as well as responding exporters, or even non-selected exporting companies may have factual information they believe the Department should consider in conducting its investigation, including during the verification visits. Rather than creating an exception that swallows the rules governing deadlines for gathering information that the Department knows it requires for the conduct of the investigation, this provision allows for any parties to submit to the Department, up until a week before verification, additional information of which the Department may not be aware, and which they wish the Department to take into consideration. For example, a party might wish to place on the record a news Article providing information on certain costs to be scrutinized at verification.

Question 14. Why does USDOC treat average price levels below 99.5 per cent as outside ordinary course of trade, but treats price levels higher as outside the ordinary course of trade only if the price levels are aberrationally high?

19. DOC's test is designed to allow it to use prices to affiliates in the home market to the extent that those prices will not distort the picture of what is happening in the real, arm's-length, market. We do not consider sales to affiliates that pass the test to be a problem in this respect, because the test indicates that these affiliates are not given favorable treatment due to the affiliation. Thus, in those instances we make an exception to the general rule that sales to affiliates are outside the ordinary course of trade. Moreover, the 99.5 per cent test, which has a specific purpose, does not rule out the possibility that a company could demonstrate that its high-priced sales are outside the ordinary course of trade.

20. Furthermore, affiliation between parties taints transactions between them. This "taint" normally would not result in sales prices being higher than the weighted average price to the arm's-length market, but rather lower. The Agreement, in Article 2.1, defines dumping in a similar fashion: merchandise is dumped if it is "introduced into the commerce of another country at less than its normal value." Purchasing subject merchandise, even from an affiliate, at prices significantly higher than average, if anything, may reflect an attempt to compensate for other sales, at below-average prices. Even among affiliates, there are stronger constraints to artificially high prices than to artificially low prices. And in the dumping context, there are incentives to sell to affiliated parties at artificially low prices.

Question 15. Why is it "fair" to test only whether prices are too low?

21. Please see the answer to Question 14 for the affirmative reasons why this test is "fair." Japan's question implies that, by not also finding home-market sales to be "outside the ordinary course of trade" on the basis of above-average prices, the Department in some way prejudices the interests of respondents. Just the opposite is true. Were the Department to also disregard sales to home market affiliates who pay above-average prices, two things would happen. First, respondents

would be burdened with reporting downstream sales more frequently, because the current test allows some sales to affiliates to be used in lieu of downstream sales. Second, the downstream sales that would otherwise be used would normally be at even higher prices, possibly resulting in higher margins. Thus, the Department's policy of allowing the use of only sales to affiliates that pass the test is not "unfair" to respondents (indeed, it may benefit them), but is merely a reflection of the fact that the Department's sole concern is with the much more common phenomenon of below-average price sales to affiliates, due to price manipulation.

Question 16. Can the US clarify its views on the relationship between arm's length transactions and sales in the ordinary course of trade?

22. For a sale to be made in the ordinary course of trade, it normally must be a sale negotiated at arm's length. A sale which is not made at arm's length does not meet this fundamental condition and is thus presumed to have been made outside the ordinary course of trade. Thus, a home market sale which is made between unaffiliated parties is assumed to be in the ordinary course of trade absent some indication to the contrary, whereas a home market sale made between affiliated parties is inherently suspect. Accordingly, the Department will consider a sale to an affiliate to have been made in the ordinary course of trade – or equivalent to an arm's-length sale – only if that affiliate passes its 99.5 per cent test and is therefore deemed to have a pricing relationship similar to that of unaffiliated customers.

23. Sales made in the ordinary course of trade, however, are not necessarily identical to sales made at arm's length. A sale made to an unaffiliated party, even if it is at arm's length, may still be outside the ordinary course of trade for other reasons. For example, referencing the non-exhaustive list given at page 834 of the Statement of Administrative Action, such a sale may involve merchandise produced according to unusual product specifications, merchandise sold at "aberrational" prices, or merchandise sold pursuant to unusual terms of sale. By the same token, a sale to an affiliate that "passes" the 99.5 per cent test may be determined not to be in the ordinary course of trade for those, or other reasons. In sum, sales which are not made at, or equivalent to, arm's length are only one sub-category of sales not in the ordinary course of trade.

Question 17. Can the USG identify any examples of cases in which it disregarded home market prices as being too high?

24. The United States has not identified any examples of cases in which it was even asked to disregard the home market sales to an affiliated company because they were, on average, so high that the respondent argued that the sales to that affiliate were outside the ordinary course of trade. This is not surprising, given that, as explained in our answer to Question 15, it would not be to a respondent's advantage for the Department to disregard sales made to an affiliate at a high average price, because those sales would be replaced by the affiliate's downstream sales, which would likely be at a higher price.

Question 18. If the average price to affiliated customers is 0.5 per cent below the average price to unaffiliated customers, USDOC considers this evidence that the price has been influenced by the relationship. If so, why is an average price 0.5 per cent higher not also evidence that the price has been influenced? What about an average price 2.5 per cent higher?

25. Prices between affiliated parties at any level are inherently suspect because they are not set according to normal market influences. Nevertheless, for the reasons set forth in the Department's answers to Questions 14 and 15, the Department is not concerned with possible influence of this sort (which is not related to manipulation of the results of antidumping proceedings and probably has little effect relative to using the downstream sales), and therefore retains these sales in the home market

database (unless they are shown to be outside the ordinary course of trade for some other reason) in order to lessen the need to resort to a greater extent to downstream sales.

Question 19. Could the USG identify specifically the ways in which it "relied on" or in any way addressed the preliminary USITC assessment of whether there was any current injury?

26. The US assumes that this question pertains to the Department of Commerce's preliminary determination of critical circumstances. The USITC preliminarily found that the US industry was being threatened with material injury by reason of the dumped imports from Japan. The USITC did *not* discuss current injury, nor did they make a finding of such.³ See *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia - Written Views and Report of USITC Preliminary Determination* (Nov. 1998) ("*USITC Views*") (Exh. JP-8). In order to determine whether importers knew or should have known that dumping existed and would cause injury, the Department relied, in part, upon the USITC's affirmative finding of threat to the US industry.⁴ As the US explained in its First Submission (paragraph 459 of Part B), because Article 10.6 utilizes the term "injury" without qualification, it refers to both injury and threat of injury. Thus, the Department's reliance on the ITC's finding of threat of injury, and on other significant evidence (see US First Submission at paragraph 476 of Part B), for purposes of determining importer awareness, was consistent with the Agreement.

Question 20. Does the USG believe that the standard "sufficient evidence" for initiating a case is the same as "sufficient evidence" to justify the extraordinary remedy of critical circumstances?

27. As the US explained in its First Submission (paragraphs 467-470 of Part B), the "sufficient evidence" standard must be viewed within the context in which it is applied. The type of evidence that is sufficient for purposes of initiation of an anti-dumping investigation may or may not be sufficient for purposes of a preliminary critical circumstances determination. In this case, in making its preliminary critical circumstances determination, the Department of Commerce looked to additional evidence outside of that presented at the time of initiation of the anti-dumping investigation.

Question 21. Beyond the general statement of purpose in the Policy Bulletin, where did USDOC make specific factual findings about the remedial effect of imposing antidumping duties?

28. Because the finding is apparent in the Department's analysis and in the record evidence, a separate, delineated finding was not necessary. Article 10.6(ii) states, "the injury is caused by massive dumped imports of a product in a relatively short time *which in light of the timing and the volume of the dumped imports and other circumstances* (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. . . ." The Department considered the effect of the timing and volume of the dumped imports. First, the Department determined there was a 101 **per cent** increase in imports over a short time following the time when importers and exporters became aware that a dumping case was

³ To the extent that there is any discussion of current material injury, it is found in Commissioner Crawford's separate determination that the US industry was suffering current material injury by reason of the dumped imports. See *USITC Views*, at 19 (Exh. JP-8). In Commissioner Crawford's views, she found that the domestic industry "would have increased its prices, and therefore, its revenues, significantly had the subject imports been fairly traded," and thus, the domestic industry was materially injured as a result of the dumped imports. *Id.* at 26. This is the only discussion in the USITC's preliminary determination relating to current material injury.

⁴ Note that the USITC also specifically found threat of material injury resulting from the surge of dumped imports. The USITC stated, "we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future." See *USITC Views*, at 15.

likely, and that the producers accounting for the majority of the imports were dumping. Additionally, the record contained significant information indicating that the surge of dumped imports contributed, or caused, threat to the US industry. For example, the USITC preliminary determination states, "[w]e recognize that petitioners have not specifically alleged that the volume of subject imports during 1995-97 was injurious. However, we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future. . . . In our view, these increases in volume and market penetration indicate a likelihood of substantially increased subject imports in the imminent future." *USITC Views*, at 15. Additionally, numerous exhibits in the petition demonstrated that the *surge* of dumped imports was severely impacting the US industry - causing prices to collapse, forcing US producers to cut production and diminishing earnings.⁵ This evidence shows that, without some remedial action, the surge of dumped imports was likely to continue and compound the threat to the US industry even further. Because the Department considers these factors in its analysis, it stated in Policy Bulletin 98/4 that the "purpose of [the critical circumstances] provision is to ensure that the statutory remedy is not undermined by massive imports following initiation of an investigation," *see Critical Circumstances Policy Bulletin*, 63 Fed. Reg. 55364 (15 Oct. 1998)(**Exh. JP-3**). As such, this factor was fully considered and addressed in the preliminary determination of critical circumstances in this case as set forth above. Because all of the factors in Article 10.6 were fully considered and addressed therein, the preliminary determination was consistent with the Agreement.

Question 22. If the captive production provision seeks only to add an additional relevant factor to be considered, why does the statute say "shall focus primarily" rather than simply saying "shall consider."

29. At the outset, the United States notes that Japan's question is misplaced because the captive production provision does not "add an additional relevant factor to be considered." The relevant factors that the USITC must consider are listed in 19 U.S.C. § 1677(7)(C)(iii), and these factors correspond to the factors listed in Article 3.4 of the Antidumping Agreement. The captive production provision merely requires the USITC, when considering certain of these listed factors, to examine the merchant market segment as a step in considering injury to the industry.

30. The statute directs the USITC's attention specifically to the merchant market segment because it is there that evidence of injury by reason of dumped imports would be most readily apparent. From there, the statute then requires the USITC to consider the effects of dumped imports, including the effects of dumped imports on the merchant market, as well as on the industry as a whole.

⁵ See, e.g., *Metal Bulletin* (24 Sept. 1998) ("The July figure fully supports our industry's contention that massive levels of steel are being dumped.")(Exh. US/B-40(c)); *Morgan Stanley, Dean Witter Industry Report* (21 July 1998) ("hot-rolled imports are in at a price of . . . 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in later September or early October.")(Exh. US/B-40(b)); *Wall Street Journal* at A4 (21 Sept. 1998) ("Steel imports to the US continued at their record pace in July . . . lost market share has hit the US steelmakers hard, particularly in the last three months as the US industry's pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earnings estimates for the third and fourth quarters.")(Exh. US/B-40(b)); *Metal Bulletin* at 33 (7 Sept. 1998) ("Nucor has cut production . . . in response to low market prices . . . because of market turmoil in the wake of a flood of cheap imports.)(Exh. US/B-40(b)); *Paine Webber - Metal Stock Strategies* (8 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.")(Exh. US/B-40(b)); *Wall Street Transcript Corporation - Industry Report* (20 July 1998) ("Imports were simply so large, and prices at which they entered markets so low, that steel pricing was compromised. . . . Further, the prices at which these products are being offered continues to erode the pricing outlook for domestic steel.")(Exh. US/B-40(b)). All of the cited newspaper articles are on the Department's administrative record.

