ANNEX C

Second Submissions by the Parties

ANNEX C-1

Second Submission of Japan

(13 September 2000)

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Business Confidential Information

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

INTRODUCTION

1. Japan has demonstrated through its factual and legal presentations in this proceeding that the United States has violated numerous provisions of the Agreement on Implementation of Article VI of GATT 1994 ("the AD Agreement") as well as Article X of GATT 1994. The United States has attempted to deflect Japan's substantive claims with faulty preliminary objections, convenient interpretations of the relevant standards of review, and misconceived allegations that Japan's case relies on conspiracy theories. These devices, however, cannot overcome the strength of Japan's legal claims.

2. This Second Submission focuses on the substance of these claims. We do not repeat here the political context in which the United States made the decisions in this case. We instead merely wish to remind the Panel that the context is important to discerning whether the United States has met its obligations to conduct its investigations in an objective, unbiased, uniform, impartial, and reasonable manner – standards that are critical to any case under the AD Agreement and Article X:3(a) of GATT 1994.

3. This case presents a number of actions and policies undertaken by the US authorities that violate the AD Agreement, as follows:

- Facts Available: USDOC has converted the "facts available" provisions of the AD Agreement from an investigative gap-filling tool into an adversarial weapon to be used against foreign respondents. The general practice of using adverse facts available to punish respondents is inconsistent on its face with both the letter and spirit of Article 6.8 and Annex II of the AD Agreement. Further, the application of the policy in this case demonstrates its abusive nature. KSC was punished for its failure to find a way to force a petitioner to cooperate in the investigation for the benefit of a respondent. NSC and NKK were punished for good faith misunderstandings in their initial questionnaire responses, which were ultimately corrected before the closing of the factual record. The US authorities misapplied Paragraph 7 of Annex II and ignored the obligation of Article 6.13.

- All Others Rate: USDOC interprets Article 9.4 as if it includes the word "entirely," and thus calculates the "all other rate" applicable to companies not investigated based on margins tainted by "facts available." What the United States could not achieve in the negotiations of the Uruguay Round, the United States unilaterally adopts as its interpretation of the treaty text.

- Affiliated Parties: USDOC applies an arbitrary and unfair 99.5 percent test to exclude nearly all low-priced home market sales to affiliates while excluding high-priced sales to affiliates only if they are "aberrationally high." This particular USDOC policy so clearly violates Article 2.4 that not one of the five third parties in this case defends this policy, and four of the five parties specifically condemn the policy. Also, the United States uses downstream prices to calculate normal value, without appropriate adjustment, in direct contravention of the requirements of Article 2.2 to use a respondent's available home market sales or other specified alternatives.

- Critical Circumstances: USDOC rushed to judgment to make an early finding of critical circumstances long before it had sufficient evidence within the meaning of Article 10.6 to do so. USDOC formalized this approach of relying almost exclusively on the petition itself in a new policy bulletin that ensures this problem will repeat itself.

- Captive Production: The statutory provision on captive production impermissibly requires the USITC to focus primarily on one segment, at the expense of the other segment and the

domestic industry as a whole. The statute does not simply add another factor, or allow appropriate consideration of all factors. The statute instead significantly skews the analysis in favour of one segment. This analytic approach thus violates the explicit requirement in Articles 3 and 4 for injury determinations to be based on the domestic industry as a whole.

- Causation: USITC impermissibly manipulated the periods examined to justify its outcome. Rather than objectively determine the facts, USITC simply ignored the logical inconsistency in its finding -- that the domestic industry increased its shipments and improved financial performance even with an increase in imports. Such self selection does not meet the requirement of Article 3.1 for an "objective examination," or Article 3.5 for a determination that subject imports themselves caused the material injury. USITC also inadequately considered alternative causes, and thus violated the Article 3.5 requirement not to attribute other causes to the imports being investigated. Selective discussion of favourable facts and ignorance of unfavourable facts simply does not meet the requirements of Article 3.

4. Beyond these AD Agreement violations, the US authorities also breached their obligations under GATT 1994 Article X:3(a) to administer the anti-dumping law in a "uniform, impartial, and reasonable" manner. These obligations exist independently of the AD Agreement, and the Panel should therefore address these separate and independent claims. They are summarized as follows:

- Notwithstanding USDOC's application of punitive adverse facts available for far less severe actions by respondents, USITC accepted corrected questionnaire responses from domestic companies filed well after the initial deadline but before the closing of the factual record. The United States pretends this asymmetry does not exist, and in doing so has the audacity to claim that the domestic companies made "timely" responses citing the USITC version of the very regulation that USDOC claims did not apply to the foreign companies.

- Notwithstanding an existing and uniformly followed regulation, the authorities conveniently overlooked clerical errors the correction of which would benefit foreign respondents, even though there was no dispute at all over the clerical error or the applicability of the regulation at issue.

- Notwithstanding a longstanding practice of not accelerating cases, particularly complex cases, the authorities pushed this case through in record time. Instead of taking more time to proceed carefully, the United States rushed to finish early.

- Notwithstanding an existing customs policy that would have easily allowed the authorities to collect retroactive duties should they prove necessary later in the case, the authorities instead capitulated to domestic industry demands to craft a new policy. The authorities then rushed to apply the new policy in this case regardless of the state of the factual record.

- Notwithstanding a long history of analyzing three-year trends, USITC chose to focus on only two-years of the investigation period so as to avoid the logical inconsistencies of considering all three years.

Although all of these decisions reflect the degree of political pressure on the US authorities, none of these decisions complies with the obligation for "uniform, impartial, and reasonable" administration of the law.

5. This case is very much about respect for the rule of law, and respect for international obligations. The Panel decision in this case will show whether the obligations reflected in the AD Agreement and in GATT 1994 Article X:3(a) are meaningful or not. If there are any limits on the discretion that

administering authorities enjoy, then this case presents multiple violations of those limits that this Panel should discipline.

I. PRELIMINARY OBJECTIONS

6. The United States made preliminary objections concerning certain evidence submitted by Japan as well as Japan's claim against the US general practice of applying adverse facts available. We address only the former here; the latter is addressed separately in the section concerning facts available.

7. Japan believes that its letter of 10 August 2000 and its answers to Panel Question 3 demonstrate that all the factual information in this case are properly before the Panel. There are three kinds of claims in this proceeding: (a) "as applied" claims under the AD Agreement, (b) "on its face" claims under the AD Agreement, and (c) claims under GATT 1994 Article X:3(a). The issue raised by the United States in its preliminary objections to certain evidence is the extent to which Article 17.5(ii) of the AD Agreement limits the factual evidence that the Panel can consider with respect to these three types of claims.

8. The United States has conceded that "on its face" claims are not limited by Article 17.5(ii) of the AD Agreement.[1] Japan agrees. Indeed, "on its face" claims could not be limited by Article 17.5(ii) because the claims are not based solely upon what an authority did in a specific investigation.

9. The same logic applies to Japan's Article X claims. Article X claims are based on a different set of facts than "as applied" claims under the AD Agreement.[2] Article X is, *inter alia*, a *comparative* task in which the Panel compares the treatment of one party to another party (such as petitioners versus respondents), or the treatment of the respondents in this investigation to the treatment of respondents in other US investigations in terms of the *administration* of a law, regulation, or practice.[3] Therefore, contrary to the US assertion in its response to Panel Question 23, it makes perfect logical sense that a specific decision might not substantively violate the obligations of the AD Agreement, but that the administration of rules leading to that decision violates Article X of GATT 1994. Although a decision in isolation might not look biased for AD Agreement purposes, when the administration leading to that decision is compared to other instances, the partiality often becomes crystal clear.[4]

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[1] US Response to Panel Question 39. The United States later in its response to Panel Question 39 makes a hypocritical statement that should be ignored. After asserting that extra-record evidence can be used to support "on its face" claims, the US encourages the Panel to ignore Japan's expert evidence from a statistician because Japanese exporters should have submitted it to USDOC during the investigation. The Japanese exporters vociferously argued against the 99.5% test in the original investigation. Japan should not now be punished in making its "on its face" claim for the fact that perhaps the exporters did not find it worth the resources to hire an expert statistician for an AD investigation before a biased authority that had used this practice in nearly every prior case. Expert testimony on the "fairness" of a particular methodology, however, is quite appropriate before a WTO panel considering the proper interpretation of the word "fair" under the AD Agreement.

[2] The United States incorrectly suggests that the only contested evidence relevant to Japan's Article X claims is two newspaper articles. All of the newspaper articles that provide background on the case and illustrate the biased and zealous manner in which the domestic industry, Congress and the US AD authority were operating help explain why the US AD authority resorted to non-uniform, partial and unreasonable administrations of its rules. *See* **Exhibits JP–16-23, 25-27, 32(a)–(e), 37, 38**. In addition to these articles, in its Article X claims Japan also references NKK's good-faith behaviour in trying to respond to USDOC's weight conversion factor. *See* Japan's First Submission, para. 317. In this way, Mr. Porter's affidavit is also relevant to Japan's Article X claims. *See* **Exhibit JP–28**.

[3] The difference between Japan's GATT 1994 Article X claims and its claims under the AD Agreement is set forth in greater detail in the section of this submission dealing with Article X.

[4] A perfect example is USDOC's refusal to correct its clerical error that inflated NKK's preliminary margin by 12 percentage points. While the decision not to correct an error before the Final Determination might

10. With respect to the "as applied" claims, this so-called "extra-record" evidence is essential for the Panel to complete its task in this case. Article 17.6(i) requires the Panel to determine whether the authorities properly established facts and undertook an objective and unbiased evaluation of the facts. Fitting together with it, DSU Article 11 requires panels to make an "objective assessment" of the matters before it. The Panel cannot determine whether the facts were properly established and objectively assessed without considering the context of those facts.[5] Therefore, the Panel is obligated under WTO rules to consider all proffered evidence that will shed light on these important issues.

11. Moreover, within the "as applied" claims, Japan makes both legal and factual claims. In this regard, the expert opinion of the statisticians does not present any new or extra-record facts. Rather, it is an expert opinion based on record facts that the USDOC arm's length test is unfair. The affidavits of respondents' counsel, contrary to presenting new factual information, for the most part document margin impact *based on record facts.* There is no basis, therefore, upon which to exclude the statements. The affidavits are explicit in demonstrating step-by-step how the affiants reached their conclusions based on the record information or information improperly expunged from the record by USDOC.

12. Newspaper articles are provided (a) to give the Panel context when it examines whether the US authority properly established facts or assessed facts in an objective and unbiased manner[6] and (b) to summarize information for the Panel.[7] The articles demonstrate the extent of lobbying exerted by the domestic steel industry in this case on Congress which then exerted pressure on USDOC. The articles highlight the zealous nature of the actions taken by the United States in this case. The articles place certain extraordinary decisions made by USDOC in context so that the Panel can determine whether an objective and unbiased authority would have reached these decisions. There was no reason for the Japanese exporters in the underlying investigation to submit these articles. The articles are themselves about the investigation and USDOC's conduct during the investigation.

13. As a result, all of the evidence submitted by Japan is worthy of the Panel's consideration.

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not create a substantive AD Agreement violation, when compared to the fact that USDOC maintains a consistent practice of correcting these significant errors in other cases, the bias and partiality becomes clear.

[5] Article 17.5(ii) does not say the Panel should rely *only* upon evidence before the authority. The provision operates in conjunction with DSU Article 11 which obliges the Panel to make an objective assessment of all of the facts. There is no conflict between Article 17.5(ii) of the AD Agreement and Article 11 of the DSU. The Appellate Body has been very clear that Article 17 of the AD Agreement does not trump the broader rights and obligations of panels and members. *See United States—Anti-Dumping Act of 1916*, 28 Aug. 2000, WT/DS136/AB/R, WT/DS162/AB/R, at para. 74 ("*U.S.—1916 Act"*) and *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, adopted 2 Nov. 1998, WT/DS60/AB/R, at para. 65-67 ("*Guatemala—Cement*"). Moreover, the Appellate Body has established that panels have broad authority to look at evidence and determine its probative value, specifically so that panels can discharge their Article 11 obligations. *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 Nov. 1998, WT/DS58/AB/R, at paras. 104-106 ("*U.S.—Shrimp"*). The Appellate Body stated:

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

[6] *See* **Exhibits JP–16-23, 25-27, 32(a)–(e), 37, 38.**

[7] *See* **Exhibits JP–32(a)–(e), 33, 36**. As for **Exhibit JP–34(a)**, if an exporter referred the authority to the article, then it is on the record and Japan can use that Article before the Panel. It does not matter if the exporters provided copies of the Article or not.

II. STANDARD OF REVIEW

A. THE DISPUTE SETTLEMENT UNDERSTANDING ("DSU")

14. The United States misunderstands the operation of the appropriate standards of review in this case. Although the AD Agreement does indeed contain a unique standard of review,[8] Article 11 of DSU does not lose its meaning as we described in Paragraph 10, and *Japan has not brought this case only under the AD Agreement.* Japan has raised simultaneous claims under GATT 1994 regarding the US *administration* of its anti-dumping rules that deserve equal attention and consideration by the Panel. Therefore, Article 11 of the DSU is the applicable standard of review for Japan's Article X claims under GATT 1994.

15. The United States has effectively conceded this fact. Their only argument pertaining to the DSU standard of review is to assert, with absolutely no support, that Article X:3 of GATT 1994 simply *cannot* apply to a Member's anti-dumping actions.[9] By focusing only upon the standard of review under the AD Agreement, the United States has effectively conceded that Article 11 of the DSU controls the Panel's standard and scope of review with respect to Japan's GATT 1994 Article X claim – a claim that is separate and independent of the claims under the AD Agreement. In this way, the Panel should remain mindful of its obligation to consider all facts and evidence under Article 11 of the DSU. The United States cannot hide behind an alleged deferential standard of review contained in the AD Agreement to limit the Panel's review over the *entire* case.

B. THE AD AGREEMENT

1. This case fits squarely within the factual standard of review

16. In theory, the parties are in agreement as to the operation of the standard of review. Japan was explicit in its First Submission that it is not asking the Panel to reweigh the specific facts in this case.[10] Rather, each factual claim is based on either the improper establishment of the facts (including the failure to consider essential facts) or the biased and non-objective evaluation of the facts.

17. Where the parties disagree sharply, however, is the level of deference the Panel is to pay to the factual conclusions of a national authority. Although Japan agrees that the Panel should not reweigh the facts, the first sentence of Article 17.6(i) specifically directs the Panel to examine whether the national authority properly established the facts and evaluated the facts in an objective and unbiased manner. This consideration requires absolutely no deference on the part of the Panel. If the Panel finds instances in which the national authority improperly established facts or failed to evaluate the facts in an objective and unbiased manner, then those determinations fail to meet the basic requirements of the AD Agreement.

18. The United States also misstates the "scope" of the Panel's factual review.[11] First, Japan's challenges in this case are not limited to only the hot-rolled investigation. To the extent, therefore, that Japan has made "on its face" challenges, Article 17.5(ii) is irrelevant. Second, contrary to the US

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[8] Oddly, in footnote 97 in Part A of its First Submission, the United States claims that this unique standard of review also applies to matters pertaining to subsidies and countervailing measures. This claim is false. The United States recently lost this argument before the WTO Appellate Body in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, adopted 7 June 2000, WT/DS138/AB/R, at paras. 50-51.

[9] US First Submission, para. A-88 (emphasis added). The obvious applicability of GATT 1994 Article X to anti-dumping measures is discussed in more detail in the section of this submission covering Japan's actual Article X claims.

[10] Japan's First Submission, para. 49.

[11] Japan's detailed arguments on this topic are presented in Japan's 10 August 2000 Response to US Preliminary Objections.

view, Article 17.5(ii) of the AD Agreement does not limit review to the "administrative record." Importantly, the Panel must take into account facts that are "placed" before an authority, but not placed on the actual record. The US attempt to limit the scope of the Panel's review would, in fact, preclude the Panel's ability to carry out its factual standard of review in which it must examine the US authority's initial establishment of the facts, and consider whether the authority evaluated the facts in an unbiased and objective manner.

2. The United States distorts the legal standard of review

(a) No interpretation should escape the disciplines of the Vienna Convention, even under Article 17.6(ii)

19. In advocating unlimited deference to Member's interpretations of the AD Agreement, the United States would have the Panel allow the United States to interpret the AD Agreement at its own will. Article 17.6(ii) stipulates that panels must interpret the anti-dumping provisions in accordance with "customary rules of interpretation of public international law," a clear reference to the Vienna Convention.[12] Nearly every panel and Appellate Body decision now refers to the Vienna Convention as the primary set of rules that govern treaty interpretation in the WTO context. The deliberate insertion into Article 17.6(ii) of a reference to the customary rules of interpretation requires an interpretation *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* as stipulated in Article 31 of the Vienna Convention.[13] And Article 32 of the Vienna Convention instructs an interpreter as to how to deal with ambiguity, if any, by referring to the treaty's supplementary materials. Faithfully interpreted, Article 17.6(ii) thus bars Members from arbitrarily interpreting the provisions of the AD Agreement in a way that neglects their object and purpose.[14] Accordingly, the attempts of the United States to justify its interpretation by referring to the second sentence of Article 17.6(ii) must fail. When the Vienna Convention and the language of Article 17.6(ii) are read together, in their entirety, they do not give a Member *carte blanche* authority to equate ambiguity with multiple interpretations as the United States attempts here.