This scheme does not in any way place emphasis on the merchant market segment over the entire industry. Nor does it have anything whatsoever to do with the weight given to any factor. In fact, in the determination in this case, the significance of the consideration of the merchant market followed by the industry as a whole was not lost on the Commissioners. Notably, Commissioner Bragg took exception to this order of consideration -- not to the weight that the other Commissioners in the majority were placing on the merchant market segment.⁶

31. Moreover, Japan's apparent preference for the "shall consider" over the "shall focus primarily" language is also misplaced. As the USITC found, in accordance with the statements in the Statement of Administrative Action, by using the "shall focus primarily" language, Congress has required the USITC to consider both the merchant market segment and the entire industry in its examination of certain factors. "Shall consider," without any description of how the consideration is to take place (*i.e.* primarily), would leave open the possibility that an authority could consider the merchant market exclusively. Congress removed this potential ambiguity by stating that the USITC "shall focus primarily" on the merchant market and thus provided a more precise structure than that proposed in the Japanese language.

Question 23. Even if the word "primarily" connotes more than one item of focus, [what] does the term mean about the relevant weight to be assigned the various areas of focus.

32. The captive production provision has no bearing on the weight that the USITC assigns to each factor. Commissioners assign weight to each factor based on the facts of the case before them. Article 3.4 of the Antidumping Agreement provides that no "one or several of these factors [can] necessarily give decisive guidance." In keeping with this provision, 19 U.S.C. § 1677(7)(E)(ii), states that "the presence or absence of any factor which the Commission is required to evaluate . . . shall not necessarily give decisive guidance with respect to the determination of the Commission . . ." The captive production provision does not inject into the impact section of the statute any new obligations that would dictate the weight to be given to any particular factor. The captive production provision merely calls for an extra step in the evaluation of certain of the factors listed in the impact section of the statute before those factors are weighed with all other factors. Thus, it does not disturb the overarching principle, articulated in both the statute and the Anti-dumping Agreement, that the weights to be assigned to each factor are determined by the Commissioners on a case-by-case basis.

Question 24. In para 34 of its oral statement, the US alludes to a two step approach. In light of the statutory requirement to "focus primarily" on the merchant market for market share and financial performance, could the US clarify the relative weight to be assigned to each step in the analysis?

33. As stated above, the captive production provision merely interposes into the statutory scheme an additional requirement to consider certain factors as they relate to the merchant market as well as the entire industry. It does not intervene in the assessment of relative weights that the Commissioners are to assign to any factors.

Question 25. How does the USG justify giving primary focus to the merchant market concept of "sales" at the expense of other factors such as overall domestic industry concept of "output?"

34. The United States does not systematically look at any factor listed in the Anti-Dumping Agreement or the US statute "at the expense of" any other factor. The Commissioners place emphasis on the various factors based on the facts of each case.

⁶ See, e.g. USITC Views at nn. 59, 75.

35. In fact, it is Japan that argues for an approach that would systematically emphasize one factor "at the expense of" another. As we have argued extensively in our first written submission, sales occur in the merchant market. In recognition of that fact, the captive production provision provides for an analysis of the merchant market to capture the effect that dumped imports are having on sales. Without such a focus on the merchant market, the USITC would be limited to evaluating only domestic producers' output (transfers plus sales) and would ignore the effects of dumped imports on sales.

Question 26. Where does the USITC explain the way in which it resolved the inconsistent trends in operating profit over the 1996-98 period between the industry overall and the merchant market only?

36. The USITC was not required to resolve any inconsistent trends in the data. Under Article 3.4 of the Anti-dumping Agreement, the USITC only had an obligation to consider all relevant economic factors bearing on the state of the industry. The USITC considered the operating profits for the 1996 to 1998 period for the merchant market and the entire industry.⁷ Thus, the USITC satisfied its obligations under the Agreement.

Question 27. In footnote 157 of its submission, the USG accuses Japan of not being clear what "factor" of financial performance it means. How does the USG address the fact that the operating income ratio for the domestic industry as a whole in 1998 exceeded that of 1996, even after the increase in imports?

37. Again, the USITC is not required to address every fact bearing on each factor. It is charged with examining relevant economic factors to assess injury. The USITC satisfied this requirement. The USITC looked at three year trends and noticed that during the last two years of the period, when apparent consumption increased to record heights, operating income and the ratio of operating income to net sales declined. It explained this anomalous situation based on declining unit values and shipments over this period.⁸

38. Japan takes issue with the fact that the USITC did not discuss the ratio of operating income to net sales for 1996 (as stated above, the USITC did address the operating income for 1996). The USITC, however, considered the ratio of operating income to net sales in light of the trends from 1996 to 1998 and noticed that the data for 1997 to 1998, in particular, posed a question that needed to be resolved. A comparison of 1996 to 1998 data does not respond to this question. It is true that a comparison of 1996 to 1998 data, alone, without consideration of 1997 data, would show an increase in the ratio of operating income to net sales for the entire domestic industry, as Japan suggests. This trend over the entire period does not mandate a negative determination, however. As the panel found in *Argentina-- Footwear*,⁹ simply because one indicator follows a trend different than other factors does not mean that the USITC's injury determination is fatally flawed. Moreover, the USITC made no finding that the domestic industry was healthy in 1996. As a result, this panel should not be swayed by Japan's focus on the changes from 1996 to 1998. It is possible (although the USITC made no findings to this fact) that the USITC would have found the domestic industry performing poorly in 1996 and 1998. Because the USITC did not have to resolve this question to reach its material injury determination, Japan's arguments are misplaced. Further, it is clear that the USITC found that falling

⁷ It looked at and compared the domestic industry's declines in the unit costs of goods sold and the unit values for the like product in the merchant market and the industry as a whole over the entire period. USITC Views at 16 n.88. It then also referred back to this discussion in its analysis of the impact of dumped imports on the domestic industry. USITC Views at 18 n.99.

⁸ USITC Views at 18.

⁹ Appellate Body Report, *Argentina -- Safeguard Measures on Imports of Footwear* ("Argentina -- Footwear"), WT/DS121/8, adopted 14 Dec. 1999 at para. 139.

back towards the 1996 level was unacceptable and a sign of injury when aggregate demand was substantially higher in 1998 than 1996. Thus, in that sense, the comparison that Japan seeks in fact occurred. The USITC had a particular concern with the data from 1997 to 1998 and it addressed that concern in its determination. The USITC performed a well-reasoned analysis, considered all the factors, and paid particular attention to the seemingly anomalous occurrence of poor performance by the domestic industry at a time of increasing consumption.

Question 28. Since USITC analyzed a three-year trend in profitability in the 1993 case, why did the USITC consider only a two-year trend in the current case?

39. Japan mischaracterizes the USITC's determinations in both the 1993 *Flat Rolled Steel* investigation and the current case. As noted above, in the current hot rolled investigation, the USITC considered the profitability of the domestic industry over the three year period¹⁰ but then provided an extensive discussion of the 1998 anomaly. Simply because the USITC looked for an explanation for why, from 1997 to 1998, apparent consumption increased but the domestic industry performed worse does not mean that the USITC ignored, or in any way failed to consider, the data for 1996, especially in light of the discussion of the 1996 data that is apparent on the face of the determination. As to the *Flat Rolled Steel* determination, Japan correctly points out that the USITC considered three year trends, but it fails to mention that the USITC also considered trends within that period.¹¹ The USITC compared data from year-to-year within the period in both investigations.

40. Japan's repeated reliance on the 1993 *Flat Rolled Steel* case is misplaced. Each investigation turns on its own record facts and the USITC's determinations are *sui generis*. Although the two investigations deal with the same or similar products, as explained in detail in our first written submission, the facts presented to the USITC during each investigation are very different. In particular, for example, in the 1993 investigation, the USITC found that domestic apparent consumption, production, and shipments all followed the same trends -- decreasing and then increasing over the period of investigation. As already noted, in the current investigation, the USITC had to address the fact that, while US apparent consumption was increasing to record heights, the US producers' production, shipments, and market share were declining. These facts were not present in the 1993 *Flat Rolled Steel* investigation. Therefore, the analyses in the two cases had to be different. The USITC could not simply ignore the facts of the investigation before it and perform a rote analysis based on the record in an investigation six years earlier.

Question 29. Where does the USITC decision address the price trends in non-subject imports? What evidence is there that the USITC even collected any information on non-subject import price trends?

41. Nonsubject imports are relevant to the causation analysis articulated in Article 3.5 of Anti-dumping Agreement only as they pertain to the proscription against attributing injury from other causes to dumped imports. That provision requires authorities to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" so that injury from other causes should not be attributed to the dumped imports. A factor which Article 3.5 states *may* be relevant to this analysis is the "volume and prices of imports not sold at dumping prices."

¹⁰ USITC Views at 16 n.88 and 18 n.100 (comparing unit costs of goods sold to unit values).

¹¹ *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("*1993 Hot Rolled Steel*") at 52-53 (**Exh. Jpn-59**).

42. The USITC examined the effects of nonsubject imports. It noted that "[i]mports from nonsubject countries maintained a stable presence in the US market throughout the period examined."¹² It thus satisfied the requirement to examine any known factors injuring the domestic industry. With an "essentially flat" market share, at a time when subject imports were rising sharply, nonsubject imports were not responsible for the decreasing market share of the domestic industry.¹³ If the price effects attributed to the dumped imports were in actuality from the nonsubject imports, then it would be expected that those nonsubject imports would be entering the United States and sold to purchasers in the same quantities as the dumped imports and capturing an increasing market share in the same way as well. Thus, the USITC's findings on volume accounted for the risk that the Commission could have mistaken the price effects of nonsubject imports for the effects of dumped imports.

43. The USITC does not collect pricing data for nonsubject imports in the same way that it collects pricing information for dumped imports. As opposed to the product-by-product prices that the USITC staff gathered for dumped imports, the USITC collected information on the value of nonsubject imports.¹⁴ This different approach to data collection stems from the different issues that the USITC resolves with respect to prices of dumped imports and prices of nonsubject imports. With respect to dumped imports, the USITC must determine whether they are having price effects on the domestic industry by specifically considering, pursuant to Article 3.2 of the Anti-dumping Agreement, whether the dumped imports undersold the domestic like product and whether the dumped imports caused price suppression or depression of the domestic product. This analysis requires, by its own terms, a detailed price analysis. As to nonsubject imports, the USITC must not attribute any injury caused by nonsubject imports to the dumped imports pursuant to Article 3.5. Such detailed price comparisons as are needed for dumped imports are therefore not required in the context of nonsubject imports.

Question 30. Why did the USDOC not correct the NKK clerical error? Can the USDOC identify any other examples of failing to correct properly alleged clerical errors?

44. As we explained in our first submission at paragraphs 28-29, Part A, and paragraph 14, Part D, Commerce's failure to correct NKK's clerical error at the preliminary determination stage was an oversight subsequently corrected in the final determination. Such an oversight is not without precedent in Commerce practice. For example, in *Certain Stainless Steel Wire Rods from France, Amended Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 47169 (30 Aug. 1999), www.ia.ita.doc.gov/frn/index.html, Commerce corrected respondents' alleged clerical errors regarding the final results, but failed to correct petitioners' alleged errors. When petitioners drew this oversight to Commerce's attention, Commerce subsequently corrected their errors as well. In *Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, Final Determination of Sales at Less Than Fair Value*, 65 Fed. Reg. 42669 (11 July 2000), Commerce did not correct a respondent's alleged clerical errors at the preliminary determination stage. It did, however, correct one of the errors in the final determination. Just as the oversights in these cases in initially failing to correct clerical errors do not reflect any evidence of bias on Commerce's part, the oversight in the instant case also does not reflect any evidence of bias.

¹² USITC Views at 10.

¹³ USITC Views at 11.

¹⁴ USITC Views at IV- 11.

ANNEX E-5

Responses of Chile to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to use in the determination of normal value?

Reply

There are no regulations in this respect. In practice, there is no particular treatment for sales to affiliated companies, but only the "in the ordinary course of trade by reason of price" test, i.e. the analysis of below-cost sales, for any sale. Regardless of whether or not the domestic sale is made by a related company, an analysis is made to determine whether sales are below total cost in accordance with Article 2.2 of the Anti-Dumping Agreement. Below-cost sales are not excluded from the calculation of normal value. If, as a result of the below-cost sales, the sales used to determine the normal value are not sufficient in terms of footnote 2 to Article 2.2, either the third country sale price or the constructed value is used. No substitute prices are used for below-cost sales. There is no other methodology.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

No. In no way and under no circumstances does the Anti-Dumping Agreement permit the use of "adverse" facts available. The objective and spirit of the provisions of the Anti-Dumping Agreement (Article 6.8 and Annex II) pertaining to cases when a party does not cooperate call for use of the information available. But not the worst information. The Agreement reads "... on the basis of the facts available", and not "on the basis of the **adverse** facts available". The Agreement does not qualify the information.

The idea is to substitute or complete the missing information when a company does not cooperate, but it is not the intention of the Agreement to "punish" such companies.

ANNEX E-6

European Communities' Answers to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The EC practice depends on the extent of the relationship between the related parties. Where the exporter has control over a related party, the EC authorities will use the price charged by the related party to an independent buyer.

Where the exporter does not control the related party, Article 2.1, second paragraph, of the EC's Basic Anti-Dumping Regulation¹ provides that:

“Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal values unless it is determined that they are unaffected by the relationship.”

Sales not in the ordinary course of trade are excluded from the normal value calculation. The EC authorities will normally calculate a constructed normal value if the remaining sales in the ordinary course of trade are not sufficiently representative.

Question 50

The EC proposes, in Section B of its Oral Statement, an alternative methodology for determining whether margins should be considered as based on facts available, and thus excluded from the calculation of the weighted average provided for in Article 9.4 (i). But such a method could result in the very situation about which it expresses concern, that there may be NO margins not based on facts available, and thus no margins on the basis of which a weighted average can be calculated. What, in the EC's view, may an investigating Member do in such a circumstance? How does the EC propose that this test be applied in practice? What is the EC's practice in this regard?

¹ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ(1995) No L 56/1 of 6.3.96.

Reply

The point made by the EC was that an interpretation of Article 9.4(i) which required to exclude a dumping margin whenever facts available have been used would often lead to the result that the method set out in Article 9.4(i) could not be applied. Indeed, almost every dumping calculation includes small elements of facts available. This is not necessarily because the exporters are uncooperative, but because small errors of a clerical nature have been made or because the information requested was simply beyond the reach of the exporters (for instance, in the case of transport costs).

The EC authorities have never encountered the situation described by the Panel. In the unlikely situation that significant adverse facts available were included in all the margins, there seems to be no alternative but to resort to facts available for the non-sampled exporters. However, in that case no adverse inferences should be drawn.

Question 51

In paragraph 22 of its oral statement, the EC notes that the US description of EC practice in the situation of captive production is incorrect. Could the EC specify in what respect that description is incorrect, and provide the Panel with a correct description.

Reply

The EC recalls that the present dispute is concerned exclusively with the US law and practice. The practice of other Members, therefore, is not directly relevant to this dispute.

The EC reiterates its position that the US description of the EC practice is not entirely accurate and, therefore, requests once again that the Panel disregard such description.

ANNEX E-7

Korea's Responses to Questions to Third Parties

(6 September 2000)

Q48. Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Korea Trade Commission ("KTC"), as the organization responsible for conducting antidumping investigations, considers a set of related factors to determine whether particular sales are made in the ordinary course of trade. The relationship between the producer and the related party, the amount or portion of the affiliated party sales, and other factors relating to the affiliated party sales are considered together. The KTC applies a fairness standard to determine whether to use the affiliated party sales in the calculation of normal value. If the KTC determines that the affiliated party sales are an inappropriate basis for establishing normal value, then it considers constructed export price or third country sales price.

We would remind the Panel that Korea does not object to the application of a test for affiliated parties *per se*. We object to the application of a test which is arbitrary and creates an unfair comparison because it may or may not compare comparable sales. There is no attempt by the US to make sure that other factors affecting comparability are taken into account before the test is applied, and the test is biased as only higher priced affiliated party sales are included after the comparison.

Q.49 Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The object and purpose of Article VI of the GATT and the Anti-Dumping Agreement is to ensure that unfair trade practices in the form of dumping can be offset or prevented by anti-dumping duties. (See, e.g., Articles VI:1 and VI:2 of the GATT and Article 1 of the Anti-Dumping Agreement. Hereinafter, "Agreement"). To that end, Article 2 of the Agreement provides numerous rules for how sales in both markets are to be determined, adjusted and compared. The Agreement also independently requires that there be a fair comparison between the export price and the normal value.

Article 6.8 of the Agreement recognizes that, in some circumstances, the evidentiary support for such determinations, adjustments or comparisons, may not be available or the interested party may refuse to supply it. Article 6.8 encompasses both deliberate acts (“refuses access to”) and involuntary or negligent acts (“or otherwise does not provide”), resulting either in information remaining absent after a “reasonable period of time” or whose absence “significantly impedes the investigation.” In either circumstance, Annex II is to be followed.

Nowhere does Annex II endorse the concept of a “punitive” facts available, e.g., as applied by the US in this case against KSC as a result of CSI’s actions. At most, Annex II contemplates that after an authority follows all the other requirements for checking and confirming the secondary information used, as provided for in Paragraph 7 of Annex II, it is permissible that the authority’s use of such data produce a result which could be less favorable. The US, by its own admission, deliberately sought the information which was the least favorable and used it for that reason.

The concept of “adverse” versus “neutral” facts available is neither the starting point nor the end of the analysis. The issue is that the Agreement requires the authorities to use the most reliable secondary information available, a determination reached only after “special circumspection.” “Circumspection” is defined as “Circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness.” The Compact Edition of the Oxford English Dictionary (1971). In other words, the decisions regarding whether to use a secondary source and, if so, which source to use, should be made very, very carefully -- with “special circumspection.”

Furthermore, once a secondary source is selected, it must be “checked” against other independent sources. This ensures that the information is reliable.

Most importantly, the Article 2.4 requirement of a “fair comparison” applies regardless of the source of the information used. Annex II provides no exception to the Article 2 requirements regarding the calculation of normal value, export price or a fair comparison.

For all these reasons, the US selection of adverse secondary information in order to penalize respondents is not consistent with the Agreement. As explained in our Third Party Written Submission, the selection of secondary information for the purpose of penalizing the respondent sidesteps the required analysis discussed above. The US cannot justify its selection of the secondary information on this basis as consistent with the Agreement.

Q.52 The first sentence of Article 2.4 requires that “A fair comparison shall be made between the export price and the normal value”. There are rules for the determination of normal value set out in Article 2.2, and rules for the determination of export price in Article 2.3. Article 2.4 continues to set out specific rules for the comparison of export price and normal value. Could Korea clarify for the Panel how it interprets a requirement of fair comparison of export price and normal value to also require overall “fairness” in the determination of normal value?

Reply

In the substantive meeting on 23 August, the EC argued that the first sentence of Article 2.4 applies only with respect to the ‘comparison’ between the export price and the normal value, because the calculation of the normal value precedes that comparison and is not subject to any general ‘fairness’ requirement. On the other hand, it was Korea’s view that ‘fairness’ should be interpreted in a broader sense, because fairness is a general principle of law. Such an interpretation of Korea is corroborated by the textual analysis of Article 2 of the Anti-Dumping Agreement as well.

Article 2.1 provides a basic guideline for determination of dumping. What the paragraph says is that there is dumping, if export price is less than normal value. Thus, the basic guideline and the key element of determination of dumping is comparison between export price and normal value. Article 2.2 and 2.3 provide for determination of normal value and export price in exceptional circumstances, where export price and normal value are not available in the ordinary course of trade. Article 2.4, after exceptional cases of export price and normal value have been brought into the purview of Article 2 through Art.2.2 and 2.3, gets back to the key element of dumping, which is comparison between export price and normal value. Here, the text says that comparison should be fair.

The title of Art.2 is ‘determination of dumping’. Determination of dumping is to be done, as we saw in the preceding paragraph, through fair comparison of export price and normal value. In EC’s view, fairness applies only to the comparison. In other words, calculation of normal value and export price does not have to be fair, because there is no fairness requirement in either Art.2.2 or Art.2.3.

Such an interpretation is not acceptable for Korea for the obvious reason. The determination of dumping cannot be fair, if only part of the process is fair. In other words, fair comparison of normal value and export price would not lead to fair determination, if normal value and export price were not established in a fair manner as well. Besides, it should be pointed out as well that Article 2.2 and 2.3 do not deal with determination of normal value and export price as such, but determination of those prices in exceptional circumstances.

Apart from the textual analysis as above, Korea’s interpretation of fairness requirement is consistent with Article 2 in view of the object and purpose of the article. The object and purpose of Article 2 is to determine dumping margin, which, as was elaborated above, is to be done through fair comparison of normal value and export price. The object and purpose of the article would not be met, unless normal value and export price, which should be compared in fair manner, have been established in a fair manner.

Finally, even if the Agreement lacked the “fair comparison” requirement in Article 2.4, the requirement of fairness in the administration of anti-dumping laws nonetheless would exist and would bind all WTO Members. Absent such a requirement (often referred to in the reverse as *abus de droit*), none of the provisions would have any meaning whatsoever. Is it seriously to be contended that a party has a right to take actions which are “unfair” so long as the action is not specifically proscribed or addressed by a specific provision of the Agreement?

Q53. In this case, the final injury determination was of current material injury. So under Korea’s view of Article 10.6, and assuming the other conditions were satisfied, retroactive duties could have been imposed. However, it is argued that without an earlier action, taken under Article 10.7, to secure the potential for imposition of retroactive duties, collection of retroactive duties would, for many Members, be impossible. Does Korea recognize any difference between the decision under Article 10.7 to preserve the possibility of retroactive duties, and the decision to actually apply duties retroactively under Article 10.6?

Reply

We do not see how one could interpret Article 10.6 and Article 10.7 differently or separately since Article 10.7 specifically incorporates by reference Article 10.6 and requires that once all the conditions set out in Article 10.6 are satisfied by sufficient evidence (and not before) the authorities can then act under Article 10.7. In other words, the “measures” of Article 10.7 are merely the tools for effectuating the retroactive application of duties under Article 10.6.

Another way of stating this is that, apart from Article 10.6, there is no separate authority or basis for acting under Article 10.7. The authority or basis for action under 10.7 is found in Article 10.6 and all of the preconditions of Article 10.6 must be met.

We do not read Article 10.7 to grant authority to “preserve the possibility” of imposing retroactive duties before the conditions of Article 10.6 are met. This would be a particularly flawed interpretation since Article 10.7 says the opposite: “once” the conditions of Article 10.6 are met, Article 10.7 measures can be taken. Since Article 10.6 addresses the application of retroactive, definitive anti-dumping duties and Article 10.2 requires a finding of present injury (and not threat of injury except under special circumstances) in order for definitive anti-dumping duties to be applied retroactively, a preliminary determination of present injury and dumping must be made or a history of dumping must be present so that the importer was “aware” that injurious dumping was occurring, prior to applying measures under Article 10.7.

ANNEX E-8

Responses of Brazil to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value? How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or third country sale price uses, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Brazilian experience involving sales to affiliated parties is quite limited. When this situation occurs, a comparison is made between sales to related parties and those to non-related parties. If a distinct pattern is detected and if the exporter cannot establish the existence of factors, other than company affiliation, that may justify the different patterns, all sales to affiliated parties are considered to be not in the ordinary course of trade and are consequently disregarded. Since the sales to non-affiliated parties were always sizeable and representative, only these sales were used to calculate the normal value. Exporters have not yet questioned this procedure.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The interpretation of Article 6.8 and its related Annex II *cannot* include the right to penalize respondents with adverse facts available, regardless of a respondent's behaviour. Reading in a right to punish respondents would (1) establish an impermissible interpretation of Article 6.8 and Annex II, and (2) broaden the rights of WTO Members in a manner inconsistent with Articles 3.2 and 19.2 of the DSU.