20. Even when the Panel finds a provision subject to more than one interpretation, that interpretation must still be "permissible" on the basis of *good faith* interpretation as elaborated above.[15] The Panel does not owe unrestrained deference to a Member's legal interpretation of treaty text. Rather, the Panel must scrutinize the permissibility of that interpretation in light of the Vienna Convention rules of treaty interpretation and a Member's obligation to implement the WTO Agreements *in good faith*.

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[12] See Steven P. Croley and John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l L. 193, 200 (1996).

[13] Vienna Convention on the Law of Treaties, art. 31.1 (emphasis added).

[14] In footnote 105 in Part A of its First Submission, the United States challenges the opinion of two GATT scholars that the anti-dumping standard of review allows for only one permissible interpretation. Far from recognizing the similarities between the standard of review and US law, the scholars point out the significant differences between the two bodies of law. Moreover, they explain the negotiating history of Article 17.6(ii), which evolved from a US proposed standard that recognized the use of multiple interpretations to the current and more limited standard of review that relies first and foremost on the Vienna Convention. *See* Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 193, 209-211 (1996). The United States is simply trying to achieve in dispute settlement what it failed to achieve in negotiations. See Gary N. Horlick and Peggy A. Clarke, "Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO," in 41 *Studies in International Economic Law: International Trade Law and the GATT/WTO Dispute Settlement System* 315, 317-320 (Ernst-Ulrich Petersmann ed. 1997), which analyzes the consistent rejection by WTO Members of US proposals regarding the anti-dumping legal standard of review during the Uruguay Round. (Attached as **Exh. JP-92**).

[15] The Government of Japan endorses the argument made by the Government of Brazil that the concept of "good faith" serves as an important tool of interpretation that should guide the Panel in determining the limits of "permissible." *See* Brazil's Third Party Submission, paras. 5-11.

(b) The United States misstates the doctrine of "subsequent practice"

21. Finally, the United States misleads the Panel as to the appropriate international practice under Article 31(3)(b) of the Vienna Convention governing subsequent practice. In this Article, "subsequent practice" must be those which establish "the agreement of the parties."[16] With no citation whatsoever, the United States whittles down this tool of interpretation to require only that "*a number* of signatories to the Agreement" have adopted the practice.[17]

22. Using this faulty premise, throughout its submission the United States alleges that other Members have interpreted the AD Agreement in a manner identical to the United States. In this submission, however, Japan will point out that many Members *do not* interpret the AD Agreement in the same manner as the United States, thereby nullifying any potential for the establishment of a "subsequent practice" under the accepted Vienna Convention interpretive tool. The concept of "subsequent practice" is about agreement and a concordance of actions; it is not about codifying varied practices or the practices of only a few dominant Members.

III. FACTS AVAILABLE

23. Japan's argument on facts available is that not only the application of relevant provisions of the US Statute in this case, but also USDOC's general practice of applying adverse facts available, violates the AD Agreement. Although the US statute itself may or may not be consistent with the Agreement, the general policies and methodologies with which USDOC consistently applies it are definitely not. Rather than use the facts available provisions of the AD Agreement as an investigative tool to find reliable information to fill gaps in information -- regardless of how those gaps are created -- USDOC uses them as a mechanism to punish respondents. Nowhere does the AD Agreement support such a policy.

24. The extreme nature of USDOC's facts available practice emerges in the arbitrary treatment of KSC, NSC, and NKK in the hot-rolled steel case. Each company cooperated with USDOC's information requests. None of them refused to provide information; none of them refused on-site verification. When they had trouble reporting information, they informed USDOC of their difficulty. The United States itself admits the Japanese companies were "substantially or largely cooperative" in this case.[18] Yet in the face of such facts, the United States now portrays them as the "bad secretary."[19]

25. The facts -- properly established and objectively evaluated -- belie this offensive analogy. KSC faced a situation in which USDOC has in the past applied special circumspection: USDOC required it to supply data from an affiliated US customer whose role as a petitioner in the case placed it odds with KSC's interest in providing USDOC with complete information. USDOC did not even consider KSC's good faith attempts to comply with USDOC's requests notwithstanding this conflict of interest. Rather than look for a reliable alternative, USDOC resorted to facts that would punish KSC.

26. USDOC also punished NSC and NKK. In response to a good faith misunderstanding by NSC about what information it had, and a good faith misunderstanding by NKK about what USDOC

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[16] The Appellate Body has explained that, "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation." *Japan—Taxes on Alcoholic Beverages*, adopted 1 Nov. 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 13 n.24 (citing Sinclair, *The Vienna Convention on the Law of Treaties* 137 (2nd ed., 1984), among others).

[17] US First Submission, para. A-86 (emphasis added). The United States also goes so far to say that a varied subsequent practice among Members demonstrates that there are multiple interpretations of a provision. Varied subsequent practice, rather, demonstrates a lack of agreement and a need for clarity.

[18] US Response to Panel Question 27, para. 16.

[19] US Closing Statement, page 2.

wanted, USDOC overreacted. Rather than accept and then verify the information when it was offered, USDOC instead excluded the information from the record. That the missing information had little impact on the margin underscores the extreme nature of the USDOC policy. Even though the nature of the information and the impact on the margin showed that respondents could not possibly have been trying to manipulate the results, USDOC assumed the worse and lashed out in a punitive way.

27. The US defense of its policy underscores the wrong-headed manner in which USDOC approaches its task. Article 6.8 and Annex II of the AD Agreement do not permit the adversarial nature of USDOC anti-dumping investigations.

A. THE US PRACTICE OF APPLYING ADVERSE FACTS AVAILABLE VIOLATES THE AD AGREEMENT

28. The language of USDOC's policy has a distinctly deterrent and punitive ring to it: "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information. . . ."[20] In other words, the policy says to the respondent "if you don't obey, you will be punished." The AD Agreement does not permit this. As we explained in response to Panel Questions 4, 6, and 7, Article 6.8 and Annex II of the AD Agreement are carefully worded to ensure that authorities focus on obtaining the most necessary and reliable facts, not punishing respondents.

29. Japan has already addressed twice the reasons why its Panel request was sufficiently detailed on this topic in its 10 August 2000 Response to US Preliminary Objections (paragraphs 32-37) and in its 6 September 2000 Answers to Panel Questions (paragraphs 10-12, answering Question 3). We merely reiterate here that the United States concedes it did nothing different in this case from what it does in every case. If this is true, then the US preliminary objection is merely aimed at urging the Panel to limit any remedy it issues on this topic to the facts of this case. We hope that the Panel understands that such a limitation merely invites repetitive litigation on USDOC's wrongful application of adverse facts available. If the Panel accepts that the United States applied a general policy in this case that was inconsistent with the AD Agreement, then the remedy should be aimed at stopping the United States from continued application of such a policy in all future cases.

30. The United States cannot reconcile its practice to the AD Agreement. Its punitive use of adverse facts available ignores the requirement of Paragraph 7 to choose secondary facts with special circumspection. Rather than look for the most reliable information under the circumstances, USDOC searches for the heaviest club it can find to beat the respondent over the head. What the United States fails to understand is that anti-dumping laws, as prescribed by the AD Agreement, are aimed at reaching the truth through the investigative process. Authorities are not permitted to treat respondents as adversaries, like USDOC chooses to treat them. The aim of the authority, at least as far as Article 6.8 and Annex II of the AD Agreement are concerned, is to work with respondents and their data, supplemented with other available information, to obtain facts that are as close to reality as possible.

1. Annex II does not authorize purposeful adverse facts available

(a) Paragraph 7

31. The United States relies most heavily on Paragraph 7 of Annex II to support its punitive use of adverse facts available. The United States claims that the "less favourable" language in the third sentence of this Paragraph authorizes authorities to apply adverse facts available.[21] This interpretation

[20] *USDOC Final Dumping Determination*, 64 Fed. Reg. at 24362, 24369 (**Exh. JP-12**).
[21] US First Submission, para. B-66 to B-67.

is misguided as it takes the sentence out of context and ignores the careful choice of words throughout the paragraph.

32. As we explained in our response to Panel Question 4 (paragraphs 14-18), Paragraph 7 of Annex II applies once the decision is made to apply facts available. The entire thrust of the Paragraph is that the authority must take special care in choosing the facts available -- in other words, to find information that most closely approximates reality. This is why Paragraph 7 calls on the authority to use "special circumspection" in choosing the facts available, and to "check the information from other independent sources." This is one place, among many, where Japan finds support for the notion that the whole purpose of the facts available provisions of the AD Agreement is to fill gaps caused by missing information.

33. The final sentence of Paragraph 7 does not change this overriding purpose. The sentence merely contemplates that if a party does not cooperate and withholds information, then a less favourable result might occur than if the party had cooperated and did not withhold information. The language of Paragraph 7 obviously draws a line between the party that withholds and the party that does not. But in all cases, the overriding purpose behind making such inferences is fact-driven: in other words, upon applying special circumspection and checking the information against other information (as required by Paragraph 7), the authority may decide that the most reasonable and logical manner in which to fill the gap caused by the missing information is to use facts which might turn out to be less favourable to the respondent. The purpose is not, as the US practice expressly states, to punish respondents for not providing the information. The following table helps to illustrate the differences between what Paragraph 7 contemplates and the US general practice:

Requirement of AD Agreement (To Find The Most Reliable Facts)	US General Practice (To Induce Respondents to Cooperate, i.e., To Punish)
• The title of Annex II generally calls on authorities to find the "best information available."	• The US does not ask whether the information is "best" under the circumstances.
• Paragraph 7 calls on authorities to use "special circumspection" and "to check the information from other independent sources."	• The US does not apply special circumspection or check its choice of facts available against any other information. In fact, the US claims that it has no reason to do so when the information used belongs to the respondent itself.
• In other words, when information is missing, the authority must be very careful in its choice of facts available. Any choice must be logical and reasonable. To the extent any inferences are made concerning the respondent's cooperation, they too must be logical and reasonable. The purpose is to use facts that most closely resemble reality.	• The US has no intention to find facts that most closely resemble reality. Rather, they specifically seek to punish the respondent for not cooperating when they use facts "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information."
• In some cases, after applying special circumspection, an authority may find that the most logical and reasonable inference is one that turns out to be less favourable to the respondent, including margins alleged in the petition. But, nonetheless, the purpose is to find the most reliable facts.	• The language of the US practice demonstrates the difference in approaches. "The purpose of the adverse facts available rule," according to the U.S., is to force respondents to cooperate, not to find the most reliable facts.

34. Even if the exporter does not or is not able to provide the requested information, the onus remains on the investigating authority to determine whether dumping exists using facts available. On this point, the United States asserts erroneously that the Panel in *U.S.—Atlantic Salmon* did not reject the principle that adverse inferences may be drawn where appropriate.[22] *U.S.—Atlantic Salmon* did not address the specific issue of whether a Member may adopt a practice of purposefully punishing an exporter with adverse facts available. That dispute focused on the impact of the choice of facts available on the non-sample group. Nonetheless, certain principles relevant to this dispute can be extracted from the Panel's analysis in *U.S.—Atlantic Salmon.* In particular, the panel considered *representativeness* to be an important goal when applying facts available. The overall goal of an investigation, therefore, is to calculate the correct margin, or at least a representative margin. The level of participation or non-participation of the exporters does not excuse investigating authorities from seeking that goal.

(b) Other Paragraphs in Annex II

35. In grasping for some basis to support its punitive form of adverse facts available, the United States attempts to read into other provisions of Annex II concepts that are not there. The United States argues that the warning set forth in Paragraph 1 of Annex II only makes sense if adverse facts available are allowed.[23] Yet, the warning that authorities may use facts available when information is not supplied within a reasonable time refers to the *possibility* that the application of facts available

[22] *Id.* paras. B-77 to B-78.
[23] *Id*. para. B-61.

will be less favourable. In some cases, the facts available may be less favourable; and because of this possibility, Paragraph 1 of Annex II requires authorities to warn the parties. In other words, the uncertainty of a less favourable result itself creates the incentive to cooperate. There is no reason to read into Paragraph 1 a warning of a purposefully adverse result.

36. The United States also asserts that because the warning specifically refers to the petition information as the alternative, the use of adverse facts available is permitted. According to the United States, because the petition information will "document the highest degree of dumping," it is clear this Paragraph authorizes the use of adverse facts available.[24] This argument suggests that the AD Agreement permits an authority to establish a practice of initiating investigations based on petition information which "generally is presumed to be adverse." If this is the case, the United States may well be violating in most cases the requirements of Articles 5.2 and 5.3 of the AD Agreement.

37. The United States also argues that if Japan's position were valid, Paragraph 5 of Annex II would not make sense, because there would be no sanction for not acting to the best of one's ability.[25] But the thrust of Paragraph 5 is precisely the opposite -- to oblige the authority to accept information even if it is not ideal, if the party has acted to the best of its ability. Even then there is no mention of facts available, adverse or otherwise. There is no textual basis for the assertion that this provision allows an authority to punish an exporter that does not act to the best of its ability.

38. Finally, with respect to Paragraph 6, the United States says "there would be *no reason* to require investigating authorities to give exporters a 'last chance' to explain before their information was rejected, if that information could be replaced only with a neutral gap-filler."[26] Paragraph 6 merely says that the authority must provide the parties reasons why information is not accepted and the opportunity for those parties to provide further explanations; if the explanations are considered unsatisfactory, the authority's reasons should be given in published determinations. The authority must allow further explanations because it may be unclear exactly what the authority is requesting or it may be that the party may not have been given the opportunity to provide the requested information. This provision therefore does not support adverse facts available. Rather, Paragraph 6 embodies the general requirements of fairness and good faith in that it provides for notice of when and why authorities might use facts available. Paragraph 6 is therefore a due process clause that exists for the benefit of the parties, not the authority.

2. Article 6.8 does not authorize purposeful adverse facts available

39. The United States illogically reads Article 6.8 provision to mean that "because the use of facts available is the solution to the problem posed by non-cooperative respondents," authorities must be able to induce respondents into cooperating by the prospect of a worse result.[27] But, as the United States admits, this interpretation is simply not supported by the text of the article: "Article 6.8 does not *explicitly* provide that the selection of facts available may entail an adverse inference."[28]

40. Article 6.8 provides "{i}n cases in which any interested party refuses access to, or otherwise does not provide, *necessary* information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." (Emphasis added) It says authorities can use facts available only when the

[24] *Id*. para. B-62.
[25] *Id*. para. B-63.
[26] *Id*. para. B-65.
[27] *Id*. para. B-59. The United States claims that the use of facts available is to solve the problems of uncooperative *respondents*. Yet, Article 6.8 clearly applies to all interested parties, not simply to respondents. The limitation by the United States of the alleged problem and solution to respondents simply serves to highlight its misunderstanding of the purpose of the provision and its biased use of the provision against respondents.
[28] *Id*. para. B-59 (emphasis added).

authorities do not have necessary information. Nowhere in Article 6.8 is the word "adverse" used, nor is there any reference to providing the authorities a mechanism to induce respondents to cooperate. Rather, Article 6.8 treats all reasons for missing information in the same manner: by permitting the resort to facts available. Even when a party "refuses access" to information, Article 6.8 merely contemplates the use of "*facts* available," not some adverse version thereof. Because there is no modification of the term facts available, the use of facts available must be as reasonable and as representative as possible.

3. The legal authorities cited by the United States are not analogous or authoritative

41. The United States analogy of a dispute between sovereign states and those between a private party and a government agency is improper. The United States cites *Canada—Civilian Aircraft* and *Argentina—Footwear* to support its conclusion that the WTO has recognized that the use of adverse inferences is a necessary tool for gathering information.[29] These cases, however, involved the use of adverse inferences during the course of the WTO dispute settlement proceeding. WTO disputes are entirely different from an anti-dumping investigation. A dispute within the WTO system involves two countries, one of which is accused of violating an international agreement. The WTO system depends on cooperation among governments and compliance with WTO Agreements. For this reason, *Canada—Civilian Aircraft* spoke about the "viability of the dispute settlement system."[30]

42. An anti-dumping investigation is distinct in that the private parties are not bound by an international agreement. Indeed, the exporter's participation is optional; the AD Agreement is indifferent as to whether an exporter participates. The AD Agreement recognizes that an exporter may lack the resources to participate, the requested information, or the ability to extract the information requested by the deadline requested. The duty of the investigating authority remains the same, regardless of the level of participation of the exporter: to calculate as accurately and reasonably as possible, the dumping margins of a particular exporter.