Article 6.8 does not distinguish between situations where a party deliberately tries to obstruct an investigation and where information simply is not otherwise provided. Rather, Article 6.8 treats those situations exactly the same, by calling for the authority to fill in the information with facts available. The first sentence of Article 6.8 effectively establishes an equal footing between a case where a party "refuses access" to data and that where a party simply "does not provide" the necessary

information. This plain language establishes that even when a party "refuses access" to information, the consequence of such action is simply the use of "the *facts* available".

Therefore, Article 6.8 is about filling in missing information, no matter what the cause. It does not treat uncooperative parties any differently from cooperative parties that simply do not have the required information. This equal treatment is no surprise given that it is often hard for an authority to determine, for example, whether a party does not have information at its disposal or whether the party is actually hiding information. Therefore, Article 6.8 operates upon a presumption of good faith and treats all parties equally.

According to the customary rules of treaty interpretation, Article 6.8 should first be read according to the ordinary meaning of its text. The primary meanings of the word "fact" in common dictionaries are "an event or thing known to have happened or existed" and "a truth verifiable from experience or observation". The concept of an "adverse fact" introduced by the US is, in this way, self-contradictory. One single *fact* cannot be chosen in a way that it may configure a less favourable result for a respondent.

Paragraph 7 of Annex II is entitled "Best Information Available", and it tries to ensure that along the course of an investigation *information* is used in such a way that it resembles the *facts* as closely as possible. It contains the only mention of "cooperation" as it applies to an authority's choice of "facts available" (i.e., paragraph 7 does not apply to the decision *whether to apply facts available, but only to the choice of "facts available"*). Yet, even this provision does not permit use of facts available to punish non-cooperative respondents as argued by the United States. First, paragraph 7 uses the verb "could" when referring to unfavourable results, thereby removing any possibility that authorities can affirmatively seek out figures that will punish or have a deterrent effect on respondent behaviour. Second, paragraph 7 instructs the authority to use "careful circumspection" in selecting its choice of information available. This phrase is an expression of "good faith" as discussed in paragraph 10 of our Third Party Submission and reinforces the notion that the *information* selected should reflect the *facts* mentioned in Article 6.8. The concept of punishing respondents simply does not fit within this obligation to act in good faith and constrain oneself when choosing appropriate facts to fill in the holes.

If representative information is available, then the authority should use it. If representative information is not available - or perhaps unreliable - because a party significantly impeded the investigation or refused to provide certain information, then such a party runs the risk of the authority using information from the petition or other "secondary source". The point, though, is to search for the most reliable information, not to choose unrepresentative data for the sheer purpose of punishing a party with an adverse result. The language and spirit of Article 6.8 and of Annex II effectively preclude an investigating authority from selecting information available *in order to* achieve a pre-determined set of results, namely the one that is least favourable to a perceived non-cooperating party. Information selection criteria cannot be based on a result oriented approach. Such criteria should be based on the quality of the information available; in other words, which information available is best suited to reflect a given indicator or a given *fact*.

The use of available facts has the purpose of facilitating the conduct of an investigation that would otherwise be brought to a halt due to lack of essential information in sole possession of a particular party. This provision is not intended to punish a party that *may* not be cooperating. In brief, any interpretation of the AD Agreement that could grant an additional punitive power to the investigative authorities would effectively expand the rights of the WTO Members under that Agreement in violation of Articles 3.2 and 19.2 of the DSU.

ANNEX E-9

Japan's Answers to Questions from the Panel at the Second Meeting of the Panel

(6 October 2000)

Question 1: In paragraph 5 of its oral statement Japan says that the use of facts available has to be logical and reasonable. In Japan's view, can it ever be logical and reasonable to use adverse inferences in the selection of facts available? Please explain.

Answer

1. Depending on the particular circumstances in a case, the most logical and reasonable inference may be adverse. For example, if the particular factual circumstances demonstrate that a respondent has withheld information intentionally, the logical and reasonable inference to be drawn might well be more adverse to the respondent than the inference to be drawn under other circumstances. But there is a fundamental difference between making inferences that end up being adverse because the particular factual circumstances make such an inference logical and reasonable, and making inferences that are purposefully adverse for the sole purpose of punishing respondents and inducing cooperation in future cases. The United States routinely uses high dumping margins as "adverse facts available" that are neither logical nor reasonable. Indeed, they are not inferences at all, but rather punishment.

2. The United States describes its adverse facts available practice in benign terms – arguing that it is only drawing adverse inferences that are reasonable and logical. But merely finding that a company failed to cooperate to the best of its ability -- the standard set forth in the US statute -- does not by itself justify any adverse inference. It must first be determined that information was in fact withheld, as required by Paragraph 7 of Annex II. Then, the authority must ensure that the inference being made is logical and reasonable in light of the circumstances. A failure to cooperate, even when information is withheld, does not justify any facts available the authority can arbitrarily think of to punish the respondent. If this were the case, there would be no reason for the protections contained in Annex II.

3. The Panel should compare the US descriptions of its supposedly benign practice with USDOC's actions in the hot-rolled steel case. The severe punishment of KSC, NSC, and NKK illustrates the true color of the practice. Instead of drawing particular inferences that are logical and reasonable – and that in some cases might also be adverse – USDOC made adverse inferences as a punishment and a warning. With KSC, USDOC punished a respondent with the second highest margin available, even though doing so would clearly reward the petitioner who failed to cooperate. With NSC and NKK, USDOC had the actual data it had requested in plenty of time to use in calculating these companies' margins, but applied the most adverse margin or price in a blatant effort to punish the companies for making a mistake. It made no attempt to use facts that most closely approximated the truth -- facts which were clearly available and which should have been used. The use of adverse inferences for such purely punitive purposes goes beyond the mandate of Article 6.8 and Annex II.

Question 2: Paragraph 7 of Annex II of the AD Agreement provides that “special circumspection” is due when authorities base their findings on information from a secondary source. Does Japan consider that the information provided by a particular company in its questionnaire response is information from a secondary source with respect to the application of facts available to that same company?

Answer

4. Yes, information provided by a company in its questionnaire response can be considered as information from a secondary source. It is important to consider both who provided the information and what information has been provided. A primary source is from the same company and responds to a specific request for information. A secondary source could be either from a different company, or information other than that specifically requested. A number from elsewhere in the response of a company related to completely different sales or a completely different category of information is just as much “secondary source” information as is data from a different source.

5. This case illustrates well the difference. USDOC decided (wrongly) that it did not have information on the conversion factors for NSC and NKK. USDOC could have filled the gap in information with logical and reasonable facts available, for which it had many alternatives. The most obvious alternative would have been the conversion factor reported by KSC and accepted by USDOC as reasonable. Although from a different company, this surrogate information had a far more plausible connection to the missing NSC and NKK conversion factors than did the highest dumping margin or the highest normal value from the same company. But, rather than use this logical and reasonable alternative, USDOC decided instead to punish NSC and NKK with the highest margin or price it could derive from the companies’ sales lists.

6. Consider the illogic of the US interpretation of “primary” sources. Under the US view, the use of the KSC conversion factor, even with its close nexus to the category of information at issue, would have required “special circumspection” as a secondary source. (Japan, of course, considers that “special circumspection” is required whenever such a secondary source is used.) Yet any figures from NSC’s and NKK’s responses -- from whatever category of information within those responses -- could be used without any special circumspection or corroboration merely because these numbers were provided by NSC and NKK themselves. This is a totally unbalanced conclusion and, thus, the US interpretation is not permissible.

Question 3: In paragraph 37 of its second oral statement, the US argues that “the fact that KSC regularly ignored the shareholders agreement does not prove that it had no power under that agreement - only that KSC did not always choose to exercise that power.” Could Japan please comment on this statement?

Answer

7. The United States is trying to divert the Panel’s attention away from USDOC’s conduct by focusing on what it thinks KSC should have done. But, the issue here is USDOC’s misapplication of facts available. Unless the United States can identify action (or inaction) taken by KSC that was aimed at withholding information from USDOC, then there is no justification for USDOC’s decision to apply an adverse inference to KSC. No such action or inaction has been identified. Japan, however, has identified multiple problems with USDOC’s actions.

8. First, the United States focuses its attention only on KSC and pretends that CSI was not involved in the investigation. But both KSC and CSI were interested parties to this investigation with diametrically opposed interests in the outcome of the investigation. When considering the plain meaning of “withheld,” it seems far more logical to apply this term to the petitioner CSI, which was

the party in control of the necessary information, than to apply this term to KSC, which was trying to obtain the information from CSI.

9. Second, the United States assumes that USDOC had no duty even to try to obtain the information from CSI. Yet, USDOC held its own separate meeting with representatives of CSI and other petitioners to discuss the issue and also failed to obtain the requested information.¹ If the authority with the legal power to issue dumping margins in response to CSI's petition was not able to obtain the information from CSI, on what basis can it possibly punish KSC for being unable to do so?

10. Third, the United States is holding respondents to the standard of perfect knowledge. While it may be easy for USDOC to identify additional steps that in hindsight could have been taken, respondents struggling to comply with extensive and burdensome questionnaires on short notice may sometimes overlook a step that could have been tried. This is particularly true in this case. CSI first told KSC that CSI would help (according to Mr. Declusin), and only later did CSI change its position and refuse to assist (by order of CSI's President and CEO).

Question 4: The Panel understands that the USDOC and USITC have different rules and deadlines with respect to information gathering and application of facts available. The Panel understands the US to have asserted that each agency applied its own rules to the parties appearing before it in an impartial manner. Does Japan contend that the USDOC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the USITC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the difference between the rules applied by the USDOC and the USITC demonstrates partiality or failure to uniformly administer the anti-dumping law?

Answer

11. With respect to the first question, the answer is yes. USDOC's rejection of NSC's and NKK's theoretical weight conversion factors was partial and non-uniform first because it deviated from USDOC's own normal practice. As the United States admits in its own Question 9 posed to Japan (see below), corrections are normally accepted as late as the first day of verification (although this deadline is normally reserved for minor corrections, while the seven-day rule typically applies to more significant corrections and other additions to the record). The lack of impartiality and uniformity of USDOC's actions in this instance is evident from the fact that USDOC refused to accept certain information from NKK and NSC before verification despite its established practice of doing so in previous cases and, for certain other information, in this very case. USDOC's practice shows that questionnaire deadlines are never the last chance an interested party has to submit information for the record.

12. As for the Panel's second question, the answer is no. Japan is not arguing that USITC's acceptance of petitioners' untimely-filed questionnaire responses in this case themselves violate USITC's own procedural rules. USITC's actions are relevant in this context only in that they show the impropriety of USDOC's and USITC's actions as a whole (i.e., the actions of the US Government).

13. Finally, regarding the Panel's third question, the answer is yes, based on the assumption that this question addresses the consequence of the difference between the rules of USDOC and USITC, which have specific roles to play vis-à-vis respondents and petitioners. When we consider the fact that the two agencies act in tandem as the US anti-dumping authority, the different rules applied by the agencies exhibit a double standard for respondents and petitioners. The rule USDOC applied in this case -- which was a clear departure from USDOC's established practice -- served to reject certain

¹ KSC asked to be a part of this meeting to try to resolve any problems with obtaining CSI's information. See KSC Letter to USDOC of 3 Dec. 1998, at 1 (**Exh. JP-78**).

corrected information submitted by NSC's and NKK's after the questionnaire deadline. Meanwhile, the rule applied by USITC served to accept only petitioners' corrections to the record even though they were also submitted well after the questionnaire deadline. These disparate rules -- taken by the US anti-dumping authority -- favor petitioners over respondents. Article X:3 is specifically intended to prohibit such double standards.