43. Finally, the US argument that most countries use adverse inferences to induce cooperation as a justification for the US practice is absurd.[31] The various practices of other Members are irrelevant to this inquiry. Panels should not determine WTO-consistency based on how many other Members are also violating a particular WTO agreement.

B. THE APPLICATION OF ADVERSE FACTS AVAILABLE TO KSC VIOLATED THE AD AGREEMENT

44. USDOC's practice of punishing respondents with adverse facts available, as applied in this case, violates the AD Agreement. Indeed, the US rebuttal with respect to its use of facts available for KSC demonstrates that USDOC improperly established the facts, and demonstrates an array of AD Agreement violations.

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[29] *Id.* paras. B-69 to B-71.

[30] Notwithstanding its inapplicability here, the *Canada—Civilian Aircraft* case makes the point that even if adverse inferences are made, such inferences must still be logical or reasonable in light of the circumstances. In other words, they must be related to the facts involved, not merely aimed at punishment. *Canada—Measures Affecting the Export of Civilian Aircraft*, 2 Aug. 1999, WT/DS70/AB/R, at para. 200 ("*Canada—Civilian Aircraft*"). Further, we note that the authority for using adverse inferences in that case was the Agreement on Subsidies and Countervailing Measures, Annex V of which specifically calls for use of adverse inferences when government parties are involved. No such provision exists in the AD Agreement.

[31] US First Submission, para. B-72. Moreover, the United States has misstated the doctrine of "subsequent practice" as a matter of international law, as discussed above.

1. The United States misstates the facts

45. The US rebuttal contains numerous factual mischaracterizations with respect to KSC. In raising these mischaracterizations, Japan does not ask the Panel to substitute its own factual conclusions for those of USDOC; rather, Japan demonstrates how USDOC (as well as the United States Government in its First Submission) improperly established the facts.

- ***"KSC did not allege that CSI was unable to provide the requested information." US First Submission, para. B-18 (emphasis in original).***

46. In fact, KSC repeatedly set forth CSI's *inability* to provide the requested information in a number of submissions to USDOC. In response to a request from KSC, CSI stated that

> CSI is *unable* under its accounting system to provide the information on sales. . . . It is also our belief that *without being able to provide* the important information of sales prices requested, the provision of other data requested by {KSC} would neither be usable nor useful in the investigation of Kawasaki. . . ."[32]

KSC first put that letter on the record on 18 December 1998,[33] and then reiterated CSI's response that CSI's accounting system was *unable* to provide the information.[34] In its continued efforts to show USDOC CSI's inability to provide the requested information, KSC twice submitted to USDOC Mr. Gonçalves' Letter to KSC of 14 December 1998.[35]

- ***"{T}he Shareholders' Agreement is the only objective evidence on the record that shows how CSI operated and was governed internally." US First Submission, para. B-88.***

47. This is a surprising and extreme statement. The purpose of any shareholders' agreement is to define how a company should operate. Such agreements alone do not necessarily reflect how a company is run in practice. KSC submitted several letters from CSI's President and CEO, Mr. Gonçalves, showing how CSI operated in practice – including its participation as a petitioner in an anti-dumping case against both its parent companies' home countries.[36] Much of this evidence demonstrated that the Shareholders' Agreement was regularly ignored by the company and its shareholders. Such evidence is no less objective than the Shareholders' Agreement itself.

- ***"{T}here is no evidence on the record that KSC even invoked [ ]" US First Submission, para. B-93.***

48. The United States conveniently ignores evidence that is clearly set forth in one of its own exhibits. The KSC Sales Verification Report acknowledges that KSC in fact invoked [ ].[37] The report also specifically recognizes CSI's letter refusing the suggested visit from one of KSC's

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[32] *See* Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**) (emphasis added).

[33] *See* KSC Letter to USDOC of 18 Dec. 1998, at Appendix A (proprietary version attached as **Exh. JP-93(a)**).

[34] *See* KSC Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**) (emphasis added).

[35] *See* KSC Verification Exhibit 20 (Mar. 1999) (excerpts attached as **Exh. JP-93(b)**); KSC's Case Brief at 16, Exhibit 2 (12 Apr. 1999) (excerpts attached as **Exh JP-93(c)**).

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

[37] *See* KSC Sales Verification Report, at 21-22 (excerpts in **US/B-21** and **Exh. JP-42(y)**) ("KSC invoked this Article in seeking permission to compile the necessary data, but CSI refused permission.").

attorneys and accounting consultant.[38] The United States also ignores the language of the Shareholders' Agreement, which includes providing [ ]."[39] Without question, the [ ].[40] Thus, as KSC's [ ] KSC's attorneys did in fact [ ] when they asked CSI for access to CSI information to prepare the response.[41]

- ***"There is nothing on the record indicating that KSC would have encountered any opposition from CVRD if KSC had directly requested CVRD's assistance in obtaining the information requested by Commerce . . . ." US First Submission, para. B-96.***

49. KSC informed USDOC that CVRD's parent, CSN was a respondent in the companion investigation of hot-rolled steel products from Brazil, and as such, CVRD was in effect a competitor of KSC in the US market.[42]

- ***"KSC never asked for Commerce's assistance in the investigation in any respect. Specifically, KSC never asked Commerce what steps it should take to obtain the information regarding its sales through CSI" or submit the information in another form. US First Submission, para. B-106.[43]***

50. KSC submitted numerous letters to USDOC outlining the difficulties KSC encountered in attempting to obtain the CSI information. It would be absurd to conclude that such repeated communications to USDOC did not *in any respect* include a request for assistance.

51. Indeed, on 9 November 1998, the day after KSC received Mr. Gonçalves' Letter of 6 November 1998, refusing the KSC visit, KSC's attorneys met with USDOC to apprise the agency of the situation.[44] Following up on the meeting, KSC submitted a letter to USDOC on 10 November 1998.[45] Moreover, in a 3 December 1998 letter to USDOC, KSC reminded USDOC that "we have received *no response* from the Department."[46] That statement was based on the belief that USDOC should have provided KSC advice following its meeting and its letters, and was intended to elicit a response from USDOC. Also in that letter, KSC asked to attend a meeting between USDOC and petitioners' counsel (*i.e.* CSI's counsel), specifically addressing CSI's refusal to provide KSC the necessary information, "so that all involved will have a complete understanding of the issues involved." USDOC refused to allow KSC to attend the meeting.

52. KSC continued its efforts to persuade USDOC to provide guidance. In its letter to USDOC of 18 December 1998, KSC was more specific in its request for assistance. KSC stated that it, as yet, had "received *no information, guidance, or response* from the Department."[47]

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[38] *Id.* at 22 (excerpts in **US/B-21** and **Exh. JP-42(y)**); *see also* Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**).

[39] Shareholders' Agreement Art. [ ] (**Exh. JP-42(aa)**) (emphasis added).

[40] Indeed, even CSI acknowledges that KSC's attorneys and accounting consultant are [ ] under the Shareholders' Agreement. *See* Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**) (noting "even Kawasaki Steel being one of our *shareholders*, we usually apply some restrictions to the *disclosure* of sensitive *data to their representatives*.") (emphasis added).

[41] *See* KSC Letter to Mr. Gonçalves of 5 Nov. 1998 (**Exh. JP-42(g)**) (requesting a four day visit with CSI's accounting staff).

[42] *See* KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

[43] The Court of International Trade opinion by Judge Restani should not be given weight because it too is based on an incorrect factual premise that KSC never asked for guidance. *See Kawasaki Steel Corp. v. United States*, Court No. 99-08-00482, Slip Op. 00-91, at 19-20 (1 Aug. 2000) (**Exh. JP-93(e)**).

[44] *See* KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-42(n)**).

[45] *See* KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

[46] KSC Letter to USDOC of 3 Dec. 1998, at 1 (**Exh. JP-78**) (emphasis added).

[47] KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-42(n)**) (emphasis added).

53. Notwithstanding that the US statement is inaccurate, whether or not KSC asked for guidance is irrelevant. As discussed further below in Section III.B.3, Article 6.13 obliges the investigating authority to provide assistance once the interested party notifies the authority of its difficulties. The AD Agreement does not oblige an interested party to ask for assistance.

- ***"Commerce did request, and KSC refused to report, the transfer prices between KSC and CSI." US First Submission, para. B-123.***

54. The US exhibits demonstrate that this statement is false. KSC provided USDOC with detailed product, quantity, and price information for its sales to CSI,[48] and later referred USDOC to its product-specific transfer price data.[49] Moreover, as the United States admits earlier in its submission, "Commerce examined documents relating to KSC's sales through CSI" at verification. [50]

55. The extent of the US mischaracterizations on all of these factual issues completely compromises the US position.

2. The United States misinterprets the requirements of Paragraph 7 of Annex II

56. The US practice ignores the requirements for choosing facts available under Paragraph 7 of Annex II. For KSC, USDOC failed to comply with three aspects of the provision. First, it chose an adverse facts available margin with the express purpose to punish the company. As discussed above, this is inconsistent with the language of Paragraph 7 of Annex II and the entire concept of facts available. Second, its choice ignored the critical question of whether KSC in fact "withheld" CSI's information, as required by Paragraph 7. Third, it made no effort whatsoever to comply with the same paragraph's requirement to use "special circumspection" in choosing facts available. The first of these violations is addressed in detail above with regard to Japan's general claim. The second and third are addressed below.

(a) The United States misunderstands the plain meaning of the term "withheld"

57. The United States argues that its choice of adverse facts was justified because KSC withheld information from USDOC. Even assuming that the words "less favourable" could justify punitive adverse facts available (which it does not), USDOC still violated the last sentence of Paragraph 7. The plain meaning of "is being withheld" requires that a party have something in its *possession* that it is *actively refusing* to turn over.[51] A party cannot "withhold" something unless it possesses it or at least has the power to exercise control over it so as to keep the item from being turned over. KSC did not possess the information requested by USDOC, nor did it control CSI so as to be able to affirmatively refuse to provide the information to USDOC.[52]

58. USDOC ignored evidence that showed CSI's inability and unwillingness to cooperate with KSC, as well as the competitive market relationship KSC maintained with both CSI and its joint venture

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[48] KSC Section A Response at Exhibit 37 (16 Nov. 1998) (excerpts attached as **Exh. JP-93(f)**, with sensitive business confidential information redacted).

[49] KSC Supplemental Section A Response at 6-7 (4 Dec. 1998) (excerpts in **US/B-24**).

[50] US First Submission, para. B-20.

[51] The definition of "withhold" in the *New Shorter Oxford English Dictionary* is: "1. restraint or hold back from action; keep under restraint; 2. keep back (what belongs to, is due to, or is desired by another); refrain from giving, granting or allowing."

[52] The fact that under US law, KSC and CSI are treated as a single entity is not determinative. Rather, it simply illustrates the absurdity of US practice. USDOC collapsed KSC and CSI, despite their conflicting interests and CSI's actual independence from KSC as exhibited through the events that actually transpired *See* 19 U.S.C. § 1677(33) (**Exh. JP-4(i)**); 19 C.F.R. § 351.102(b) (**Exh. JP-5(a)**); 19 C.F.R §351.401(f) (attached as **Exh. JP-90(b)**).

partner, CVRD. USDOC thus failed to properly establish the facts or evaluate them objectively and, in turn, ignored its obligations under the AD Agreement.

(i) *CSI's President and CEO repeatedly made clear he could not and would not help KSC respond to the USDOC*

59. It is an uncontested fact that KSC did not itself possess the information USDOC deemed necessary from CSI. The issue, then, is whether KSC nonetheless controlled whether CSI would release the information. In fact, KSC did not control CSI's ability or willingness to provide the information.

60. In response to an 8 December 1998 request for information from KSC's attorneys,[53] CSI's President and CEO Mr. Gonçalves stated as follows:

> "CSI is *unable* under its accounting system to provide the information on sales requested in question 1. . . . It is also our belief that *without being able to provide* the important information of sales prices requested, the provision of other data requested by {KSC} would neither be usable nor useful in the investigation of Kawasaki. . . ."[54]

So, in addition to not having the information itself, KSC was told that the entity that controlled the information was unable to supply the most important part of it.

61. Furthermore, Mr. Gonçalves repeatedly refused to provide the requested information,[55] citing CSI's role as a petitioner in the investigation:

- "{P}lease remember that *CSI is one of the petitioners*, and eventually we would be in a difficult position to supply some kind of information."[56]
- "Besides the fact, that *CSI is one of the petitioners* . . . some of the data {KSC} would like to have access is confidential CSI data, and even Kawasaki Steel being one of our shareholders, we usually apply some restrictions to the disclosure of sensitive data to their representatives. This behaviour has been adopted here at CSI in order *to protect the company as an American steel company*, regardless of the Brazilian and Japanese ownership."[57]

- "It is also {CSI's} belief that without being able to provide the important information of sales prices requested, the provision of other data requested by {KSC's attorneys} would be neither usable nor useful in the investigation of Kawasaki and therefore would be a waste of resources for both CSI and Kawasaki."[58]

So, beyond CSI's apparent inability to help with respect to some requests, the company also refused to help with others.

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[53] KSC Letter to CSI of 8 Dec. 1998 (**Exh. JP-42(l)**) (emphasis added).

[54] Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**) (emphasis added).

[55] *See* KSC Letter to Mr. Gonçalves of 27 Oct. 1998 (**Exh. JP-42(e)**) (seeking cooperation in responding to USDOC questionnaire, specifically including sales by CSI as reseller or further processor of the subject merchandise originating from KSC); KSC Letter to Mr. Gonçalves of 5 Nov. 1998 (**Exh. JP-42(g)**) (requesting acceptance of a four-day visit with CSI's accounting staff by one of KSC's attorneys and KSC's accounting consultant in order to review the information for the questionnaire response); KSC Letter to CSI of 8 Dec. 1998 (**Exh. JP-42(l)**) (inquiring into its previous requests for information and specifically listing the information requested pertaining to CSI from the Supplemental Questionnaire); KSC Letter to CSI of 7 Jan. 1999 (**Exh. JP-42(t)**) (reminding CSI of its previous requests for information and requesting again all of the information requested by USDOC in its questionnaires).

[56] Mr. Gonçalves Letter to KSC of 29 Oct. 1998 (**Exh. JP-42(f)**) (emphasis added).

[57] Mr. Gonçalves Letter to KSC of 6 Nov. 1998 (**Exh. JP-42(h)**) (emphasis added).

[58] Mr. Gonçalves Letter to KSC of 14 Dec. 1998 (**Exh. JP-42(m)**).

62. To downplay the actions of Mr. Gonçalves, the United States depicts the President and CEO of any company as a low-level employee.[59] In actuality, the President and CEO of any company is the highest-ranking "employee" and has considerable power to take actions on a daily basis in the best interests of the company.[60]

63. The power of the President and CEO was even more pronounced in the case of CSI. At verification, KSC officials explained that the Shareholders' Agreement between KSC and CVRD did not operate to allow either company any real control of CSI's day-to-day conduct.[61] In fact, the Agreement was structured so that the rights of KSC and CVRD would be in exact balance. Given that neither KSC nor CVRD controlled the day-to-day conduct of CSI, that left only one person in a position to do so: Mr. Gonçalves.

64. Indeed, CSI's decision to become a petitioner in the investigation is a perfect example of the power Mr. Gonçalves had as President and CEO. Contrary to Article [ ] of the Shareholders' Agreement, CSI's decision to become a petitioner was [ ].[62] By the time of the [ ] in December, CSI was already a petitioner.[63] Moreover, CSI did not obtain KSC's approval to become a petitioner.[64] Thus, the ultimate decision to become a petitioner must have been made by the highest ranking officer of CSI, Mr. Gonçalves.[65]

65. Petitioner CSI, therefore, had the power to act on its own, including maintaining possession of the information USDOC wanted and prohibiting KSC – and USDOC – from seeing it. Under such circumstances, KSC could not withhold the information.

(ii) Even though KSC was a part owner, it had no unilateral control of CSI

66. The United States incorrectly concludes that KSC's 50-percent ownership of CSI should have given KSC the requisite power to obtain the information.[66] Yet, because KSC only controls 50 percent of the shareholder votes and directors, KSC was not in a position to *unilaterally* reverse CSI's decision not to cooperate with KSC's requests for information. Instead, KSC needed the support of its joint venture partner, CVRD.

67. Considering Mr. Gonçalves personal ties to both CVRD and CSN, however, KSC had reason to believe that CVRD's position would be the same as that of Mr. Gonçalves. Mr. Gonçalves was nominated by CVRD to be CSI's President and CEO. In addition, prior to becoming President and CEO, Mr. Gonçalves had been an employee of CSN, CVRD's partial owner. As an employee of CSN, Mr. Gonçalves was aware of the close relationship between CSN and CVRD. Moreover, Mr. Gonçalves, as well as KSC, appreciated that CSN was KSC's competitor in the US market and as a competitor of KSC, it would be in CSN's, and CVRD's favor for KSC to obtain a higher margin than CSN.[67]

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[59] US First Submission, para. B-83.

[60] 1 *Corporation* ¶ 1713 (1997) (excerpts attached as **Exh. JP-93(g)**) ({T}he president of a corporation is its business head and has power to do any act that the board of directors could authorize or ratify.").

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

[62] *See* Board Meeting Minutes of 28 July 1998 (**US/B-23/BIS**).

[63] *See* Board Meeting Minutes of 10 Dec. 1998 (**US/B-23/BIS**).

[64] KSC Sales Verification Report, at 21 (excerpts in **US/B-21** and **Exh. JP-42(y)**).

[65] This is one among many ways in which the actual operation of CSI failed to comply with the apparent intent of the Shareholders Agreement. **Exhibit JP-93(d)** provides a complete list.

[66] US First Submission, para. B-89.

[67] KSC Letter to USDOC of 10 Nov. 1998 (**Exh. JP-42(i)**).

68. The United States suggests that the [ ] could have easily resolved the dispute.[68] The [ ].[69] With [ ] it is highly unlikely that its convention would resolve in actuality any deadlock.

69. The US arguments supporting its claim that KSC could exert power over CSI are simply not sensitive to the corporate realities of multinational companies that are owned by companies with differing interests in a particular dumping proceeding. Here we have an extreme case where KSC's interests are in conflict with both parties who would be in the best position to provide assistance. CSI's interests are in conflict with KSC's as CSI is a petitioner. KSC's interests are in conflict with CVRD, because CVRD's part owner, CSN, is also a respondent in the investigation and thereby competes with KSC in the US market.

70. The United States focuses on how or whether KSC could have obtained the information, and whether the respondent acted to the best of its ability. The United States therefore implies that a party must take all actions that USDOC thinks necessary, whether in reality they would prove futile or not. But whether or not all such actions are taken, the question remains: did KSC withhold the information?

71. The facts clearly show that KSC did not possess the CSI information, and that as a practical matter, KSC did not have the power to obtain the information. The United States failed to establish that KSC *in fact* could have obtained this information, and, in turn, that it effectively withheld the information. The United States therefore applied facts available in violation of Annex II.

(b) The United States misunderstands the plain meaning of "special circumspection"

72. The United States misconstrues the requirement of "special circumspection in Paragraph 7." [70] The United States claims that it applied circumspection by using the second-highest rather than the highest margin given that the highest margin was not within the mainstream of KSC's sales. Also, the United States argues that in choosing the second highest margin, its use of adverse inferences was "directly proportionate" to the significance of the underlying violation.[71]

73. This argument demonstrates that the United States does not comprehend the true purpose of facts available: to fill in the gaps left when necessary information is unavailable and to do so in such a manner to ensure the information used is reliable so as to produce an accurate margin. This is the whole point of Paragraph 7's requirement to use special circumspection and to corroborate any information it chooses to use. The phrase special circumspection cannot mean punishing a respondent with the second worst results instead of the worst results. Indeed, such an application is far from circumspection -- "a cautious observation of the circumstances" and "taking everything into account." Further, the phrase circumspection is modified by the adjective "special." According to the *New Shorter Oxford English Dictionary*, special means "exceptional in quality or degree; unusual, out of the ordinary." This modification of circumspection emphasizes the exceptional exercise of care

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[68] US First Submission, para. B-96.

[69] Shareholders' Agreement Art. [ ] (**Exh. JP-42(aa)**) (emphasis added).

[70] Actually, the primary argument made by the United States is that Paragraph 7 does not even apply. The United States asserts that the special circumspection requirement is irrelevant because USDOC used KSC's own information, and not information from a secondary source -- *i.e.*, a source other than the respondent itself. US First Submission, paras. B-109 to B-110. A secondary source, however, is anything other than the primary source (*i.e.*, the actual information requested). The use of margins from KSC's other sales as a substitute for its CEP sales was therefore a secondary source. This must be the case as there is no reason to apply a different standard for checking the representativeness of data merely because the data used as facts available belongs to the party. In any event, the question of representativeness -- which is required by Annex II, as discussed above in paragraphs 41 through 43 -- still applies notwithstanding the US interpretation of "secondary source." Note also that if the United States is right about "secondary source," then it can no longer rely on "less favourable" to justify adverse facts available.

[71] US First Submission, paras. B-112 to B-113.

authorities must observe in relying on facts available -- they must ensure that the information used is reliable and as close to reality as possible.

74. The United States claims that the use of any other facts would have rewarded KSC for not cooperating.[72] Ignoring for a moment that KSC did, in fact, cooperate, a less punitive facts available margin would have rewarded KSC only if KSC knew that CSI's information would produce a high margin. The facts show that neither of these were possible. First, KSC did not know the actual margin as it did not possess or even have access to CSI's resale information. Second, USDOC did not know the actual margins and, thereby, did not know when it would cross the threshold between punishment and reward. Thus, the US claim is not credible.

75. In a weak attempt to demonstrate that USDOC took everything into account, the United States claims that it was in CSI's best interests to cooperate as an affiliated importer and reseller of KSC hot-rolled steel and that any benefit experienced by CSI from the application of adverse facts available indirectly rewarded KSC as a shareholder of CSI.[73] USDOC cannot possibly decide what is and is not in a company's best interests. CSI *obviously* decided that, on balance, it enjoys the greatest benefit by refusing to cooperate, and encouraging USDOC to apply facts available to KSC.

76. Besides the factual inaccuracies of this argument, the United States relies on circular logic. It is absurd for the United States to excuse the benefit to CSI by arguing that any benefit to CSI would also benefit KSC as a shareholder. If this logic were true, then the United States would have contravened its basic intention of penalizing KSC. The United States cannot try to justify adverse facts available to penalize KSC in one context, and then argue that its application was justified because it indirectly benefited KSC.

77. Lastly, the United States asserts that it exercised special circumspection by using partial facts available instead of total facts available.[74] This is absurd. If the US interpretation were true, any partial facts available would satisfy this requirement, regardless of how illogical or unreasonable the available facts might be.

78. Ultimately, what matters most is that USDOC failed to consider carefully the fact that CSI was a petitioner in this case -- a fact which led USDOC to excuse respondents in previous cases.[75] Above all else, this fact proves that USDOC failed to apply "special circumspection" when choosing which facts available to use when CSI refused to cooperate.

3. Article 6.13 unambiguously requires authorities to take into account any difficulties experienced by interested parties and to provide assistance to those parties

79. The United States attempts to dismiss the mandatory language of Article 6.13, by misreading the actual language of the article, focusing inappropriately on KSC's size, and shifting its obligations onto KSC's attorneys.[76] These arguments ignore the simple fact that Article 6.13 unambiguously establishes obligations upon the *authority*, and not upon the interested party or its lawyers.

80. Article 6.13 states "{t}he authorities *shall* take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and *shall* provide any assistance practicable" (emphasis added). The text of Article 6.13 is unambiguous.

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[72] *Id*. para. B-113.

[73] *Id.* para. B-114.

[74] *Id*. para. B-116.

[75] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Taiwan*, 63 Fed. Reg. 40461, 40464 (29 July 1998) (excerpts attached as **Exh. JP-93(h)**) (noting that one of the reasons the respondent was unable to report the information USDOC requested was the affiliate's participation in the proceeding as a petitioner).

[76] US First Submission, paras. B-103 to B-106.

Contrary to US claim, the phrase "in particular small companies" does not limit Article 6.13 exclusively to small companies,[77] and does not absolve the authority of this responsibility when a large company is subject to investigation. Further, Article 6.13 explicitly requires authorities to examine carefully *any* kind of obstacles interested parties faced in supplying the requested information to the authority. Indeed, the use of the words "shall" and "any" demonstrate the broad scope of this obligation. In this case, KSC made clear it had difficulties.

81. The United States attempts to sidestep USDOC's obligation to provide assistance by claiming that KSC should have known how to handle its affiliate and joint venture partner. But, as discussed above, USDOC ignored the competitive realities of the situation. Further, USDOC affirmatively *obstructed* efforts to find a solution, when it scheduled a meeting with CSI to discuss the anti-dumping case and refused KSC's participation.[78] At the very least, attempting to suggest alternatives, and seeing that they were not viable, would have better positioned USDOC to more fully appreciate the difficulties KSC experienced and understand that KSC had in fact acted to the best of its ability. This type of exchange is exactly the type of collaborative effort contemplated by Article 6.13.

82. In the final determination, USDOC identified after-the-fact avenues KSC should have explored to convince the United States that it had acted to the best of its ability. USDOC could have notified KSC of those expectations during the investigation. This would have both provided "practicable assistance" and put KSC on notice that unless it at least attempted these approaches, USDOC would deem KSC as non-cooperative. Instead, USDOC simply waited until the final investigation to identify other avenues it required KSC to explore. This predatory approach reveals that USDOC was not acting as a neutral fact-finder, but instead in a biased manner that ultimately violated its obligations under the AD Agreement.

4. USDOC's failure to calculate a constructed export price for KSC violated Article 2.3 of the AD Agreement

83. Instead of actually calculating an export price for KSC's sales of hot-rolled steel to CSI, USDOC used the second-highest margin from any of KSC's sales for all of those CSI transactions, in violation of Article 2.3 of the AD Agreement. The United States argues that if the authority considers that the export price is unreliable because of an association, it need not test whether in fact the prices are reliable.[79] But this interpretation ignores the rest of the text of Article 2.3.

84. Article 2.3 provides that authorities *calculate* export price on the basis of resale price or "another reasonable basis." When read as a whole, the text of Article 2.3 shows there must be something that brings the unreliability of the prices into question in order for the authority to later be able to judge the reasonableness of its calculation. Association alone cannot serve as the basis for the decision that the prices appear unreliable. Instead, Article 2.3 indicates that the phrase "because of association" is not the justification for an unreliability determination. Rather, the authority must find that the prices are unreliable, and their unreliability must be caused by the association.

85. In its response to Japan's suggestion that USDOC use KSC's own prices to CSI to test the reliability of the data, the United States incorrectly states that KSC refused to report the transfer price between KSC and CSI.[80] As discussed above, however, the record shows that USDOC did in fact have the information that would have allowed it to make a comparison between KSC's sales to CSI and those to its non-affiliated customers.[81] USDOC simply ignored the data. USDOC immediately

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[77] *Id.* para. B-103.

[78] KSC Letter to USDOC of 3 Dec. 1998 (**Exh. JP-78**). Japan wonders why USDOC did not take this opportunity to specifically request the information from CSI directly.

[79] US First Submission, para. B-120.

[80] *Id.* para. B-123.

[81] KSC Section A Response at Exhibit 37 (excerpts attached as **Exh. JP-93(f)**).

jumped to the assumption that because KSC and CSI were affiliates, CSI's resale prices were necessary.[82]

86. Had USDOC actually determined that KSC's transfer prices to CSI were unreliable, the detailed transfer price information still provided USDOC with a "reasonable basis" to calculate a surrogate export price to compare to normal value, rather than immediately applying a margin for sales through CSI.[83] USDOC instead chose to ignore its obligation under Article 2.3 to calculate an export price on a "reasonable basis" once it summarily decided that the KSC-to-CSI price was unreliable. The United States again specifically relies on the factual inaccuracy that KSC did not provide such information to justify disregarding the existence of perfectly acceptable normal values.[84]

87. We recognize that to apply facts available to calculate a surrogate export price, USDOC would have to make certain assumptions about expenses. This is precisely the objective of facts available, and the obligation of the authority: if it cannot obtain the ideal information in its investigation, the authority should resort to secondary sources for information. KSC's sales to CSI were the best source for such information. The fact that the United States quickly jumped to a punitive application of the second highest margin, and did not enlist KSC to help it develop a surrogate export price in the face of CSI's recalcitrance, demonstrates that the United States had no intent of trying to find the "best information available," as the title of Annex II intends.

C. THE APPLICATION OF ADVERSE FACTS AVAILABLE TO NKK AND NSC VIOLATES THE AD AGREEMENT

88. USDOC acted arbitrarily in its treatment of NKK and NSC. An objective authority could not have assessed the facts surrounding NKK's and NSC's errors as deserving such harsh punishment. Moreover, USDOC failed to apply the requisite legal standards of the AD Agreement when it carried out these punishments. Specifically, USDOC actually received the information it needed from NSC and NKK; both provided the information and offered to verify the information. USDOC arbitrarily decided the information had not been provided fast enough. Ignoring the circumstances that led to the inadvertent delays, USDOC punished the companies with adverse facts available.

1. The United States argues for unreasonable standards of timeliness and unreachable standards for cooperation

(b) Article 6.8 and Annex II establish a "reasonableness" standard for timely submission of information

89. The United States equates deadlines with a "reasonable time" or a "timely fashion" under Paragraphs 1 and 3 of Annex II. The issue is not whether the deadlines were reasonable, but rather whether NKK and NSC submitted the information within a reasonable period.[85] *A deadline cannot define what is a reasonable period of time for all information the authority will incorporate into its determination*. Although deadlines may be necessary to obtain the majority of information from

[82] Note that one requirement for applying facts available under Article 6.8 is that the information be "necessary." This discussion proves that USDOC did not even determine whether it was necessary, and thus violated Article 6.8.

[83] The US suggestion that Japan treats the "reasonable basis" language of Article 2.3 as a separate facts available provision is mistaken. The reasonable basis requirement of Article 2.3 only applies to Article 2.3 and does not replace the facts available provisions. For example, in KSC's situation, the reasonable basis requirement would have simply allowed USDOC to devise a reasonable manner in which to calculate the export price after it determined the KSC-to-CSI price was unreliable. The facts available provisions would provide the authority for USDOC to use the secondary information available in order to calculate the export price on a reasonable basis.

[84] US First Submission, para. B-124.

[85] US First Submission, para. B-132.

respondents, it is not reasonable to claim that a deadline should mark the last moment the authority will accept new information in all cases under all circumstances. Flexibility, when circumstances demand it, is the hallmark of reasonableness. For example, to the extent there are small, lingering categories of information that are submitted after a deadline, or collected by the authority during a verification, the authority has received this information within a reasonable period of time to incorporate it into its dumping analysis and calculations.

90. Authorities also must consider the other informational demands on respondents during an investigation; whether the authority's initial request was clear (or whether there was some doubt as to exactly what the authority was requesting); whether the authority assisted the company with follow-up guidance as to the nature of its request and how to comply with it; and whether the information was maintained in the normal course of business (or whether it would have to be developed solely for the investigation). USDOC ignored all of these factors during its fact-finding for NKK and NSC.

(ii) The requirement of Paragraph 1 of Annex II for submission of information within a "reasonable time" must be read in the context of USDOC general practice

91. The United States incorrectly claims that Paragraph 1 of Annex II equates "a reasonable time" with deadlines established by the authority.[86] Paragraph 1 states that "if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." Although "reasonableness" is subjective, it must be interpreted in context of the proceeding itself and the authority's prior practice. In the ordinary legal meaning of the term, reasonable means "suitable under the circumstances."[87] This case does not present a situation where the respondents provided nothing within USDOC's questionnaire deadlines. Respondents provided an extraordinary amount of information in an extremely detailed manner. The weight conversion factors at issue here represented a very minor portion of the large volume of information submitted by NKK and NSC. When these companies discovered that they could correct the record and submit the requested information, they submitted the factors along with a long list of other corrections and supplemental information. All of these corrections were submitted well before verification, and therefore in a reasonable time; USDOC and petitioners had substantial opportunity to review, respond to, and use the information. The fact that USDOC accepted NKK's and NSC's other corrections, and thereby implicitly found that they were submitted in a reasonable period, proves that the conversion factors were timely under the circumstances.

92. USDOC *regularly* accepts information after questionnaire deadlines, as recognized in its regulation that allows parties to submit new factual information up until seven days before verification.[88] The US argument against application of this regulatory deadline to NKK's and NSC's submission of new factual information is entirely inconsistent with USDOC practice.[89] Taken to the

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[86] *Id.* paras. B-133 to B-139.

[87] *Black's Law Dictionary* 1265 (6th Ed. 1990).

[88] In this very case, USDOC accepted approximately 200 pages of new factual information submitted by petitioners the same day NKK and NSC submitted their weight conversion factors. Petitioners' 22 February 1999 submission to USDOC provided a number of press articles about KSC, NKK, or NSC; the Japanese steel industry generally; factors affecting demand; and other general information.