Question 5: In light of the US statements at the second meeting concerning rules of statutory construction and interpretation of US law, does Japan still maintain, as it asserted in its second oral statement, that the captive production provisions "takes precedence" over the other provisions of US law regarding the analysis and determination of injury? If yes, please explain on what basis Japan maintains this position.

Answer

14. Nothing in the US statements at the Second Meeting changes Japan's position in its Second Submission that the captive production provision in 19 U.S.C. § 1677(7)(c)(iv) supersedes 19 U.S.C. § 1677(7)(c)(iii), when applicable. The United States grossly mischaracterizes Japan's arguments concerning statutory construction.² Japan nowhere argues that the captive production provision repeals 19 U.S.C. § 1677(7)(c)(iii), by implication or otherwise. This would be impossible, because the captive production provision only applies when certain conditions are met, and expressly refers to Section 1677(7)(c)(iii). Japan only argues that when the captive production provision applies, it supersedes those elements of 19 U.S.C. § 1677(7)(c)(iii) that conflict with its command to "focus primarily" on market share and financial performance in the merchant market.

15. Japan cites canons of statutory construction concerning the interpretation of statutes addressing the same subject matter, which are said to be "in pari materia."³ Under these canons, "{i}t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter."⁴ The captive production provision and Section 1677(7)(c)(iii) are in pari materia because "one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way."⁵ Both provisions concern USITC's analysis of the impact of subject imports on a domestic industry. But while Section 1677(7)(c)(iii) sets forth USITC's general approach to analyzing the impact of subject imports on domestic producers as a whole, Section 1677(7)(c)(iv) creates a specific exception to this approach. The express language of the captive production provision modifies Section 1677(7)(c)(iii), providing that when the provision's criteria are met, "the Commission, in determining market share and the factors affecting financial performance *set forth in clause (iii)*, shall focus primarily on the merchant market for the domestic like product." (Emphasis added).

² Oral Statement of the United States, Second Meeting, para. 25.

³ See generally 2B Sutherland Stat Constr § 51.01 (5th Ed. 1992) (additional excerpts attached as **Exh. JP-107**).

⁴ *Id.* at § 51.02 (additional excerpts attached as **Exh. JP-107**).

⁵ *Id.* at § 51.05 (**Exh. JP-101(a)**).

16. When the captive production provision applies, USITC cannot “focus primarily” on the market share and financial performance of both producers as a whole and the merchant market segment; in other words, Sections 1677(7)(c)(iii) and 1677(7)(c)(iv) are in conflict. Under the canon of statutory construction cited by Japan, such conflicts are resolved in favor of the more specific provision, in this case, the captive production provision.⁶ The more general provision is not repealed by implication, but only disregarded in favor of the more specific provision, when it applies.

17. This is not a complex argument – Japan is only suggesting that the statute means what it says. When the captive production provision applies, USITC is to “focus primarily on the merchant market for the domestic like product” in determining “market share and the factors affecting financial performance set for in clause (iii)” instead of determining market share and the factors affecting financial performance with respect to the industry as a whole, as it would ordinarily under clause (iii). Indeed, in the hot-rolled steel case, three commissioners faithfully applied the captive production provision, methodically analyzing each of the provision’s three criteria and, finding them satisfied, modifying its analysis of impact accordingly: “Because we have found the captive production provision to apply in this case, we have focused primarily on the merchant market in assessing market share and the factors affecting financial performance.”⁷

18. After inventing an argument that Japan has never made, the United States attacks its straw man by citing *Watt v. Alaska*, “repeals by implication are not favoured. . . . The intention of the legislature to repeal must be ‘clear and manifest.’”⁸ As Japan does not argue that the captive production provision repealed Section 1677(7)(c)(iii) by implication, this holding is completely irrelevant. Moreover, Japan cites *Watt* not to support its argument that the more specific captive production provision supersedes the more general Section 1677(7)(c)(iii), but to support its related argument that when two provisions conflict, the more recent provision should prevail.⁹ The United States is silent on the Supreme Court case cited by Japan, *Busic v. United States*, which affirms the canon that a “more specific statute will be given precedence over a general one.”¹⁰

19. Beyond its mischaracterization of such basic concepts of statutory construction, the United States also incorrectly asserted at the Second Meeting that Japan has abandoned a point made in its First Submission – specifically, that “it was improper to consider, either primarily or secondarily, data for the merchant market sector.”¹¹ In actuality, Japan recognized in its First Submission that the panel report in *Mexico—High Fructose Corn Syrup* does not completely preclude a sectoral analysis.¹² Japan only argued, “the commissioners could not have considered, either primarily or secondarily,

⁶ *Id.* (“Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter with prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.”) (citations omitted) (**Exh. JP-101(a)**).

⁷ *USITC Final Injury Determination*, USITC Pub. 3202 at 35 (**Exh. JP-14**). The United States argued at the Second Meeting that the Statement of Administrative Action expresses Congress’ intent that the captive production provision would be consistent with the AD Agreement and that USITC is therefore somehow free to resolve ambiguities in the captive production provision “in a manner consistent with the United States’ obligation under the Agreement.” Oral Statement of the United States, Second Meeting, at para. 23. Such statements, however, do not ensure that a provision -- or its application -- is in fact consistent with the Agreement. This is for the Panel to determine, not the United States. In Japan’s opinion, as discussed above, the provisions are inherently inconsistent, and USITC did nothing in its final determination to overcome this fact.

⁸ Oral Statement of the United States, Second Meeting, para. 26.

⁹ Japan’s Second Submission, para. 193 n.221.

¹⁰ *Id.* at para. 193 n.221 (citing *Busic v. United States*, 446 U.S. 398, 406, 65 L.Ed.2d 381, 389 (1980)).

¹¹ Oral Statement of the United States, Second Meeting, para. 19 (incorrectly citing Japan’s First Submission, para. 45 instead of para. 245).

¹² Japan’s First Submission, para. 223.

data for the merchant market *in this case* without distorting their judgment.”¹³ Far from abandoning this argument, Japan’s Second Submission actually amplifies it, elaborating on how USITC cannot relate merchant market segment findings to the industry as a whole, as the AD Agreement requires, without also examining all other industry segments.¹⁴

¹³ *Id.* at para. 245 (emphasis added).

¹⁴ *See, e.g.*, Japan’s Second Submission, para. 222.

ANNEX E-10

Japan's Answers to Questions from the United States at the Second Meeting of the Panel

(6 October 2000)

Regarding CSI's alleged inability to provide information requested by Commerce:

Question 1: Isn't it true that, in CSI's letter of December 14, 1998 (JP-42(m)), addressed to KSC, CSI claimed it was unable under its accounting system to provide the information requested with regard to only question one, when KSC in fact posed twelve questions (JP-42(1))?

Answer

1. While it is true that CSI responded directly to only the first of twelve questions posed by KSC, the first question sought the most important information – transfer prices and the prices to the first unaffiliated US customer for all sales of subject hot-rolled steel that CSI further manufactured. The other eleven questions requested subsidiary information about product descriptions and specifications, source documentation supporting any reported resales, price lists, documentation or explanations of CSI's sales process, frequency of changes in sales terms, and general financial or corporate structure information.¹ The absence of the basic price/sales data rendered the remaining information useless. CSI itself noted in its response:

In reference to your letter of December 8, 1998, this is to inform you that CSI is unable under its accounting system to provide the information on sales requested in question 1. While we could provide other information to you, it would be difficult for us to provide such information within the time frame specified in your letter. *It is also our belief that without being able to provide the important information of sales prices requested, the provision of other data requested by you would be neither usable nor useful in the investigation of Kawasaki and therefore would be a waste of resources for both CSI and Kawasaki.*²

2. This letter does not make clear the reason for CSI's refusal to provide the subsidiary information. The tone suggests unwillingness, but the fact remains that the absence of necessary price information, which CSI was unable to provide, made the other requested information useless. KSC repeatedly informed USDOC of CSI's inability and/or unwillingness to provide necessary information, including providing CSI's 14 December 1999 letter.

¹ KSC Letter to CSI on 8 Dec. 1998 (Exh. JP-42(1)). Note that each of the questions KSC posed to CSI restated USDOC's questionnaire verbatim.

² Mr. Goncalves Letter to KSC of 14 Dec. 1998 (Exh. JP-42(m)) (emphasis added).

Question 2: Where precisely in the exhibits Japan has cited did *KSC* inform *Commerce* that *CSI* was *unable* to supply the requested information? In addition to providing the cites, please quote actual statements by *KSC*.

Answer

3. *KSC* repeatedly informed *USDOC* that *CSI* was *unable* to supply the requested information, either by explicitly saying so in its letters to *USDOC*, or by referencing, or attaching to, *CSI*'s Letter to *KSC* of 14 December 1998 (**Exh. JP-42(m)**) (in which *CSI* stated it was unable to supply the information requested in Question 1 of *KSC*'s Letter of 8 December 1998).³ We have provided below relevant quotes and references from Japan's exhibits.

- *KSC* Letter to *USDOC* of 18 Dec. 1998 (**Exh. JP-93(a)**): "Attached to this letter is the most recent written response of *CSI* {*CSI*'s Letter to *KSC* of 14 Dec. 1998} to our requests for information. . . . *CSI* has declined to provide *KSC* with information necessary to respond to Sections C and E. . . ." The attached letter clearly indicated *CSI*'s inability to provide the information.
- *KSC*'s Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**): "CSI responded to this request a week later, on December 14, 1998, and with multiple excuses indicated its *inability*/unwillingness to provide the necessary information, including (1) that its accounting system was *unable* to provide information regarding its sales of further manufactured products. . . ." (Emphasis added.)
- *KSC* Verification Exhibit 20 (Mar. 1999) (**Exh. JP-93(b)**): *KSC* again provided *USDOC* with {*CSI*'s Letter to *KSC* of 14 Dec. 1998}, which contained *CSI*'s statement that it was unable to provide the information requested in question 1 of *KSC*'s Letter to *CSI* of 8 December 1998.
- *KSC*'s *USDOC* Case Brief, at 16, Exhibit 2 (12 Apr. 1999) (**Exh. JP-93(c)**): In the text of its case brief on page 16, *KSC* quoted in its entirety *CSI*'s Letter to *KSC* of 14 December 1998, which explicitly *CSI*'s inability to provide the information requested in question 1 of *KSC*'s Letter to *CSI* of 8 December 1998. Moreover, *KSC* again provided *USDOC* that letter in Exhibit 2.

4. As the evidence demonstrates, *KSC* repeatedly informed *USDOC* that *CSI* was unable to provide the information requested in Question 1 of *KSC*'s Letter of 8 December 1998. Sometimes *KSC* said it directly, other times *KSC* quoted the words of *CSI*. Japan is alarmed that *USDOC* is not familiar with the record of its own investigation.

Question 3: Isn't it true that *KSC* told *Commerce*, in *KSC*'s questionnaire response of December 21, 1998 (**JP-42(p)**), that *CSI* did not provide a reason for its claim that under its accounting system it was unable to provide sales information?

Answer

5. Yes. *KSC* noted in its questionnaire response the terse *CSI* comment, which included no explanation, to show that *CSI* was not at all forthcoming with *KSC*. Whether the statement was true or not is not something *KSC* was ever able to determine. If *USDOC* questioned the veracity of the

³ See Japan's Second Submission, para. 46.

statement or wanted an explanation, it could have followed up with CSI directly after KSC informed USDOC of CSI's response. CSI was, after all, an interested party to the investigation.

Question 4: Isn't it true that, in all of the following documents submitted to Commerce, KSC said that CSI refused to supply, or would not supply, or would not cooperate with KSC to supply (rather than was *unable* to supply), the requested information: JP-42(n) (KSC letter to USDOC, 18 Dec. 1998); JP-42(p) (KSC response to section C of USDOC questionnaire); JP-42(u) (KSC response to first USDOC section A supplemental questionnaire); JP-42(v) (KSC response to sections B and C of Commerce supplemental questionnaire)?