[89] The United States is trying to convince the Panel that the regulation does not apply to information requested in a questionnaire. *See* US Response to Japan's Question 9, para. 12. USDOC itself recently took the opposite position. *See Issues and Decision Memorandum for the Investigation of Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877 (30 Mar. 2000), <http://ia.ita.doc.gov/frn/summary/taiwan/00-7925-1.txt> (attached as **Exh. JP-94)** (*"Decision Memorandum"*). In this recent case, USDOC faced a challenge from petitioners to disregard corrections submitted by a respondent just before verification. USDOC first noted that respondent's original questionnaire and supplemental questionnaire responses were all submitted within the time limits established by USDOC. USDOC also noted that respondent's corrections were timely in accordance with 19 C.F.R. § 351.301(b)(1) (the same provision at issue in the hot-rolled steel case). Then, citing the overriding purpose of the US anti-dumping statute, which "is to determine margins as accurately as possible," USDOC

extreme, this interpretation would prevent submission of any corrections or supplemental information before verification. Yet corrections are necessary when a respondent's prior questionnaire responses were either incorrect or incomplete. This is USDOC's standard practice, which it otherwise followed in the hot-rolled steel investigation.

93. The weight conversion information submitted by NKK and NSC was a correction.[90] The companies mistakenly believed that they could not respond to USDOC's request. When it became clear to NKK (without any assistance from USDOC) that what USDOC required was a better estimate of weight, NKK corrected its prior submissions and supplied the information. Similarly, NSC discovered during verification preparation that its production facilities actually retained weight information for the subject sales, a discovery that was not made earlier because the weight information was maintained on a computer system that could not be accessed by the NSC sales personnel responsible for preparing NSC's questionnaire response. NSC then corrected itself and supplied the information. The conversion factors were submitted before the regulatory deadline for new factual information and therefore were submitted within in a reasonable time.

94. Moreover, USDOC accepted a large number of other corrections *after* the applicable questionnaire deadlines.[91] These additional corrections had a much larger impact on USDOC's dumping analysis than the weight conversion factor. The long list of corrections submitted by each company places the weight conversion factor into context, and highlights the arbitrary nature of USDOC's decision. The US emphasis on the fact that NKK and NSC had 87 days in which to submit the conversion factors is unconvincing considering the fact that the information on which many of the other corrections were based was due in exactly the same amount of time.[92]

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stated that it would be "incongruous with the express intent of the statute to rely on data that are clearly inaccurate by a respondent's own admission. Accordingly, it is the Department's general practice to allow respondents to revise their data upon identification of errors when such revisions are done in a timely manner. Timely revisions to respondents' submissions are neither unusual nor inconsistent with the Department's standard practice." *Decision Memorandum*, at cmt. 1 (internal footnotes omitted).

[90] We note that the United States wants the Panel to believe that in good faith, USDOC made a mistake in not correcting the clerical error in NKK's preliminary dumping margin, which was not corrected until the final determination. *See* US Response to Japan's Question 30, para. 44. But, then USDOC was justified in rejecting NKK's and NSC's inadvertent, good faith errors. USDOC's double-standard should not be overlooked.

[91] In the same 22 February 1999, submission that included the weight conversion factor, NKK submitted *seventeen* other corrections along with new transaction-specific sales lists. On the same day, but in a separate submission, NKK submitted *five* other corrections to its cost of production and constructed value databases. Over a week later, on 4 March 1999, NKK submitted *six* more corrections and revised sales lists and cost databases. This is in addition to *one* correction presented on 8 March 1999, *at the beginning of verification*. (See **Exhibit JP-95** for a summary of these corrections.) USDOC accepted and relied upon all of these corrections, even those that affected a large percentage of sales. This is in stark contrast to USDOC's refusal to accept NKK's weight conversion factor, which affected only a small number of sales. This is in addition to *fifteen* corrections NKK submitted in its 25 January 1999, Supplemental Section B Questionnaire Response.

Similarly, on 22 February 1999, NSC submitted *five* corrections and additions to previously submitted information, along with its weight conversion factor. Then, at the beginning of each of USDOC's verifications of NSC and its US affiliate (conducted consecutively from 22 February 1999 through 12 March 1999), NSC presented a total of *eleven* more corrections discovered during verification preparation. Finally, in a 1 March 1999 submission to USDOC, NSC submitted *three* additional corrections. (See **Exhibit JP-96** for a summary of these corrections.) In addition, on 1 March 1999, NSC submitted at USDOC's direction, corrected data, which affected every US and home market sale. In contrast, the conversion factor submitted by NSC on 22 February 1999 affected only a tiny handful of US sales.

[92] For example, USDOC repeatedly asked NKK for transaction-specific movement expenses – in the original Section B questionnaire and in the same supplemental questionnaire that asked NKK to "clearly describe the conversion factor {NKK} used." NKK explained that such information was not available at the time and instead provided estimated movement expenses that approximated actual expenses. NKK corrected its calculation of movement expenses in the 22 February 1999, submission that provided the conversion factor.

(ii) Paragraph 3 of Annex II requires authorities to take everything into account in determining whether facts available are warranted

95. The United States argues that Paragraph 3 of Annex II requires authorities to consider only that information that was "*inter alia* timely."[93] This argument stretches the meaning of timeliness and ignores the other elements of this provision. Paragraph 3 states that:

> All information which is *verifiable*, which is appropriately submitted so that it can be used in the investigation *without undue difficulties*, which is supplied in a *timely fashion*, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. (Emphasis added.)

The United States makes an unjustified leap from "timely fashion" to "submitted within the authority's questionnaire deadlines." With a flourish of Latin, the United States also completely ignores other elements of this paragraph, which provide important rules for what information authorities should take into account.

96. Paragraph 3 references "undue difficulties" to address the manageability of the anti-dumping investigation from both perspectives: placing the burden on respondents to provide useable information and on authorities to take that useable information into account. The facts of this case show that USDOC could have used the conversion factors without undue difficulties. The United States mischaracterizes the impact of using the submitted factors as "entirely new databases."[94] The factors were actually just a couple of numbers that USDOC could have added to one line of its dumping calculation program. The sale-specific raw data did not change. The United States therefore has not demonstrated that it was prejudiced by NKK's and NSC's submission of the conversion factors after questionnaire deadlines. The fact that USDOC easily verified NKK's factor demonstrates this lack of prejudice.

97. The United States also ignores the requirement that authorities should take into account "verifiable" information. Importantly, USDOC actually verified NKK's weight conversion factor. In NSC's case, USDOC was prepared to, but then affirmatively refused to, verify NSC's factor and the evidence NSC had proposed for USDOC's review. NKK and NSC met their burden of providing verifiable information in conformity with Paragraph 3.

98. Although timeliness is an important factor in Paragraph 3, these other considerations must be weighed in determining whether submitted information will be used in the authority's analysis. Perhaps realizing this, the United States argues that the AD Agreement does not compel the authority to accept late-provided information.[95] This is not Japan's position. Japan is simply arguing that reasonableness is by definition contextual. Other provisions demonstrate that the AD Agreement does not contemplate the interpretation of "reasonable time" suggested by the United States:

- The reference in Article 6.13 requires authorities to be mindful of difficulties, and this will impact the notion of "reasonable period."

- The "best of its ability" phrase in Paragraph 5, Annex II warns authorities to not act too rashly in disregarding less than perfect information, requiring a more reasoned analysis of a party's participation.

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[93] US First Submission, para. B-137.

[94] US Response to Japan's Question 9, para. 14. Again, we note that unlike the weight conversion factor voluntarily submitted by NSC, the changes required by USDOC impacted every US and home market sale reported by NSC.

[95] US First Submission, paras. B-159 to B-160.

- The "special circumspection" phrase in Paragraph 7, Annex II further obligates authorities to take care in applying information from other sources.

99. Thus deadlines alone cannot determine whether information is timely. In rejecting NKK's and NSC's conversion factors, USDOC failed to consider the circumstances. The factors were submitted in a timely fashion; therefore, the information "{should have been} taken into account when determinations {were} made."

(c) The United States demanded an inappropriate standard of cooperation under Annex II

100. The United States claims that NKK and NSC failed to cooperate simply because the submitted information was late. The United States impermissibly blurs Paragraphs 5 and 7 of Annex II. Paragraph 5 governs when an authority must accept proffered information instead of resorting to facts available. Paragraph 7 concerns the separate decision of what information an authority can use once it is authorized to use facts available.

(i) The United States ignored the requirements of Paragraph 7 in choosing adverse inferences

101. The United States asserts that Paragraph 7 of Annex II does not require a finding that the party withheld necessary information.[96] Paragraph 7 states, "if an interested party does not cooperate and thus *relevant information is being withheld from authorities*, this situation could lead to a result which is less favourable to the party than if the party did cooperate." (Emphasis added.) Thus, the possibility of "less favourable" results arises only in those "situations" where information *"is being withheld."*

102. There was no withholding here. The moment the companies determined they could provide the requested information to USDOC, they did so. This is far different than if USDOC were to discover, for example, low-priced export sales during a verification that the company had purposefully tried to conceal. Rather, NKK and NSC provided the very information requested by USDOC in sufficient time for verification and incorporation into USDOC's dumping analysis. Information was not withheld and NKK and NSC fully cooperated.

(ii) Paragraph 5 mandates acceptance of NKK's and NSC's corrections

103. Citing Paragraph 5 of Annex II, the United States claims that NKK's and NSC's "reaction" to the preliminary determination demonstrated that the companies could have provided the information at any time, but failed to cooperate to the best of their abilities by not providing the information sooner.[97] This argument demonstrates the unfairness of the US position. The United States is trying to use NKK's and NSC's cooperation against them. That is, according to US logic, NKK and NSC somehow proved their lack of cooperation by cooperating. The United States is also suggesting that any reaction to a preliminary determination, legal or factual, is manipulative. This position undermines the main purpose of notice, which is to give parties a reasonable opportunity to respond.

104. The facts of this case show that NKK and NSC responded fully to USDOC's extensive informational demands and that USDOC's decision to reject the conversion factors violated Paragraph 5. NKK and NSC provided the very information requested by USDOC and therefore the information was "ideal in all respects." NKK and NSC also acted to the best of their abilities. The US position is contingent on the premise that the "best of its ability" equates to meeting questionnaire deadlines, just as "reasonable time" equates to questionnaire deadlines. Rather, "ability" must be

[96] *Id.* para. B-162, n.237.
[97] *Id.* paras. B-150 to B-152.

assessed within the context of a variety of factors, including allowance for mistakes in an accelerated investigation involving large volumes of information.

(iii) In both instances, USDOC ignored NKK's and NSC's additional cooperation during verification

105. As further evidence of their cooperation, NKK and NSC were fully prepared to verify the accuracy of corrections submitted before or during verification, including the conversion factors. NKK and NSC reasonably believed that the conversion factors and all of the other corrections would be verified and then used in USDOC's final dumping calculation. The United States now tries to argue that the verification agenda did not create an expectation that USDOC would verify the weight conversion factors.[98] This argument ignores the fact that USDOC *actually verified* NKK's information and until the last moment continued to assure NSC that it would verify its factor. USDOC's actions at the time do not support the US Government's belated interpretation of its verification agenda. The United States also claims that the agendas show that USDOC intended to verify NKK's and NSC's inability to provide the conversion factor. This places NKK and NSC in an impossible situation: face facts available for submitting the facts or face facts available for not submitting the facts and failing verification. This argument also shows the results-oriented nature of USDOC's decision.

106. The US argument that there is no obligation in the Agreement to verify the conversion factors is similarly unconvincing. The US argument is valid only if it is successful in arguing that it was justified in not accepting the conversion factors. But, if the US argument is true, why did it verify NKK's factor? Verification of NKK's factor demonstrates that USDOC will in fact verify items that are not ultimately part of their findings. USDOC routinely verifies other issues, such as US indirect selling expenses, that are not always used in the dumping calculation.

2. The United States improperly dismisses the duties the AD Agreement places on authorities to conduct a fair investigation

(a) NKK and NSC were entitled to reasonable guidance from USDOC under Article 6.13

107. The United States claims that USDOC's requests for information were clear and in accordance with Article 6.1.[99] The US position would make sense if USDOC had requested information normally maintained by NKK or NSC, or something at least familiar to the companies. It is undisputed that steel companies commonly sell products based on actual weight and theoretical weight. The companies in this investigation, however, do not normally convert one type of weight to the other. Therefore, USDOC's request effectively required the companies to develop a conversion factor that: (1) neither company maintained in the normal course of business, (2) neither company had ever used before, and (3) was entirely foreign to either company. USDOC's lack of clarity in requesting this obscure conversion factor constitutes a failure to establish the facts properly.

108. The United States overlooks that this was, for all practical purposes, the only request for information that was not routinely understood and accommodated by NKK and NSC. The companies provided volumes of other information. When USDOC did not fully understand the information provided or when it needed additional information, it issued supplemental questions to NKK and NSC to clarify their responses. With respect to the conversion factors, USDOC's requests for information from NKK were ambiguous and confusing.

109. This is demonstrated by the difficulties NKK and NSC had in obtaining the information. NSC repeatedly informed USDOC it was impossible under any circumstances to obtain the

[98] *Id.* para. B-170.
[99] *Id.* paras. B-165 to B-169.

conversion factor because the weight data necessary to calculate it did not exist.[100] Without any guidance or assistance from USDOC, NSC itself discovered that actual weights were recorded at the production facility and immediately informed USDOC. Similarly, NKK did not receive sufficient "notice of the information which the authorities require" because USDOC offered vague and even contradictory instructions. The supplemental questionnaire to NKK shows that even USDOC did not entirely understand what it was asking for in its initial questionnaire. The supplemental questionnaire actually presumed that NKK had submitted a factor, when in fact it had not. NKK sought additional guidance and was misled by USDOC officials, who told NKK's US attorney that it should just confirm its statement that a conversion factor was impossible.[101] This cannot be what the AD Agreement contemplates with respect to sufficient guidance that results in a proper establishment of the facts.

110. The United States also questions why there is no record of the conversation between NKK's attorney and USDOC. There are many elements to an investigation that investigators do not routinely memorialize in the written record. In fact, USDOC failed to put a variety of information on the record in this very investigation. This is just another example of USDOC's failure to establish the record properly.

111. The United States also incorrectly limits Article 6.13 to small companies.[102] The United States effectively writes the phrase "in particular" out of the Agreement. This is by no means limiting language, but an acknowledgement that small companies are more likely to experience difficulties in responding the information requests of authorities. Although Article 6.13 emphasizes the needs of small companies, it is not designed to protect small companies exclusively. Rather, Article 6.13 embraces the general notion that the authorities should be sensitive to all forms of difficulties experienced by parties. The fact that NKK and NSC were able to provide all other information without difficulty, but obviously struggled with the conversion factor should have been a clear indication to USDOC that this particular request prompted a difficulty.

112. The United States seems to take the position that large companies should be left to fend for themselves and do not deserve USDOC's assistance. For example, the United States implies that service of KSC's questionnaire responses placed NKK and NSC on notice of how to calculate a weight conversion factor. Armed with this knowledge, NKK and NSC therefore could have submitted the factors within questionnaire deadlines without any assistance from USDOC.[103] This assumption is incorrect both factually and legally. Like NSC, KSC told USDOC that it did not calculate a conversion factor in its normal course of business. Rather, for the purposes of this anti-dumping investigation, KSC calculated a *better estimate* of the weight of its theoretical weight sales.[104] NKK's and NSC's counsel could not predict whether this better estimate would satisfy USDOC. Instead, under Article 6.13 of the AD Agreement, USDOC had the burden of informing NKK and NSC of an acceptable methodology for calculating the factor, which it could have easily done in its supplemental questionnaires.

113. Furthermore, USDOC's vague instructions in the original and supplemental questionnaires do not constitute "practicable" assistance. The contradictory guidance given NKK is the antithesis of assistance. Practicable means assistance that the authority is capable of providing. When it was obvious that NKK misunderstood the request for a conversion factor, particularly in light of

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[100] NSC Section B Questionnaire Response, at B-22 (Dec. 22, 1998) (**Exh. JP-29**); NSC Supplemental Section B Questionnaire Response, at Supp. B-24 (Jan. 26, 1999) (**Exh. JP-29**).

[101] The United States implies that the conversation between NKK's US attorney and the relevant USDOC official may not have occurred. It is interesting that the United States did not submit an affidavit from the officials in charge of denying this.

[102] US First Submission, paras. B-171 to B-172.

[103] US Response to Panel Question 24, para. 6.

[104] *See* KSC Supplemental Questionnaire Response, at 19 (25 Jan. 1999) (**Exh. JP-49(f)**).

USDOC's contradictory and misleading oral guidance to NKK, USDOC was more than capable of clarifying its request. When NSC stated that it was impossible to provide the information requested by the USDOC because the necessary underlying data did not exist, USDOC should have offered "practicable" assistance in the form of suggestions about information that NSC could provide as a substitute for the assertedly unavailable information. Instead, USDOC gave no meaningful assistance to either NKK or NSC with their difficulties in responding to this request. The United States thereby failed to meet its obligations under Article 6.13.