Answer

6. Japan's answer to US Question 2 above documents the numerous instances in which KSC communicated this basic point to USDOC, and includes citations to some of the documents identified here. KSC assumed that USDOC would be reading not just the text of its answers, but also the attached correspondence from CSI. The fact that KSC may not have provided full quotations from the CSI correspondence in the text of each and every letter it submitted to USDOC does not change the fact that the correspondence is on the record.

7. Perhaps the best and most obvious example is from KSC's Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**). KSC informed USDOC that CSI responded to KSC's latest request for information on December 14, 1998, and "with multiple excuses indicated its inability/unwillingness to provide the necessary information, including (1) that its accounting system was unable to provide information regarding its sales of further manufactured products." With this and many other submissions, KSC clearly documented CSI's unwillingness *and* inability to provide necessary information.

Regarding the KSC/CSI transfer price information:

Question 5: Isn't it true that the transfer price data which KSC submitted to USDOC (JP-93(f) and US/B-24bis) excludes product characteristics such as prime, paint, quality, carbon, strength, coil, tempered, and pickled?

Answer

8. No, this is not entirely true. The table KSC provided in its Section A response showed which types of steel it sold to CSI.⁴ The table contained pertinent product characteristic data including thickness, width, and specification. From the specification, USDOC could have determined quality, carbon, and strength, as explained in KSC's Section C Questionnaire Response.⁵ Further, KSC indicated in its Section C Response that all sales to the United States were prime, unpainted product.⁶

9. The remaining product characteristics mentioned in the question (coil, tempered, and pickled) were not provided -- but they were also never requested by USDOC. This is because USDOC inappropriately assumes that all export sales to affiliates are unreliable -- an assumption Japan thinks is erroneous. The United States cannot now defend this erroneous assumption by blaming KSC for following USDOC's questionnaire.

⁴ KSC's Section A Questionnaire Response, Exhibit 37 (16 Nov. 1998) (**Exh. JP-93(f)**). The information was provided in product groups, *i.e.* ["thinner gauge HRS for resale," "HRS for Cold-Rolled" and "Galvanized," and "HRS for Pipes"]. (HRS is hot-rolled steel.)

⁵ KSC's Section C Response, at C-2 (21 Dec. 1998) (additional excerpts attached as **Exh. JP-108**).

⁶ *Id.* at 7-8 (additional excerpts attached as **Exh. JP-108**).

10. In any event, the missing information was not critical for determining whether KSC-to-CSI prices were reliable. A test of reliability does not depend on a comparison of products using USDOC's CONNUMs. USDOC had the most important product characteristics in the data KSC provided in its Section A response. These were more than sufficient to determine the reliability of the gross unit prices at which KSC sold to CSI.

11. Furthermore, given the difficulties USDOC knew KSC was facing in obtaining downstream data from CSI, USDOC could have requested the other product characteristics from KSC in order to form a more reasonable basis for facts available if the KSC-to-CSI prices were, in fact, deemed unreliable.

Question 6: Isn't it true that this same information excludes selling expenses such as rebates, credit, advertising, warranty, technical services, indirect selling expenses, and packing expenses, as well as terms such as order date, pay date, sales terms, payment terms, and quantity type?

Answer

12. This question misses the point. USDOC does not need a full response to its questionnaire to test whether the relationship has influenced the prices. Given KSC's data on prices, quantities, and most product characteristics, USDOC could undertake a basic examination of the reliability of the KSC-to-CSI prices without the missing data. Furthermore, as discussed above, knowing that KSC was having difficulty collecting the downstream information from CSI, USDOC could have asked KSC for more detail regarding its transfer sales to CSI.

Regarding Japan's Second Opening Statement and KSC:

Question 7: How can Japan state in its Second Opening Statement (para. 10) that the "USDOC ignored the fact that the company whose information USDOC demanded was a petitioner" when the USDOC, in its final determination (JP-12), specifically addressed this fact, as explained and quoted in the US 1st Submission (para. B-114)?

Answer

13. In its Oral Statement at the Second Meeting, Japan made this argument to highlight USDOC's refusal to give this fact any weight. An authority can mention a fact, but then make a decision that completely ignores the significance of that fact. To do so is to ignore the fact at issue.

14. The quoted passage demonstrates that USDOC did not give full and fair consideration to the very important fact that CSI was an active petitioner in the investigation. The discussion quoted in para. B-114 of the US First Submission only obliquely references CSI's status as an active petitioner. The vast majority of USDOC's analysis treats this case like any other case involving affiliates, just assuming that affiliates act in concert to the benefit of the whole. USDOC's discussion of what KSC did or did not do and the possible benefits accruing to KSC and CSI is remarkably void of any reasoned consideration of the obvious effect CSI's status as petitioner would have on the situation.

15. The only perceptible reference to CSI as petitioner is where USDOC casually stated, "while KSC's business relationships may involve certain internal conflicts of interest, the use of an adverse inference in determining the dumping margins on CSI sales does not contradict the Department's policies."⁷ It is exactly the "internal conflicts of interest" caused by CSI's independent decision to participate in the investigation as an adversary to KSC that created the problem. If CSI had wanted to help KSC in the defense, CSI would have cooperated, KSC could have met USDOC information

⁷ *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24368 (Exh. JP-12).

demands, and there would have been no need for “facts available.” CSI itself stated that its status as petitioner affected its willingness to assist KSC.⁸ USDOC dismisses CSI’s obvious independent self-interest, by assuming affiliates act in concert regardless of the circumstances. USDOC’s theory that KSC and CSI acted in concert was not supported by the facts in this case. Thus, its adverse inference was illogical and unreasonable.

Question 8: Why does Japan persist in referring to “cases” in the plural (Japan’s 2nd Opening Statement para. 10 and Japan’s 2nd Submission para. 78) with regard to a USDOC case involving a US importer/petitioner, when there is only one such case (JP-93(h))? Isn’t it true that, with regard to this one case, Commerce found the petitioner to have had “exclusive control” over the requested data?

Answer

16. While Japan has checked again and could find no other relevant cases directly on point, this is unsurprising. How often is the US affiliate of a foreign company authorized to file an anti-dumping petition against its parent? The very fact that KSC was unable to prevent CSI from joining the anti-dumping petition demonstrates KSC’s lack of control over CSI.

17. The United States is wrong to insinuate that USDOC declined to apply adverse facts available in *Stainless Steel Wire Rod From Taiwan* merely because it found the petitioner had “exclusive control” over the requested data. It is clear that USDOC made this decision based on no fewer than four factors, best summarized in the USDOC’s “Walsin Concurrence Memorandum,” which the determination explicitly cites:⁹

{A}t the time of response preparation and verification, Carpenter and Walsin were not affiliated within the meaning of section 771(33)(E) of the Tariff Act of 1930...In addition to this fact, it is important to note Carpenter’s role as a petitioner in the investigation of SSWR, its interest in domestic production of SSWR rather than importation from Taiwan, and its lack of direct financial liability with respect to imports of the subject merchandise which occurred after the suspension of liquidation.”¹⁰

Thus, aside from the issue of control over the requested information, USDOC also recognized Carpenter’s ample incentive to sabotage Walsin’s questionnaire responses, given its role as petitioner, its interest in domestic production, and its lack of direct financial liability for antidumping duties. USDOC refused to punish Walsin for Carpenter’s self-interested behaviour, and applied neutral facts available.¹¹

⁸ See Japan’s Second Submission, para. 61 (quoting letters from CSI: “please remember that CSI is one of the petitioners, and eventually we would be in a difficult position to supply some kind of information” and “{t}his behaviour has been adopted here at CSI in order to protect the company as an American steel company, regardless of the Brazilian and Japanese ownership.”).

⁹ *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 40461, 40464 (29 July 1998) (“For further discussion, see Walsin Concurrence Memorandum.”) (**Exh. JP-93(h)**).

¹⁰ Anti-Dumping Duty Investigation of Stainless Steel Wire Rod (SSWR) from Taiwan, A-583-828, Walsin-Cartech Specialty Steel Corporation: Concurrence Memorandum for the Final Determination (20 July 1998) (excerpts attached as **Exh. JP-109**).

¹¹ *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. at 40464 (“Given these *unusual* circumstances, we have not determined that Walsin failed to act to the best of its ability. . . . Therefore, in applying facts available, we used the weighted-average margin for all of Walsin’s reported sales to the CEP sales that were not reported. . . .”) (emphasis added) (**Exh. JP-93(h)**).

18. CSI's incentive to sabotage KSC's questionnaire response was no different. CSI was a petitioner. Its primary interest was in domestic production, not importation, as evidenced by USITC's decision to not exclude any related parties from its preliminary investigation.¹² CSI no longer imported hot-rolled steel from KSC, so it would not have been financially liable for any future anti-dumping duties.¹³

19. In any event, regardless of whether USDOC followed past practice, its treatment of KSC violated its WTO obligations. USDOC should have recognized KSC's predicament and applied special circumspection in its application of facts available, as required by Paragraph 7 of Annex II. It should also have rendered practicable assistance, as required under Article 6.13. The adversarial approach USDOC adopted in this case, and its ultimate resort to adverse facts available, violated the letter and spirit of the Agreement.

Regarding NSC/NKK:

Question 9: Japan's Second Written submission, at fn. 89, claims that the Polyester Staple Fibre case shows that the "Seven-Day Rule" does apply to information requested in questionnaire. It is undisputed that that case dealt with corrections to data already submitted, and that Commerce regularly accepts such corrections as late as the first day of verification, as it did in this case for all three Japanese respondent firms. Given that the deadline for "corrections" is not seven days before verification, but the first day of verification, and that the reference to the "Seven-Day Rule" in the Polyester Staple Fibre case is therefore clearly an incorrect citation, and given that the *chapeau* of 19 C.F.R. § 351.301(b) expressly provides that the questionnaire deadlines in 19 C.F.R. § 301(c) take precedence over the general deadline in 19 C.F.R. § 351.301(b), how can the Polyester Staple Fibre case provide that the Department's general practice is to allow the submission of new data categories, including those that-like the theoretical weight factors – are not corrections, long after the questionnaire deadlines?

ANSWER

20. The United States is drawing a distinction between corrections and new information that does not apply in this case. First, NSC's and NKK's submissions of conversion factors were in fact corrections. Both companies had incorrectly stated they did not have the information requested. This incorrect statement was then corrected. Neither company left this question blank. Both provided an answer, and they then sought to correct that answer as soon as they discovered their initial answer was incorrect.

21. Second, the conversion factor cannot reasonably be considered a "new data category." NSC and NKK provided quantities, prices, and all the necessary adjustments. The only outstanding issue was whether and to what extent the quantities being reported needed to be adjusted. In other words, was the quantity that had been reported correct, or did it need to be corrected?

22. Third, the United States responded to a Panel question at the Second Meeting by arguing that allowing new information creates a loophole and creates unfairness. Neither claim is correct. Because the USDOC policy of accepting corrections itself contemplates new information coming later

¹² See *USITC Final Injury Determination*, USITC Pub. 3202, at 5-6 ("In the preliminary phase of this investigation, we found that two domestic producers were related parties...We further found that appropriate circumstances did not exist to exclude either of these producers from the domestic industry. In the final phase of this investigation, we have not found any evidence to warrant changing this finding.") (Exh. JP-14).

¹³ See KSC Letter to USDOC of 10 Nov. 1998 ("While CSI has historically been the importer of record for all imported steel including KSC HRS, when a HRS shipment arrived potentially subject to retroactive antidumping duties, CSI required that purchase to be entered by . . . Kawasho International.") (Exh. JP-42(i)).

in the investigation, the addition of such information cannot be considered a loophole to the questionnaire deadlines. Nor is there any unfairness. The “seven-day rule” allows for information to be placed on the record prior to the verification, and weeks before the arguments by both sides. This case illustrates well the amount of time available for comment. Petitioners had time to comment before the verification, during the verification, and after the verification. Petitioners had time to make arguments in their brief, and make arguments in the oral hearing. Given these extensive opportunities to comment, the United States cannot argue credibly that there was no time for systematic analysis or comments by others.

23. We also note the illogic of the US argument. If corrections can be made as late as the first day of verification, then the seven-day rule must apply to other categories of information. If this is true, then it is unclear on what basis USDOC can justify rejecting NSC’s and NKK’s conversion factors.

Regarding Affiliated Sales in Home Market:

Question 10: Japan continues to complain that it is unfairly harmed by Commerce’s failure to exclude, as not in the ordinary course of trade, sales to an affiliate made at artificially high prices, such as those which might be made to a cash-rich affiliate for subsequent resale as a lower price for tax purposes. In response to Panel Question 37 on this hypothetical situation, the Department noted (at paragraph 43) that if the transfer price sales were, in fact, outside the ordinary course of trade because the merchandise was sold to the affiliate at artificially high prices, the producer could report the downstream sales at the market price, even if these were below the affiliate’s cost of *acquisition*. (We note that the Department did not, as Japan suggests in its Second Written Submission, state that it would accept downstream sales below the cost of *production*; such sales are expressly outside the ordinary course of trade.) In its Second Written Submission, at paragraph 125 and fn. 124, Japan’s response is to question whether Commerce would, in “a real investigation,” accept the below acquisition cost sales.

In this investigation, KSC made a large percentage of its home market sales through its affiliated trading company, Kawasho. KSC did not report its transfer prices to Kawasho. Instead, as permitted by the Department’s standard questionnaire, KSC reported only Kawasho’s downstream sales. (Preliminary Analysis Memorandum for KSC, Exh. USB-6.) NSC also directly reported downstream sales for its principal home market trading company, in lieu of the transfer price sales to that company. (Preliminary Analysis Memorandum for NSC, Exh. USB-32.)

Given this situation, in this “real investigation,” could Japan please explain how the Department would be in a position to know what an affiliate’s acquisition costs were if a producer chose, instead of reporting the artificially high sales, to report the more ordinary downstream sales instead? If the Department does not even know what the acquisition costs are, how can the Department decline to accept downstream sales on the grounds that they are made below their acquisition cost?

Answer

24. The US question (as well as the accompanying essay) misses the point. Japan is not complaining that any high-priced sales were inappropriately included in this case. Rather, Japan has demonstrated that the asymmetry of the US 99.5 per cent test makes it inherently unfair. The US policy subjects low-priced sales to a severe test, and yet does no testing at all of high-priced sales.

25. The choices made by foreign producers in a given case reflect the constraints imposed by the USDOC questionnaire. USDOC cannot give instructions in a questionnaire – such as saying you may

ignore the related party sales and simply report the downstream sales – and then complain that by following such instructions the respondents did not provide the necessary information. The USDOC questionnaire is a further indication of the flawed USDOC policy.

ANNEX E-11

Answers of the United States to Questions from Japan at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO JAPAN'S QUESTIONS TO THE US

Question 1: Where does the USITC determination mention in any way the profit level for 1996? How can the USITC evaluate a crucial fact without mentioning that fact?

1. At the outset, we note that Japan seems to confuse the evaluation of factors required in Article 3.4 of the Anti-dumping Agreement with examination of evidence (facts). Articles 3.1 and 3.5 require that a determination of injury be based on "positive evidence" and an "examination of all relevant evidence." The United States maintains that it performed an objective examination of all the evidence, including the 1996 financial performance of the domestic industry, in its examination of the impact of imports on the domestic industry, as required by Article 3.4. Article 3.4 simply requires that the USITC provide "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."¹

2. A panel recently faced with this issue assessed whether Thai authorities had "failed to consider the factors listed in Article 3.4."² At the outset, we note that the panel characterized the obligation of the Thai authority as to "consider." Although the word "consider" does not appear in Article 3.4, "examine", which is the language in Article 3.4, is defined as "to consider or discuss critically."³

3. As the *Angles* panel found, an appropriate consideration does not require a finding or determination specifically about the factor considered. Although a panel may prefer such an explicit characterization, a reference to the factor need not be explicit on the face of the decision. All that is required is that the USITC demonstrate that it has "given attention to and taken into account" the factor under consideration.⁴ The USITC has considered properly when it puts a factor "into context."⁵ In determining whether the USITC met this obligation, this Panel should take all "statements and characterizations into account."⁶

4. Accordingly, the USITC properly evaluated profits in its examination of the impact of dumped imports when it provided a description of the financial performance of the industry. The USITC's explicit findings demonstrate that it adequately considered profits in accordance with the Anti-dumping Agreement. The USITC discussed the 1997 to 1998 declines in operating income and

¹ Panel Report, Thailand -Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Angles"), WT/DS122/R, circulated on 28 September 2000, para. 7.236.

² *Angles* at para. 7.238.

³ The Compact Edition of the Oxford English Dictionary 364 (1985).

⁴ *Angles* at paras. 7.161 & 7.180.

⁵ *Angles* at para. 7.170.

⁶ *Angles* at para. 7.165.

in the ratio of operating income to net sales.⁷ Referring back to its discussion of price effects, the USITC also considered the unit cost of goods sold and unit values (the difference in these two indicators being unit profits) from 1996 to 1998.⁸

5. Japan has refined its argument such that it is now focused not on whether the USITC considered profits, but on whether it considered profits over the entire period -- from 1996 to 1998. The USITC clearly considered the 1996 data in rendering its determination. In its discussion of the financial performance of the industry, the USITC specifically cited to the table in the staff report that included the information for 1996.⁹ The USITC also explained why it considered the 1997 to 1998 period particularly probative and, in so doing, made clear that it had considered the 1996 data. Respondents had argued to the USITC that 1997 was a banner year. As a result, respondents asserted, increases from 1996 to 1998 were more instructive to the USITC's analysis than declines from 1997 to 1998.¹⁰ The USITC expressly rejected this argument. Implicit in the explanation of why 1997 to 1998 was an appropriate period of comparison is a consideration of the 1996 information and a rejection of the proposed 1996 to 1998 comparison.¹¹ In sum, the USITC did consider the 1996 data but simply expressed its determination in a manner different than Japan would have this panel believe is required -- instead of providing its reason for *not* relying on a 1996 to 1998 comparison (which would in all likelihood have included a recitation of the 1996 data), the USITC clarified why it *was* relying on 1997 to 1998 comparisons. Either way, 1996 data clearly was considered.

6. Moreover, the USITC found that the industry's performance was "substantially poorer than what would have been expected given record levels of demand in 1998."¹² This statement reflects the USITC's understanding that performance trends might (depending on the time period examined) be regarded as growing, as in 1996 to 1998, rather than falling, as in 1997 to 1998. Further, the USITC's discussion of average unit values and unit cost of goods sold shows that it was cognizant of the profit trends over the period, with 1998 profits lower than those in 1997 but still higher than in 1996.¹³

7. The characterization of 1998 as underperforming shows not only that the USITC was aware of the trends over the entire period, but also that it found the negative impact of dumped imports on growth, another Article 3.4 factor, as instructive in its determination. The USITC found that the domestic industry should have been performing better in 1998 in light of the conditions of competition at that time and that the dumped imports were preventing the industry from taking advantage of the increased demand. While Japan may "have preferred a more robust evaluation of" profits¹⁴, the USITC's consideration of profits, and specifically the 1996 profit levels, is apparent in the determination.

8. This Panel should also note that Japan's question rests on the false premise that the profit level in 1996 was a "crucial fact." "In a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case."¹⁵ In some cases, certain listed factors may not be relevant at all and their "relative importance or weight can vary significantly from case to case."¹⁶ Here, the USITC's report explained the weight it gave to the

⁷ USITC Views at 18.

⁸ USITC Views at 18 n.100.

⁹ USITC Views at 18 nn.99 & 100.

¹⁰ Respondents' Posthearing Brief at 19 (Exh. US/C-32).

¹¹ USITC Views at 18.

¹² USITC Views at 20.

¹³ USITC Views at 18 n.100.

¹⁴ See *Angles* at 7.241.

¹⁵ *Angles* at para. 7.225.

¹⁶ *Angles* at para. 7.236.

evidence concerning each of the enumerated factors. This Panel should not follow Japan's lead in its attempt to reweigh the evidence.

9. Further, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodologies to be used."¹⁷ Japan has not demonstrated that the USITC's methodology "introduced a flaw in the authority's analysis."¹⁸ Thus, this Panel should not find fault with the fact that the USITC did not rely on the 1996 profit levels.

10. Finally, Japan's argument about the 1996 profitability are not properly before this panel. Based on *High Fructose Corn Syrup*, Japan is attacking the USITC's determination by asserting that the decision does not make the consideration of the Article 3.4 factors apparent.¹⁹ However, Japan has not claimed a violation of Article 12 of the Anti-dumping Agreement, in which the requirements to make "detailed findings" and respond to parties arguments appear. Consequently, this panel need not "make a specific finding as to the adequacy of the text" of the USITC's determination.²⁰

Question 2: Where on the documents [had] USITC "recognized the effects of captive production" (para. 33) as opposed to simply noting the existence of captive production?

11. In this case, the USITC noted the existence of captive production²¹ and, accordingly, some Commissioners applied the captive production provision. The captive production provision, in itself, is a recognition of the fact that having significant amounts of captive production may skew an analysis of injury. Consequently, in applying the provision, three Commissioners necessarily did more than merely note the existence of captive production.

12. In addition, the determination is replete with references to the effects of captive production on the USITC's analysis. In footnote 28, the USITC found that dumped imports and the domestic like product were sold in the same channels of distribution, notwithstanding the fact that domestic producers internally transfer significant amounts of hot rolled steel. On page 11, the USITC recognized that minimills are more sensitive to competition than integrated producers in part because "their captive operations are generally not as substantial." On page 19, the USITC found that minimills had a worse financial performance than integrated producers because they had a "greater dependence on the merchant market, where imports are concentrated." To say that those firms that lack captive operations are more "sensitive" to import competition is equivalent to saying that those firms that have captive operations are relatively shielded from import competition. The particular method of explanation used by the USITC in this case stemmed from its comparison of the performance of integrated producers with that of minimills to show that imports affected the industry as a whole. This analysis resulted in the conclusion that the integrated producers, who were less sensitive to import competition, performed better than the minimills, and the results for both groups of firms showed that the industry was adversely impacted by imports. Finally, the USITC makes parallel findings about the merchant market and the industry as a whole throughout its determination. By implication, each of these parallel findings includes a finding about the captive segment of the market because there are only two segments that make up the whole -- merchant market and captive production.

13. Japan seems to view the effects of captive production only as shielding the captive segment of the market from competition, without recognizing that the merchant market sector remains affected by

¹⁷ *Angles* at para. 7.159.

¹⁸ *Angles* at para. 7.159.

¹⁹ Japan's First Written Submission at para. 259.

²⁰ *Angles* at n.244.

²¹ USITC Views at 9.

import competition. As a result, Japan's challenge to the USITC's analysis of captive production rests largely on the fact that the USITC characterized the effects of captive production differently in this case than it did in the 1993 *Flat Rolled Steel* investigation. The Panel should reject this argument because the USITC properly recognized the effects of captive production in both cases in light of the conditions of competition in the industry at the time.

14. Two factors other than the captive production provision affect the different context from the 1993 decision in which the USITC discussed captive production in its 1999 decision. In this case, an additional layer was added to the analysis because, as respondents urged, one segment of the domestic industry, minimills, was becoming increasingly important and was more heavily dependant upon the merchant market. Thus, in discussing the relative effects of captive operations in the context of the relative impact of imports on minimills, the USITC was simply recognizing a change in the conditions of competition since 1993.