(b) The fair comparison requirements of Article 2.4 continue to apply to the calculation of NKK's and NSC's margins

114. Article 2.4 requires authorities to make a "fair comparison . . . between the export price and the normal value." The United States claims that it complied with Article 2.4 in applying adverse facts available to NKK's and NSC's margins. However, the use of facts available in the AD Agreement presumes that the authority will apply facts available only where necessary. Here, to the extent facts available was necessary, it related to a conversion factor and the recalculation of US price for NSC, or normal value for NKK. The facts available mode does not suddenly excuse authorities of all of their obligations. It simply is a remedy for filling a void in the information needed to calculate margins. USDOC could have used some form of conversion factor to generate surrogate US prices for NSC and normal values for NKK. This would have then allowed USDOC to calculate margins using the remaining information for NKK and NSC. Instead, USDOC made no "comparison" between export price and normal value for the affected NSC sales, but simply applied an unreasonably high margin. For NKK, USDOC chose normal values without regard to how closely those underlying sales related to the overall average normal value for the product categories that included the theoretical weight sales at issue. Such an approach is not a "fair comparison" as contemplated by Article 2.4.

115. The United States wrongly interprets the facts available tool as something that, when used, renders other provisions of the AD Agreement meaningless. The *US —Atlantic Salmon* decision demonstrates this interpretation is not permissible. That Panel admonished the United States for acting inconsistently with Article 2.4 by failing to consider the representativeness of the resulting margin in deciding which facts available to use.[105] Unreasonably inflated margins are not representative of the displaced price comparison if there is no demonstration that the facts available were at all related to the underlying sales. The US First Submission does not respond to Japan's claims that the facts available were not rationally related to the theoretical weight sales and therefore offers no proof that the resulting margins were representative. The United States did not meet its burden of making a fair comparison in accordance with Article 2.4.

116. The United States also asserts that if it is required to only use facts available selectively, this would nullify the authority in Paragraph 7 of Annex II to select facts that are less favourable.[106] Paragraph 7 does not provide an affirmative allowance to use punitive facts available.[107] In addition, to the extent it does, the punitive facts available should be used selectively, and only with respect to those facts not obtained. Here, this meant certain US prices and home market prices for NKK and NSC.

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[105] United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, adopted 27 April 1994, 41S/229 BISD, para. 450 ("U.S.—Atlantic Salmon").

[106] US First Submission, para. B-174.

[107] On a related issue, the United States has argued that it does not select facts available that are certainly adverse, but sufficiently adverse. *See* US Response to Japan Questions 5 and 6, paras. 7-8. Surprisingly, it is the US position that it did not know for sure that the facts available USDOC applied to NKK and NSC were adverse because "it does not have the actual information against which to compare its choice of presumably adverse information." *Id.* This simply is not true. USDOC had the actual weight conversion factor for each company. Therefore, not only did USDOC act improperly by rejecting the factors and resorting to facts available, it knew the facts available it applied were adverse.

IV. ALL-OTHERS RATE

117. Article 9.4 states that the all-others rate shall not be based on margins calculated using facts available. It does not distinguish between margins calculated using partial facts available versus those using total facts available.

118. The United States thinks that this provision contains a word limiting its applicability to margins based entirely on facts available, but no such limiting word exist.[108] As Brazil points out, "the word 'entire' does not appear in Article 9.4."[109] Dumping margins calculated on the basis of partial facts available *are* "margins established under the circumstances referred to in Paragraph 8 of Article 6,"[110] and therefore they are not permitted to be used in calculating the all-others rate.

119. The United States complains that it would be "impossible" for USDOC to calculate an all-others rate if Article 9.4 forbids the use of margins based on partial facts available, because all three individually-investigated respondents were assigned overall margins based on partial facts available.[111] Nothing in Article 9.4, however, prevents USDOC from using a composite of the portions of the investigated companies' margins not based on facts available. In many cases, USDOC will have determined a margin based on the company's information and then add a few distorting adjustments to that margin based on adverse facts available -- indeed, that is precisely what USDOC did to KSC, NSC, and NKK in this case. Having added the distorting adjustments, USDOC could just as easily leave them out, and determine margins based solely on the companies' own information.

120. The United States also makes a series of policy arguments not grounded in the AD Agreement. First, the United States notes that calculating margins is a complicated endeavour, and claims that authorities need discretion with the use of facts available to fill gaps in respondents' information.[112] Japan does not deny that anti-dumping duty calculations are complicated. The issue for purposes of Article 9.4, however, is to whom the facts available are applied when a gap appears in the record. If an authority legitimately determines that a company it is investigating has withheld the necessary information, that is a different issue from applying facts available in the calculation of the all-others margin. The companies that must live with this rate have not even been given the opportunity to provide any information. The AD Agreement is clear that companies not individually investigated should not be affected by the behaviour of investigated companies.

121. Second, the United States claims that the result of using facts-available rates in the calculation of the all-others rate is neutral, because nothing at all is known about the pricing of other companies. The United States implies that companies in the all-others category could be dumping at a *higher* margin than the individually-investigated respondents.[113] Japan believes that the important question under the AD Agreement is the following: why is nothing known about the company? If nothing is known because the company has not cooperated or has been unable to provide the information, then a resort to facts available may be appropriate. But if nothing is known because USDOC decided not to devote any time or resources to investigating that company, as is the case with the companies in the

[108] US First Submission, paras. B-180, B-183, B-189.

[109] Brazil's Third Party Submission, para. II.D.2. The European Communities also appears to share Japan's interpretation of Article 9.4 that margins based even partially on facts available must be excluded from the margin calculation for companies that were not individually investigated. *See* Oral Statement by the European Communities, para. 8.

[110] Article 9.4 of the AD Agreement.

[111] US First Submission, para. B-194.

[112] *See* US First Submission, paras. B-199 to B-200.

[113] *See* US First Submission, para. B-198, n.262.

all-others category, then it is not permissible—indeed, it is not fair—to calculate the all-others rate with margins based on facts available.[114]

V. AFFILIATED SALES IN THE HOME MARKET

A. EXCLUSION OF SALES TO AFFILIATES

1. The 99.5 percent test neither determines whether a sale is in the ordinary course of trade nor results in a fair comparison

122. Article 2.1 requires a determination of the dumping margin based on home-market sales "in the ordinary course of trade," and Article 2.4 requires a "fair comparison" between the home market and export prices. USDOC's 99.5 percent test -- which disregards sales to any affiliated customer unless they are priced 99.5 percent or greater than the average price to unaffiliated customers -- accomplishes neither. This test is too simple and mechanical to resolve whether the sales are within the "ordinary course of trade" or not, and its systematic disregard of only low-priced sales prevents a "fair comparison."[115] When the United States attempts to rationalize the 99.5 percent test on the merits, it simply underscores the inherent unfairness and unreasonableness of the test. Not surprisingly, not a single third party to this proceeding endorses the US practice at issue.

123. The United States asserts that since Article 2.1 of the AD Agreement does not specify how to evaluate whether a sale is in the "ordinary course of trade," then any conceivable test is acceptable.[116] The United States misinterprets the standard of review,[117] and fails to reconcile its interpretation with other provisions of the AD Agreement, such as Article 2.4. The United States has essentially admitted that it applies a double standard when it comes to determining whether sales to affiliates shall be included in the normal value calculation: low-priced sales are excluded if they are as little as 0.5 percent less than prices charged to non-affiliates,[118] but high-priced sales are excluded only if they are "aberrationally high."[119] Nowhere does the United States articulate why home market prices that

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[114] In response to Japan's argument that the calculation of the all-others rate in this particular investigation violated the AD Agreement, the United States notes that SMI did not make exactly the same argument to USDOC that Japan now makes to the Panel. *See* US First Submission, para. B-36, n.91. SMI focused on the use of adverse inferences against KSC and how that inflated the all-others rate. *See* Sumitomo Metal Indus., Ltd. Case Brief, at 4-5 (12 Apr. 1999) **(Exh. JP-48).** SMI's position in this investigation, however, only underscores the flaws in the US statute and in particular its distinction between margins based "entirely" and margins based only "partially" on facts available. SMI's lawyers made a strategic decision to try to work within the US framework and minimize the inflation of the all-others rate by urging USDOC not to punish respondents for a petitioner's refusal to cooperate.

[115] The test also violates the spirit of Article 2.2, which sets forth the circumstances under which home-market sales may be excluded as below cost or in insufficient quantities. Article 2.2.1 illustrates how carefully an authority must determine whether a sale should be excluded as outside the ordinary course of trade. As Korea notes, Article 2.2.1 specifies that below-cost sales "may" be disregarded only under very specific circumstances. The AD Agreement thus places very strict limits on an authority's discretion to disregard even below-cost sales; *a fortiori*, above-cost sales cannot be disregarded in an arbitrary manner. *See* Korea's Third Party Submission, paras. II.E.5-7.

[116] *See* US First Submission, paras. B-214, B-217.

[117] *See* Section II.B.2 above.

[118] The United States glosses over the important difference between the two-percent *de minimis* test for dumping margins and the severe 0.5-percent test for sales to affiliates. *See* US First Submission, para. B-221, n.308. Yet the language cited by the United States makes Japan's point even more compelling. Deciding whether an affiliation affects the pricing "may involve situations where the outcome is close and the exercise of human judgment is unavoidable." *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, adopted 19 Mar. 1999, WT/DS99/R, at para. 4.661. That is precisely the point. The hair-trigger test of 0.5 percent makes no sense given the complicated nature of the analysis USDOC purports to undertake.

[119] US First Submission, para. B-228.

are too low show that the relationship affected prices, but that home market prices that are too high would not show the same thing. This double standard reveals that the true purpose of the 99.5 percent test is to inflate the magnitude of the dumping margin, which the United States essentially admits, [120] not to determine whether sales to affiliates are in the ordinary course of trade. This is neither "fair" (Art. 2.4) nor does it indicate whether the sales are indeed "ordinary" (Art. 2.1).

124. Contrary to the US argument,[121] the 99.5 percent test does not focus on the relationship with an affiliated company. As Japan explained at the first meeting with the Panel, assume a parent company is running a loss, but owns a subsidiary whose profits are quite high. Under such circumstances, the parent company would have an incentive to sell to its subsidiary at higher prices than it sells to other customers to reduce the profit of the subsidiary and consequently reduce its taxable income. Since the parent company is running a loss anyway, the parent's additional revenue would not increase its tax burden. In other words, in such a situation the affiliation tends to result in high prices between the companies, not low prices. The prices are distorted by the affiliation; they are therefore not at arm's length. Yet, USDOC's so-called "arm's length test" would not exclude those sales because its test addresses only whether the average price to affiliates is lower than the average price to non-affiliates.

125. When asked by the Panel to comment on this hypothetical situation, the US response only confirmed Japan's concerns. The United States allows only that it "might" disregard such high-priced home-market sales, and only if a respondent affirmatively demonstrates that they are outside the ordinary course of trade.[122] Yet the United States will *always* automatically exclude all home-market sales to affiliates below the rigid 99.5 percent test, and makes no further inquiry. This is precisely what Japan means by a double standard: substantially equivalent or slightly lower prices never make it into the normal value calculation, but high prices -- even up to "aberrationally high" levels -- are presumed to be in the ordinary course of trade. The United States digs an even deeper hole for itself when it tries to portray this policy as *favorable* to respondents. The United States states that in Japan's hypothetical situation, assuming the high-priced sales pass the 99.5 percent test, respondents would be "free" to distort normal value downward by reporting downstream resales that are *below cost.*[123] This point, if true,[124] simply demonstrates that USDOC is not trying to use the 99.5 percent test to eliminate sales "outside the ordinary course of trade" at all. What better example is there of prices being influenced by the fact of affiliation, than the fact that the downstream reseller systematically sells at a loss? Yet the United States insists that such sales would be acceptable to USDOC under the 99.5 percent test.

126. The United States argues the 99.5 percent test results in a "fair comparison" because Article 2.4 is self-contained -- that is, a comparison is inherently "fair" if an attempt is made to adjust the prices for differences such as taxes or the level of trade.[125] The first sentence of Article 2.4, however, stands on its own as an independent requirement. The requirement of a "fair comparison" did not appear at all in the Tokyo Round Anti-Dumping Code, but was specifically added, as a separate sentence, during the Uruguay Round.[126] This addition of new language must serve some purpose. As Japan has demonstrated -- and as the European Communities, Brazil, Chile, and Korea

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[120] *See* US Response to Panel Question 34, paras. 33-35 (focusing on the alleged importance of excluding low-priced sales).

[121] *See* US First Submission, paras. 211-213.

[122] US Response to Panel Question 37, para. 41.

[123] US Response to Panel Question 37, para. 43. Even more absurd is the US claim that respondents should be grateful that USDOC did not apply current US practice to exclude those higher priced sales and use instead even higher priced downstream sales.

[124] Japan frankly questions whether, in a real investigation, USDOC would accept such below-cost downstream resales as "in the ordinary course of trade."

[125] *See* US First Submission, para. B-219.

[126] *Compare* Article 2:6 of the Tokyo Round Anti-Dumping Code *with* Article 2.4 of the Uruguay Round Anti-Dumping Agreement.

also have concluded -- the 99.5 percent test is unfair because it systematically inflates the dumping margin without truly determining whether the sales it eliminates were outside the ordinary course of trade or, conversely, whether the sales it retains were in the ordinary course of trade.

127. The United States argues that Japan is trying to impose its own concept of "unfairness," and that the Panel cannot make such judgments.[127] It is hard to imagine a clearer example of "unfair" than a test that is one-sided: it permits higher prices (and thus higher dumping margins), but precludes lower prices (and thus lower dumping margins). The test simply has no rational relationship to reality, and reflects an outcome-determinative approach.

128. The United States also asserts that the 99.5 percent test "has no predictable or necessary effect on the calculated dumping margin" because individual sales that might be below the 99.5 percent threshold are included in normal value.[128] This argument ignores the systemic unfairness that *all* the sales to this customer are, on average, higher than the sales of similarly-situated customers whose purchases do not pass the 99.5 percent test. If sales to all affiliated parties are "inherently suspect,"[129] what is fair about retaining only high-priced sales?

129. The United States claims that NKK's proposed standard deviation test errs on the side of including affiliated-party transactions that might actually be affected by the relationship.[130] Such a test, by definition, eliminates low-priced sales as well as the "aberrationally high" prices identified in the US submission. Such a test is not one-sided, and is objectively reasonable.[131] Though the United States may be correct that the margin calculation does not rely on standard-deviation analysis,[132] the arm's-length test poses a different question. Dumping margins simply measure differences in price. The arm's-length test is supposed to measure, solely on the basis of price, whether a sale to an affiliate has been influenced by the relationship or is outside the ordinary course of trade -- a more complicated endeavour.

130. Japan does not posit that a standard deviation test is the only way to do this; Japan simply wants the Panel to know that alternatives were presented to USDOC in this investigation, that standard deviation is a more reasonable way to determine whether a sale is in the ordinary course of trade based solely on price, and that USDOC has not shown any interest in seriously considering such inherently fair alternatives.

2. The "everyone else does it" excuse is not only weak, but also wrong

131. Ultimately, we are left with what the United States apparently believes is its best defense of its practice of excluding sales to affiliates: "everyone else does it." According to the United States, other major users of the anti-dumping laws have similar rules for excluding home-market sales to affiliates from the normal-value calculation.[133] This defense does not rise to the level of subsequent practice,[134] and is both irrelevant and wrong. It is irrelevant because the other Members' statutes and practices have never been reviewed for WTO consistency by a panel. It is wrong because the

[127] US First Submission, para. 219.
[128] US Response to Panel Question 36, para. 37.
[129] US Response to Panel Question 34, para. 33.
[130] US First Submission, paras. B-223 to B-224.
[131] Japan refers the Panel to the affidavit submitted from two statisticians, both of whom have held professional positions in the US Government, concerning the inherent bias in the 99.5 percent test. *See* **Exhibit JP-56**.
[132] S*ee* US First Submission, para. B-225.
[133] *See* US First Submission, paras. B-206 to B-207.
[134] *See* Section II.B.2.b above.

language from those statutes quoted by the United States indicates that the other countries have more thoughtful and less mechanical approaches than the 99.5 percent test.[135]

132. The European Communities, Brazil and Korea, whose practices have been cited by the United States, specifically support Japan on this question and agree that USDOC's practice is unreasonably biased and mechanical.[136] There is *no* country other than the United States that rejects sales to affiliates simply because they are sold at average prices less than 99.5 percent of the average price to non-affiliates.

3. Article 2.2 makes clear that any test for finding sales to be outside the ordinary course of trade must be more rigorous than USDOC's 99.5 percent test

133. Article 2.2 sets forth the circumstances in which an authority may rely on something other than a producer's own sales in the home market to calculate normal value when there are no sales in the ordinary course of trade. The only outside-the-ordinary-course-of-trade sales identified in this provision are the below-cost sales discussed in Article 2.2.1. This provision makes clear that choosing to exclude sales as outside the ordinary course of trade is a rigorous undertaking. Even below-cost sales cannot be deemed outside the ordinary course of trade unless they are made (a) within an extended period of time, (b) in substantial quantities, and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time. The fact that the sales are below cost is alone not sufficient to justify their exclusion. Rather, each one of the specified conditions must be met.

134. Similar rigor must apply if an authority is to exclude sales to affiliates. It is not sufficient that the relationship between the companies can be as low as a five percent shareholding and that the average price between the companies is merely 0.5 percent lower than the average price charged to unaffiliated companies.[137] It strains common sense that such an easy test could be permitted given the rigor with which authorities must analyze below-cost sales.

B. REPLACEMENT WITH DOWNSTREAM RESALES

135. Even assuming the sales to affiliates are deemed outside the ordinary course of trade, the AD Agreement does not permit USDOC to replace sales to affiliates with downstream resales, as the United States does in "most" cases.[138] USDOC may use other home-market sales, or, if there are no home-market sales in the ordinary course of trade, Article 2.2 specifies that it must use only third-country sales or constructed value. Other than a desire to increase the burden on respondents, the United States has not identified any rationale for its policy.

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[135] The EC excludes sales to affiliates unless it determines that the prices are "unaffected by the relationship." US First Submission, para. B-206, n.266. So do Australia, New Zealand, Argentina and Korea, in similar language. *Id*. para. B-206, nn.268-70. Brazil's statute includes the precatory "may," and hinges exclusion on a determination of whether "related prices and costs are comparable to those of operations among parties that are not so related." *Id*. para. B-206, n.267.

[136] *See* Brazil's Third Party Submission, Part III.C; Brazil's Response to the Questions to the Third Parties, Question 48; Oral Statement by the European Communities, paras. 20-21; European Communities' Response to the Questions to the Third Parties, Question 48; Korea's Third Party Submission, Part II.E, F; Korea's Response to the Questions to the Third Parties, Question 48; *see also* Chile's Third Party Submission, 8-9.

[137] This applies with equal force to tests that do not even consider relative price levels. The United States claims in response to Panel Question 34 that USDOC "could reasonably have disregarded all … sales {to affiliates} in the home market, regardless of price levels to affiliates, as Canada and Mexico do, and relied solely on arm's length sales to unaffiliated parties." US Response to Panel Question 34, para. 33. Japan disagrees. The 99.5 percent test is unfair not merely because it excludes low-priced sales to affiliates, but also because it assumes that such prices are low because of affiliation, regardless of the level of affiliation and even when the affiliation is as low as five percent.

[138] US Response to Panel Question 35, para. 36.

1. Article 2.1 does not justify use of downstream sales in the home market

136. The United States claims that downstream sales "clearly come within" home market sales under Article 2.1. In doing so, however, the United States makes no effort to explain why.

137. The US position on this issue is indefensible. Article 2.1 merely defines dumping. Nowhere does this provision discuss using downstream sales. The United States is reading into the AD Agreement concepts that are not there. The expansive reading the United States has adopted would permit all sorts of alternatives to using a respondent's sales, as long as they are in the ordinary course of trade and destined for consumption in the exporting country. Such an expansive reading, however, ignores clear preferences in the AD Agreement, such as determining dumping margins for individual exporters and/or producers (Article 6.10). This preference explains why constructed value is calculated based on production costs (Article 2.2), not the costs of a reseller. There is simply no reason to interpret Article 2.1 to permit the US practice.

138. Article 2.3 specifically allows the use of downstream prices in the export context, but not in the context of home-market sales.[139] Article 2.3 exists because there is no alternative for export price to a specific market other than some price at which sales are made in that specific export market. Therefore, Article 2.3 creates a mechanism for constructing an export price for that market. There is no such need for this policy on the home market side, because there are other alternatives, including other home market sales and, based on Article 2.2, constructed value or third country sales (if the remaining sales are too few). Nothing in the AD Agreement permits the use of resales in the home market.[140]

2. If there are no home-market sales in the ordinary course of trade, then Article 2.2 requires use of third-country sales or constructed value.

139. If USDOC does not believe sales to affiliates are in the ordinary course of trade, then it has three choices. The first choice is to use the respondent's other home-market sales.[141] When there are *no* sales in the ordinary course of trade in the home market, or when such sales do not permit a proper comparison then the second and third choices present themselves: third-country sales or constructed value. Where downstream home-market sales in the ordinary course of trade exist, however, the United States thinks USDOC may not reasonably use other non-home market based alternatives.[142] In this sense, the United States claims that the particular provisions of Article 2.2 and 2.3, if read to prohibit replacement of sales to affiliates with the downstream resales, lead to an "absurd result." Japan disagrees. When USDOC rejects home-market sales to an affiliate on the basis of the 99.5 percent test, USDOC is declaring that these sales are not in the ordinary course or do not permit a proper comparison. Assuming that judgment is correct -- a point Japan contests -- the question

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[139] *See* Japan's First Submission, paras. 162 to 164.

[140] The United States responds to Japan's analysis with an attack on the viability of the maxim "expressio unius est exclusio alterius." That is, the language must be viewed in context, and the United States thinks it is inappropriate to infer any substantive meaning from the specification of some concepts and the omission of others. *See* US First Submission, paras. B-232, B-234 to B-235. Attributing meaning to text is the essence of treaty interpretation. The textual approach of Article 31 of the Vienna Convention rests on certain "logical presumptions," including specifically the presumption that "express mention excludes other items (expressio unius est exclusio alterius)." In fact, the United States and the US steel industry recently embraced "expressio unius" as a tool for interpreting the Uruguay Round Agreements in the Panel proceedings in *U.S.—Leaded Bar*. *See* US First Submission, para. 154, Attachment 2.1 to the Panel Report, WT/DS138R (23 Dec. 1999) & Exhibit USA-25 (excerpts attached as **Exh. JP-98**).

[141] The United States does not even acknowledge that the other home-market sales should be the primary recourse, but identifies only the downstream resales as the "ordinary course" sales available for the normal-value calculation. *See* US Response to Panel Question 33, paras. 29-30.

[142] *See* US First Submission, para. B-234.

becomes what alternative prices USDOC may use. By specifying the alternatives, Article 2.2 does not permit USDOC to use downstream resales.

140. The United States also suggests that Japan's interpretation of the AD Agreement would allow respondents to manipulate the normal-value calculation by structuring *all* home-market sales through affiliated resellers, apparently with the expectation that USDOC would be left with no home-market sales in the ordinary course of trade.[143] First, Japan does not accept the premise that all sales to affiliates will always be outside the ordinary course of trade. Even if such a decision is made, then indeed Article 2.2 requires the authorities to calculate normal value only on the basis of third-country sales or constructed value. In fact, in its official internal "Antidumping Manual," USDOC instructs its staff to do exactly what the United States now claims is "absurd": use third-country sales or constructed value where there are no home-market sales in the ordinary course of trade.[144]

3. The use of downstream resales also violates Article 2.4's "fair comparison" requirement

141. USDOC's use of downstream resales also violates the "fair comparison" requirement because it results in an "apples to oranges" comparison.[145] The United States insists this is not so, because USDOC makes level of trade adjustments -- something the Japanese mills allegedly never requested and Japan allegedly does not even acknowledge in its brief.[146] The United States is mistaken on two points.

142. First, USDOC's level of trade adjustments, which focus on different selling functions, do not address differences in price comparability due to the resellers' costs and profit. Without accounting for such differences, USDOC does not reduce price to the ex-factory level – a task USDOC goes to great lengths to accomplish on the export side when calculating constructed export price.[147] Because USDOC ensures that all constructed export prices are ex-factory prices, any use of downstream sales in the home market that does not incorporate deductions to reach an equivalent ex-factory price will result in an "apples-to-oranges" comparison. [148]

143. Second, USDOC received a specific request for a level of trade adjustment to the downstream resales USDOC used as a surrogate for NKK's home market price.[149] NKK noted the different selling functions it performed for its direct customers as opposed to the customers of its affiliated reseller.[150] USDOC did not grant the level of trade adjustment requested by NKK.[151] So, USDOC did not even apply its limited level of trade adjustment, thus making the "apples-to-oranges" comparison more severe.

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[143] *See* US First Submission, para. B-235.

[144] *Compare* Antidumping Manual, ch. 8, at 2-4, 56 (Dep't Commerce 22 Jan. 1998) (excerpts attached as **Exh. JP-99)** *with* US First Submission, para. B-235.

[145] *See* Japan's First Submission, para. 170.

[146] US First Submission, para. B-236.

[147] When the United States calculates constructed export price, it makes adjustments to the affiliate's resale prices to reduce it to an ex-factory equivalent. 19 U.S.C. § 1677a(c)-(d) (excerpts attached as **Exh. JP-90(c)**). Specifically, subsection (d)(1) reduces the export price to reflect all reseller costs, and subsection (d)(3) reduces the export price to reflect the profit attributable to the reseller. No such adjustment is made by the United States on the home market side when using downstream sales, unless the respondent successfully meets the high US standard for a level of trade adjustment. 19 U.S.C. § 1677b(a)(7) (excerpts attached as **Exh. JP-90(d)**). Even then, however, the adjustment does not reduce the price to an ex-factory level. Rather than deducting all "expenses" as specified in Section 1677a(d)(1), Section 1677b(a)(7)(A) focuses on different "selling activities" that are "demonstrated to affect price comparability." Moreover, Section 1677b(a)(7)(A) makes no provision for deductions for profit, nor does US practice.

[148] *See* Korea's Third Party Submission, paras. II.E.3, II.F.1-4.

[149] *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24339 (**Exh. JP-12**).

[150] *Id*. at 24339-40 **(Exh. JP-12)**.

[151] *Id*. at 24340 **(Exh. JP-12)**.

VI. CRITICAL CIRCUMSTANCES

144. The United States made early decisions on critical circumstances to chase Japanese imports from the market, and thus to placate domestic political pressures. Indeed, the new US policy was sold to domestic constituencies based precisely on this chilling effect. Given the normal operation of US customs law, there was absolutely no need to rush anything to preserve the option to collect retroactive duties, should they ultimately become necessary.[152] The rush to judgment, long before the authorities have any time to collect or analyze "sufficient evidence" to support such actions, violates Article 10 of the AD Agreement.

145. Moreover, the new US policy that has made this rush to judgment a regular feature of US anti-dumping cases must be addressed by this Panel. The decisions at the end of an investigation should not shield from review those violations of WTO obligations that occur earlier in the investigation, particularly those violations that are likely to be repeated in future cases if not disciplined.

A. THE AUTHORITIES CANNOT PREDICATE A FINDING OF CRITICAL CIRCUMSTANCES ON "THREAT OF INJURY"

146. The United States misreads Article 10.6 to allow "threat" of injury to substitute for current injury. But the language of Article 10.6, the context of Article 10 more generally, and the overall purpose of retroactive duties all contradict this US interpretation.

147. Article 10.6 means what its says: "injury," and not threat of injury. The United States uses Footnote 9 of Article 3 to claim that an affirmative finding of threat of injury *is* an affirmative finding of injury pursuant to which retroactive duties may be assessed.[153] As Japan explained in its First Submission[154] and in response to Panel Question 14, Footnote 9 cannot apply to "injury" as that term is used in Article 10.6. Footnote 9 sets a general rule "unless otherwise specified." The language and context of Article 10 generally and Article 10.6 specifically represent such an "otherwise specified."

148. Consider for a moment the illogic if Footnote 9 were deemed to apply to Article 10.6. The US reading of Article 10.6 would permit imposition of critical circumstances based on a finding a threat of injury. Yet this reading directly contradicts Article 10.4's requirement that in cases of threat, duties can only be prospective. In context, it makes no sense for Article 10.6 to authorize what Article 10.4 does not permit.

149. Although the United States might turn to Article 10.2 as an exception to Article 10.4 allowing some retroactive duties in cases of threat, this argument overlooks the situation of material retardation -- which is also listed in Footnote 9. The United States cannot use Footnote 9 to add "threat of injury" to Article 10.6 without also adding "material retardation" to Article 10.6. Yet under Article 10.4, a finding of material retardation may ***never*** justify retroactive duties -- not duties during the period of provisional measures, and certainly not duties that go back 90 days prior to the start of provisional measures. The problem persists: it makes no sense for Article 10.6 to be read as authorizing what Article 10.4 does not permit. Rather than this bizarre interpretation, the far more natural reading is that Article 10.6 means what it says -- "injury" means current injury, not threat of injury and not material retardation.[155]

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[152] *See* Japan's Response to Panel Question 16, para. 56.

[153] *See* US First Submission, para. B-256.

[154] Japan's First Submission, paras. 191-194.

[155] Nor can the United States argue distinctions between preliminary and final determinations of critical circumstances. The language of Article 10.6 does not mean different things at the preliminary and final stage -- the word "injury" does not change with the passage of few months. The requirements of Article 10.6 apply

150. The United States also argues the phrase "would cause injury" indicates that present injury is not a requirement.[156] As Japan explained in response to Panel Question 14, the US interpretation is incorrect as a matter of language as well as logic. As a matter of language, "would" is of course the *past* tense of will and does not indicate future events.[157] The US interpretation of "would cause injury" to connote future events also would be inconsistent with the context of Article 10, with its overall retrospective purpose. Article 10.6(i) simply cannot be read to describe future events, such as the causation of injury, in light of the use of the present tense in virtually all other verbs in Article 10 relevant to the factual predicate for what the United States terms "critical circumstances."[158]

151. Japan read the US response to Panel Question 30 with interest, since Japan also was curious why USDOC felt the need for more information if USITC's threat-of-injury determination was sufficient to establish "injury" under Article 10.6(i). The only reason the United States identifies, however, is a concern that the injury "may be less apparent to the importers" in light of USITC's finding that there was not even a reasonable indication of present material injury.[159] Japan certainly shares this concern, but this US response does not answer the Panel's question. Indeed, the US response reinforces Japan's point that USITC's *threat-of-injury* finding undermines the basis for concluding that importers, in the "here and now," should have known about dumping and injury.

B. USDOC'S EARLY PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES IN THIS INVESTIGATION VIOLATED THE AD AGREEMENT

152. Articles 10.6 and 10.7 establish important limits on the ability of a WTO Member to determine, in US nomenclature, that "critical circumstances" exist and retroactive duties may be imposed. The United States has disregarded these limits, and rushed to judgment before it had sufficient evidence to justify such an extreme action. None of the elements of Article 10.6 was established to the degree required by Article 10.7; any one of these legal errors would be sufficient for the Panel to find a violation of the AD Agreement. There was no finding that imports were "dumped." There was insufficient evidence that importers knew or should have known of dumping and injury, only vague newspaper articles. There was no finding at all that imports were "likely to seriously undermine the remedial effect" of the duties. The evidence was not sufficient to support a finding of "massive imports4," since imports from Japan actually declined after the petition was filed. Most troubling, the premature timing of the decision, mandated by USDOC's new policy bulletin, guaranteed that sufficient evidence of the elements of Articles 10.6 would not exist.

153. As explained in Japan's Answers to Panel Questions 11 and 15, and in Japan's First Submission, the basic problem is that USDOC simply accepted everything in the petition as the truth. The United States now attempts to distance itself from this fact, but USDOC's contemporaneous documentation proves Japan's point. The preliminary determination of critical circumstances was, in the words of the internal USDOC decisional memo, "{b}ased on allegations contained in the petitions," and on nothing more.[160]

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consistently at both stages. The only difference is the degree of evidence one has of those requirements at each stage.

[156] *See* US First Submission, para. B-274.

[157] *See generally New Shorter Oxford English Dictionary* at 3687-88, 3725; William Strunk, Jr. & E.B. White, *The Elements of Style* 64-65 (3d ed. 1979) (attached as **Exh. JP-100**).

[158] *See* Japan's First Submission, paras. 190-196.

[159] See US Response to Panel Question 30, para. 22.

[160] Memorandum From Roland L. MacDonald and Edward C. Yang to Joseph A. Spetrini Regarding Antidumping Duty Investigations of Certain Hot-Rolled Carbon Steel Flat Products from Japan and the Russian Federation—Determination of Critical Circumstances, 23 Nov. 1998, at 1 **(Exh. US/B-42)** (hereinafter "Spetrini Memo").

1. There was no finding that imports were dumped

154. As a threshold matter, Article 10.6(ii), and the chapeau of Article 10.6,[161] require that the imports in question be "dumped" before the authority can make a finding of critical circumstances. There was no such finding at the time USDOC made its preliminary determination of critical circumstances, and the United States does not even address this specific violation in its written submission.