15. Moreover, the evidence concerning the effects of imports that the USITC was examining was different in 1999 than it was in 1993. In 1993, the domestic industry's market share fell by one percent while its profitability declined sharply.²² Notably, subject imports generally had higher prices that fell less than the price of the domestic product.²³ Further, it was reported that the domestic producers led price declines as minimills entered the market.²⁴ These factors led the USITC to conclude that something other than dumped imports was causing injury to the domestic industry. Even then, however, the USITC characterized its analysis at that time as giving "separate consideration to the effect of subject imports on the *merchant market* segment of the industry."²⁵ As Japan suggests, however, the USITC discussed captive production in terms of the captive consumption segment. Thus, it is obvious that the USITC did not find the distinctions between an analysis based on the captive segment and an analysis founded in the merchant market as telling as Japan now claims.

16. By contrast, in the current case, subject imports doubled their market share at a time of increasing consumption²⁶, subject imports increasingly undersold the domestic like product²⁷, and the domestic industry's financial indicators were decreasing at the time of the highest import penetration.²⁸ Respondents argued that established and efficient minimills were driving down domestic prices and causing injury to the domestic industry. The USITC thus looked at price declines for these producers, finding them exaggerated because of competition with imports.²⁹ In this analysis, the USITC was compelled to consider the merchant market where minimills generally participate in the marketplace.

17. In these two cases, the USITC discussed the same phenomenon, but did it using different terms and with different emphasis because the conditions of competition in the hot rolled steel industry had changed in the intervening years. Thus, it is Japan's desired rote analysis which would violate the Anti-dumping Agreement and not the method employed by the USITC in this case. Japan

²² Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("Flat Rolled Steel") at 52.

²³ Flat Rolled Steel at 48.

²⁴ Flat Rolled Steel at 49-50.

²⁵ *Flat Rolled Steel* at 17 (emphasis added).

²⁶ USITC Views at 12-13.

²⁷ USITC Views at 14-15.

²⁸ USITC Views at 18.

²⁹ USITC Views at 15-16.

would have this Panel reject the USITC's decision in favour of a methodology which concerned itself with facts that are no longer relevant to the industry today. The Panel should decline this offer.

Question 3: What is the textual basis for interpreting Article 6.13 as requiring the respondents to ask for help?

18. Article 6.13 states that "[t]he authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable." In order for an investigating authority to be aware of an interested party's need for assistance, such that Article 6.13 applies, the party must communicate, in some objective and understandable manner, its need for assistance. Otherwise, the investigating authority will not be aware of the need for that assistance, while the responding party could later claim that it should have gotten help for which it never communicated a need. Thus, Article 6.13 necessarily assumes that parties have identified any problems that they are experiencing.

19. The Panel's question number 5, of its first round of questions to Japan, asked: "Could Japan provide the Panel with specific references to, or copies of, documents or other information which in Japan's view demonstrates that the Japanese respondents requested the USDOC for assistance in providing the information requested in the USDOC questionnaire?" In its response, at paragraph 22, Japan argued that the obligations of Article 6.13 are not dependent on a party's request for assistance and that KSC and NKK "made it clear" to Commerce that they "were experiencing difficulties." However, that was not the case. As explained in the United States' second submission at paragraph 18, KSC, rather than communicating to Commerce its supposed need for assistance in dealing with its affiliate CSI, requested that Commerce excuse KSC altogether from its responsibility for providing the requested information. *See also* United States' First Submission at para. B-106. If KSC's request to be excused from reporting the requested information was meant in fact to be a request for assistance, then KSC was asking the Department to be a mind-reader. An interpretation of Article 6.13 that would require the Department to provide assistance under such circumstances is neither logical nor permissible.

20. With regard to the difficulties alleged to have been experienced by NKK and NSC in reporting the weight conversion factors, the United States notes that the Department facilitated the efforts of these companies to provide the factors in various ways. First, the Department's questionnaire did not require any particular methodology be used in providing the conversion factors. Instead, it gave both companies wide latitude to arrive at such factors in the manner most suited to their own processes and data maintenance systems. It was the companies, not the Department, which were most familiar with these processes and systems. Thus, any action which the Department might have taken to prescribe exactly how any particular company should have obtained internal data and calculated the conversion factor would have *limited* that company's options, rather than constituting "assistance." Second, the Department provided additional response time when requested by NKK and NSC. Both companies were granted extensions of both the original questionnaire deadline and the deadline for the supplemental questionnaire. Third, the Department's service requirements permit counsel for one respondent to examine the approaches used by counsel for other respondents, as a source of possible solutions, should they lack ideas about how a particular issue might be approached (without imposing any particular approach). In this case, for example, if NKK had been truly stymied as to how it might calculate a conversion factor, its counsel could have examined KSC's initial questionnaire response (which was provided to NKK's counsel long before NKK's response to the supplemental questionnaire was due) to determine whether KSC's methodology might be adaptable to NKK's own databases. NKK did not need to wait for the Department point out this obvious possibility. Similarly, the Department should not have had to point out the obvious fact that coils would be weighed at the factory, not at the Tokyo office, and that weight data not available at the Tokyo office might nonetheless exist at the factory. Thus, while Japan complains that the Department failed to give NSC and NKK sufficient "assistance" with regard to the conversion factors, the

Department in fact provided all the "assistance" it could to these large, sophisticated companies who were, themselves, the masters of the information requested.

ANNEX E-12

Answers of the United States to Questions from the Panel at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO THE PANEL'S QUESTIONS TO THE US

Question 6: According to the United States, did KSC provide KSC-to-CSI sales data with its Section A response as Japan maintains (paragraph 9 of Japan's Oral Statement)? On what basis did the United States conclude in this case that prices of KSC to CSI were unreliable because of association? Did it base this conclusion on any facts particular to the KSC-CSI relationship, or the facts in this case, or did the United States presume such prices were unreliable based on the fact of that relationship?

1. The United States presumed that the KSC/CSI transfer prices were unreliable based on the relationship between the parties: KSC owned 50 per cent of CSI. Such a presumption represents a permissible interpretation of Article 2.3 of the Agreement. That article states, in pertinent part, that "[i]n cases ... where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are ... not resold in the condition as imported, on such reasonable basis as the authorities may determine." In this case, Commerce presumed that the parent-subsidiary association between KSC and CSI caused any prices between them to be inherently unreliable, because of the potential for manipulation of those prices. In such a case, Commerce will nearly always use the downstream sales to the first unrelated buyers as a basis for calculation of export price.

2. This is not to say that Commerce *always* insists on using downstream prices. It is the Department's practice not to use downstream sales in two circumstances which presented themselves in this case: where the "special rule" for further manufacturing applies and where there are a small number of sales through a US affiliate. As explained in the United States' first submission, para. B-122, and in the US response to question 42 of the Panel's first questions, KSC requested that Commerce exclude CSI's sales pursuant to the "special rule" for further manufacturing. Under that rule, if substantial value is added (over 65 per cent) to the imported product before it is sold to the first unrelated buyer, Commerce will not construct export price, on the theory that it is not worth gathering all the necessary information concerning further manufacturing and then "backing out" those data to construct the price. Instead, in such a situation, Commerce uses a surrogate export price. In this case, KSC did not meet the threshold for the "special rule" and Commerce did not apply it. By contrast, KSC requested, and Commerce agreed, to exclude altogether its sales to its affiliate VEST, because they represented such a small amount (less than 5 per cent) of KSC's US sales.

3. Nevertheless, even if Commerce had wanted to calculate export price using the limited KSC/CSI sales data which KSC did supply with its Section A questionnaire response (JP-93(f) and US/B-24bis), it would have been unable to do so, because that information was inadequate as a basis for the calculation of export price. KSC did not provide the data necessary for an accurate

product-by-product matching to Japan's home market sales. The missing information included: product characteristics such as prime or not prime, painted or not painted, the quality, the amount of carbon, the yield strength, coil or cut-to-length, temper rolled or not temper rolled, pickled or not pickled, the edge trim, and with or without patterns in relief; selling expenses such as rebates, credit expenses, advertising expenses, warranty expenses, technical services expenses, indirect selling expenses, and packing expenses; and terms such as order date, payment date, sales terms, payment terms, and quantity type. In fact, KSC never responded to Commerce's Section C questionnaire, which requested full matching data for KSC's downstream sales through CSI. *See* Exh. JP-42(p) and (v).

4. Although KSC did supply limited KSC/CSI transfer price data (Exh. US/B24bis and JP-93(f)), the data it supplied responded only to Commerce's Section A questionnaire, which requested general quantity, price, and value data for further manufactured products. Commerce routinely requests such data, which can be used to determine whether the "special rule" for further manufactured products, involving substantial value added, may apply. When KSC later requested to be excused from reporting its sales to CSI, it used this volume and value data to support that request. *See* Exh. JP-42(i). While the KSC/CSI transfer price data were sufficient for, and indeed used by, Commerce to determine the applicability of the special rule, they were completely inadequate to serve as a basis for calculating export prices to be matched to identical or similar home market prices in Japan for purposes of the margin calculation.

5. Finally, with regard to Article 2.3 generally, the United States does not wish to suggest, by this answer to the Panel's question, that the United States considers every export transaction that involves an "association or compensatory arrangement between the exporter and the importer or a third party" to require the construction of an export price, *per se*. There are many forms of association, some of which are quite remote. Presumably, there are forms of compensatory arrangements that would amount to simple adjustments to the export price, rather than indicating that the export price was not an arm's-length price, and therefore was not an appropriate basis for the dumping comparison. It is possible that in many of these situations, the United States would not consider the construction of an export price necessary.

6. The relationship between KSC and CSI, however, did not involve a mere "association" between the exporter and the importer or some objective compensatory relationship. Rather, it involved a very close level of *affiliation* - - KSC was the 50 per cent owner of CSI. Given this intimate level of affiliation, there is absolutely no way that the intra-corporate transfer price between KSC and CSI constituted an arm's-length price that could serve as an appropriate basis for a dumping comparison.

Question 7: The US (in paragraph 41 of its second oral statement) makes a distinction between "corrections" to questionnaire responses that were accepted by USDOC and "new information" such as the weight conversion factors that were not. Could the US please explain what it considers the difference is between "corrections" and "new" information submitted in response to a request for such information in the questionnaire?

7. A "correction" is a revision to data that have previously been submitted. While corrections necessarily involve replacing the erroneous data with different, hence "new," data, the Department generally accepts information which should have been provided by a questionnaire deadline only when it constitutes a correction to data which were timely submitted.

8. NSC and NKK did not submit any conversion factors in their responses to the original or supplemental questionnaires requesting these factors. These factors and their supporting data were entire *categories of information* which had not been submitted by the questionnaire deadlines; thus, they were not "corrections."

9. Japan's position suggests that a respondent can simply assert that requested data are "unnecessary" or that it is "unable to respond," and that such statements in a questionnaire response would then enable it to submit any and all categories of data, for the first time, at verification, under the rubric of "corrections" to such statements. Under this theory, by merely inserting a boilerplate "place holder" in its questionnaire response, a responding party could convert any information it wished to withhold until after the preliminary dumping determination into a "correction" the Department would be forced to accept.

10. NSC and NKK assert that their original claims – that the factors were unnecessary or impossible to provide -- were made in "good faith". An assertion of good faith does not require that these factors be accepted as "corrections." This is not a workable standard, and the Agreement does not impose any such standard. Administering agencies have no way of verifying the truth of allegations as to what motives a company may have for providing, or withholding, particular data at a particular time. Were the position espoused by Japan to be adopted, administering authorities would have to accept any data a party chose to provide at verification, so long as a protestation of "good faith" (which could never be refuted) were made. Just as the Agreement does not require reasonable deadlines to dissolve under the effects of a "place holder" excuse, it also does not dictate that such deadlines must dissolve whenever a party invokes the mantra of "good faith." Were the Panel to adopt either of these positions, it would be impossible to enforce the reasonable deadlines necessary to gather and allow comment on information in a systematic fashion, prior to the preliminary determination.