155. The preliminary determination of dumping was not made until three months later. There was not even any independent evidence of dumping -- apart from the self-serving allegations in the petition -- when USDOC made its preliminary critical circumstances determination. Evidence of dumping might exist if there were an independent assessment, but on this point USDOC's critical circumstances analysis simply summarized the allegations in the petition.[162] "Alleged dumping" is not sufficient to establish that the product was "dumped" for purposes of Article 10.6,[163] as the United States appears to acknowledge when arguing in the context of facts available that petitions are always adverse.[164]

2. There was insufficient evidence of importer knowledge of dumping

156. There was insufficient evidence that importers should have been aware of dumping, a requirement of Article 10.6(i). USDOC's total reliance on the petition is legally insufficient. USDOC specifically found "The most reasonable source of information concerning knowledge of dumping is the petition itself."[165] The United States is conspicuously silent as to this rather remarkable conclusion. Why would an allegation in a lawsuit be the "*most reasonable* source of information" about what other parties knew or should have known? How could any adjudication system conclude that an allegation by one side, standing alone, is the "most reasonable" indicator of the truth?[166]

157. Even the United States recognizes that the information in the petition at best tells only one side of the story.[167] The US attempt to rationalize this assertion in response to Panel Question 32 fails. The United States notes that USDOC calculated a higher dumping margin for KSC than the margins alleged in the petition. *But the petition did not even calculate a margin for KSC*, only for NKK and NSC. Moreover, USDOC's final determination for KSC was distorted by the use of facts available.

158. Under its "25 percent test," USDOC concluded that importers should have been aware that they were dealing in dumped merchandise -- during a period several months before the petition was even filed -- solely because the petitioners subsequently *alleged* that dumping margins for NKK and NSC exceeded 25 percent.[168] As explained in Japan's answer to Panel Question 11, this alone cannot

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[161] On this point, Japan concurs with the reasoning in Brazil's Third Party Submission, para. IV.3.

[162] *See* Spetrini Memo, at 2 (**Exh. US/B-42**).

[163] *Compare* Article 5 ("Initiation and Subsequent Investigation") *with* Article 10.6. As Japan explained in response to Question 11 from the Panel, the evidentiary standard for initiating an investigation does not approach the evidentiary standard for substantive determinations.

[164] US First Submission, para. B-72.

[165] *USDOC Preliminary Critical Circumstances Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**. *See* Spetrini Memo at 2 ("the Department has relied on margin information provided by petitioners in the petition to impute knowledge of sales of subject merchandise at less than fair value") (**Exh. US/B-42**).

[166] *See United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, adopted 23 May 1997, WT/DS33/AB/R, at 14 ("{W}e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.").

[167] *See* US First Submission, para. B-72.

[168] *See* US First Submission, para. B-269.

constitute sufficient evidence, because petitioners' alleged dumping margins are self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities.[169] This deficiency in petitioners' data is underscored by the ultimate dumping determination with respect to NKK and NSC once their information was placed on the record and evaluated by USDOC. Ironically, USDOC then concluded that NKK and NSC -- the two companies whose estimated margins formed the basis of the "25 percent test" -- specifically did *not* dump by margins exceeding 25 percent.[170] The United States has emphasized the quantity of petitioners' allegations and newspaper articles, as if *more* inconclusive newspaper articles or *longer* allegations at some point become proof.[171] They do not, as the USDOC analysis eventually showed.[172]

159. As Brazil notes in its third party submission, even an affirmative finding of dumping above 25 percent would not be sufficient evidence that importers knew or should have known that fact, because importers rarely if ever know the price at which their foreign suppliers sell in their home market (or whether such sales are above the cost of production).[173] The only response the United States can muster is that the 25 percent test is a "permissible interpretation" of Article 10, because the Agreement does not specify how authorities should determine importer knowledge of dumping.[174] This begs the question; however the United States might interpret the Agreement, it may not do so in a manner that eviscerates the Article 10.7 requirement of "sufficient evidence."

3. There was insufficient evidence that imports had injured the domestic industry

160. As discussed above, critical circumstances may not be applied when only a threat of material injury exists. In this case, USITC preliminarily found only a threat of material injury. USDOC, therefore, had insufficient evidence on which to base a finding of material injury, as required by Articles 10.6(ii).

4. There was insufficient evidence of importer knowledge of injury

161. There also was insufficient evidence of importer knowledge that their purchases of the dumped product would "cause injury" to the US industry as required by Article 10.6(i). The United States has attempted to bolster USDOC's finding on this point with a detailed discussion of the facts and the law, but the United States is wrong on both.

162. On the facts, the United States insists importers knew or should have known of injury based on the allegations in the petition, including the vague newspaper articles submitted by petitioners. As discussed in Japan's Answer to Panel Question 15, this argument is meritless based on the substance and chronology of those articles. Other "evidence" of importer knowledge of present material injury included (1) the finding that there were "massive imports" during the earlier, arbitrary period allegedly established by the newspaper articles, (2) the magnitude of the estimated dumping margins alleged in the petition, and (3) "information regarding injury to the domestic industry in the petition itself."[175] In other words, the decision was based on *nothing at all* other than the petition and the contrary conclusion by USITC that there was only a reasonable indication of threat of injury. This basis is inherently insufficient.

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[169] Japan notes that USDOC's initiation checklist simply summarized the allegations in the petition, *see Initiation Checklist*, at 62-63 (**Exh. US/B-18**), as did its internal "analysis" of the critical circumstances allegation, *see* Spetrini Memo, at 2 (**Exh. US/B-42**).

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

[171] *See, e.g.*, US First Submission, para. B-268 ("the approximately 700 pages of exhibits submitted with the petition and the amendments thereto are not mere allegations -- they are evidence").

[172] *See* Japan's Response to Panel Question 15, para. 54.

[173] *See* Brazil's Third Party Submission, para. IV.6.

[174] *See* US First Submission, para. B-271.

[175] Spetrini Memo, at 3 (**Exh. US/B-42**).

163. Note that Article 10.6(i) is quite specific that dumping *by the exporter* must be causing injury. Vague stories about troubles being experienced by the domestic industry, or vague references to imports in general does not provide a legally sufficient basis to find that importers should have known specific exporters or specific countries were the cause of alleged injury.[176]

164. Moreover, the United States admits that petitioner needed to wait for "sufficient evidence" even to make an allegation.[177] Yet the United States still argues that months before the petition the importers should have known about the injury. If petitioners, carefully studying the market to file a case could not even credibly allege injury in early 1998, how could importers have been aware that alleged dumping would cause injury?

5. There was no finding that imports were likely to seriously undermine the remedial effect of any duty

165. Contrary to Article 10.6(ii), USDOC did not address at all whether the imports were "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." The United States does not even attempt to justify this failure apart from a conclusory assertion, without any citation to the record in this investigation, that USDOC "plainly" considered this factor as an "integral part" of its analysis.[178] USDOC did not do so, quite simply because it is not required to do so by the US statute or policy bulletin, as explained in subpart C below addressing how US law is inconsistent on its face with the Agreement.[179] By comparison, factors USITC typically considers in determining whether the imports were "likely to seriously undermine the remedial effect" include subject import volumes before and after the filing of the petition, trends in subject import pricing data, and inventory levels.[180] USDOC, however, considered none of these factors.[181]

166. The magnitude of this oversight emerges from the illogic of the USDOC position. USDOC identified a surge in imports from a much *earlier* period of time to avoid the inconvenient fact that imports at the time of the petition were falling. USDOC then implicitly jumps to a *future* period to

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[176] Once one looks carefully behind the US allegations that hundreds of pages of evidence supported the USDOC conclusions, it becomes apparent the US argument is an extreme exaggeration. USDOC identified 24 media reports that ostensibly supported its preliminary finding of critical circumstances. Spetrini Memo, at 7-9 (**Exh. US/B42**). Of these 24, however, only 6 mention Japan at all; as the Spetrini Memo itself acknowledges the remainder are either general comments about imports, or articles that discuss other import sources. Of these 6 articles mentioning Japan, only 3 articles appear to mention hot-rolled steel. One of these three, however, is inaccurately described in the Spetrini Memo as having to do with hot-rolled steel -- the interview of Hank Barnette on CNN did not mention hot-rolled steel at all, and discussed only general steel developments. Transcript #98073003FN-L02, of CNNFN: *Before Hours* (30 July 1998) (attached as **Exh. JP-91**). Moreover, of these 6 articles mentioning Japan, 2 of them came in late September just as the petition was about to be filed. The entire US case of "sufficient evidence" with respect to Japan thus collapses to two isolated reports -- one from a British consulting firm CRU International, and another from an obscure publication called the Tex Report, published in Japan in English. In each case, the reference to hot-rolled steel from Japan occupies one or two sentences in a multi-page report covering a variety of other topics. The US argument is that a stray sentence or two in publications, no matter how obscure, represents sufficient evidence that importers should have been aware that alleged dumping of hot-rolled steel was injuring the US industry. This claim is absurd.

[177] US First Submission, para. B-278.

[178] *Id*. para. B-280.

[179] *See also* Spetrini Memo, at 1 (summarizing statutory factors USDOC was considering, and omitting this one) (**Exh. US/B-42**).

[180] *See, e.g., USITC Final Injury Determination*, USITC Pub. 3202, at 21-23 (**Exh. JP-14**).

[181] *See* Spetrini Memo, at 2-4 (**Exh. US/B-42**). The Memo did cite "falling domestic prices resulting from rising imports," but this was based on the selected newspaper articles rather than USITC's pricing data, and it was during "early to mid-1998," not during a period in which imports could have seriously undermined the effect of an eventual order.

allege without any analysis that imports will undermine the remedial effect of the order. The USDOC cannot have it both ways.

6. Inappropriate measurement period for "massive imports"

167. The final factual predicate for a finding of critical circumstances is "massive imports of the subject merchandise over a relatively short period,"[182] which is how the US statute paraphrases Article 10.6(ii). Given the fact that imports from Japan actually declined after the petition was filed and after initiation, which were the periods USDOC always examined until this investigation,[183] there was no sufficient evidence of this point.

168. The United States mischaracterizes Japan's argument by claiming Japan does not actually question the sufficiency of the evidence, but rather why the period was different from usual.[184] There should be no misunderstandings: the use of an arbitrary measurement period undermines the sufficiency of the evidence. USDOC's selection of a measurement period that would best support its preordained conclusion (i.e., that imports were massive in a short period of time) on the basis of nothing but petitioners' allegations and vague newspaper articles is an example of bias and unreasonableness in the collection and evaluation of evidence. The United States attempts to justify the use of this earlier period by claiming that the petitioners' decision to wait until they had sufficient evidence before filing the petition should not deprive them of their remedy against a massive surge of dumped imports.[185] But there must be a neutral, transparent period within which USDOC objectively measures the growth in imports. It cannot be whichever period best supports the petitioners' case, as USDOC did here.

169. The United States also overlooks the illogic of its position. The purpose of the 90-day period is to catch sudden surges triggered by the petition. It makes no sense to look months before the petition to find a surge, overlook a post petition decline, and then assert the need to invoke provisional measures retroactively by 90 days to place duties on those already declining imports.

7. The timing of the decision guaranteed that sufficient evidence would not exist

170. As explained in Japan's answers to Panel Questions, the major flaw in USDOC's preliminary determination of critical circumstances in this case is that the determination was made too early. USDOC traditionally waits until the preliminary determination of dumping to make its preliminary critical circumstances determinations, but changed its practice during the investigation of hot-rolled steel from Japan to provide that critical circumstances determinations should be made "as soon as possible after initiation."[186] By requiring the decision to be made "as soon as possible," USDOC systematically prevented its determination from being made on the basis of "sufficient evidence" as required by Articles 10.6 and 10.7 of the AD Agreement.

171. The United States has attempted to justify its new policy requiring premature findings by noting that Article 10.7 does not require USDOC to wait for the preliminary determination of dumping.[187] True; but that was never precisely Japan's argument. The AD Agreement requires USDOC to make its determination of critical circumstances only on the basis of "sufficient evidence," and USDOC lacked the evidence in this investigation when it rendered its determination so soon after initiation. There may be instances in which USDOC *could* make the decision early, but not without

[182] Section 733(e)(1)(B), 19 U.S.C. § 1673b(e)(1)(B) **(Exh. JP-4(b))**.
[183] *See* Japan's First Submission, para. 204.
[184] *See* US First Submission, para. B-275.
[185] *See* US First Submission, para. B-278.
[186] USDOC Critical Circumstances Policy Bulletin, 63 Fed. Reg. at 55364 **(Exh. JP-3).**
[187] US First Submission, para. B-244.

establishing, on the basis of sufficient evidence, all the elements required by Article 10.6. The petition alone is never "sufficient evidence."

172. The United States also makes the baffling claim that USDOC simply cannot wait to make its preliminary critical circumstances finding until there is any evidence other than the petition because the delay would jeopardize the remedial purpose.[188] As Japan explained in response to Panel Question 16, the US Customs Service does not finalize duty liability until approximately 314 days after entry.[189] There will be plenty of time — over ten months — to determine the final duty liability of the affected entries without any risk that those entries will escape the liability. But rather than recognizing the ordinary operation of US customs law, the United States rushed to judgment. If the facts truly justified critical circumstance there would be plenty of time, but the United States could not be bothered to wait for sufficient evidence.

C. THE US LAW, ON ITS FACE, VIOLATES THE AD AGREEMENT

1. The US distinction between "mandatory" and "discretionary" laws is contrived

173. Several of the problems with the specific application of "critical" circumstances in this case reflect underlying defects in the US statute and how it has been interpreted by USDOC. The United States tries to avoid this problem by invoking the mandatory/discretionary distinctions explored by the GATT Panel in *U.S.—Tobacco*.[190] According to the United States, "{a} law is not, on its face, inconsistent with a WTO Agreement unless it mandates actions that are inconsistent with that Agreement."[191] The United States has invoked *U.S.—Tobacco* repeatedly in other WTO Panel proceedings, and this attempt to misuse that decision must fail just as surely as the others did.

174. First and foremost, the US law and practice governing preliminary determinations of critical circumstances is indeed mandatory. Under Article 10, the United States must not find critical circumstances unless the elements established in that Article are met. In Section 733(e),[192] however, USDOC is directed to determine preliminarily ("shall promptly . . . determine") whether critical circumstances exist under a much lower evidentiary standard and without finding certain essential elements of Article 10. In addition, the Policy Bulletin squarely states, "Commerce should issue its preliminary finding on critical circumstances before the preliminary determination, and also as soon as possible after initiation."[193] The United States has confirmed to the Panel that the Policy Bulletin establishes a practice "for all ongoing and future cases."[194] This is a mandatory practice subject to a *prima facie* challenge under the AD Agreement.[195]

175. Second, the GATT Panel in *U.S.—Tobacco* dealt with very different facts from those before this Panel. The text of the law in question in the *U.S.—Tobacco* case was ambiguous, and it had not yet even been applied. These circumstances led the Panel to give the United States the benefit of the doubt.[196] In contrast, the US statute and USDOC Policy Bulletin pertaining to preliminary

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[188] *See* US First Submission, para. B-266; *see also* US Response to Panel Question 32, para. 27.

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

[190] *See* US First Submission, paras. B-283 to B-284 (citing generally *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 Oct. 1994, BISD 41S/131) ("*U.S.—Tobacco*").

[191] US First Submission, para. B-283.

[192] Codified at 19 U.S.C. § 1673b(e) **(Exh. JP-4(b))**.

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

[194] US Response to Panel Question 26, para. 14.

[195] Cf. United States—Sections 301-310 of the Trade Act of 1974, adopted 27 Jan. 2000, WT/DS152/R, at para. 7.97 ("U.S.—Section 301").

[196] *U.S.—Tobacco*, para. 123.

determinations of critical circumstances have been applied repeatedly, including in this investigation.[197]

176. These features bring this case closer to *U.S.—Section 301* and *U.S.— 1916 Act*,[198] two recent Panel decisions that squarely rejected US attempts to analogize *U.S.—Tobacco*. The Panel in *U.S.—Section 301* persuasively explained why statutes must be read in light of their interpretation by agencies:

> Frequently the Legislator itself does not seek to control, through statute, all covered conduct. Instead it delegates to pre-existing or specially created administrative agencies or other public authorities, regulatory and supervisory tasks which are to be administered according to certain criteria and within discretionary limits set out by the Legislator . . . . The elements of this type of national law are . . . often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations. For example, *even though the statutory language granting specific powers to a government agency may be prima facie consistent with WTO rules, the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation . . .*[199]

Therefore, the Policy Bulletin must form an essential part of the Panel's review of Japan's *prima facie* challenge to the US practice. Japan need only demonstrate the practice that has developed, and how it is inconsistent with the Agreement, for the Panel to review the US practice for conformity with the Agreement.[200]

177. Finally, the pre-Uruguay Round Panel reports, such as *U.S.? Tobacco*, have limited relevance in disputes concerning the conformity of a Member's laws with GATT 1994 and the Uruguay Round Agreements. Article XVI:4 of the Agreement Establishing the World Trade Organization provides: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." "Legislation may thus breach WTO obligations."[201] Whether a particular piece of legislation is "mandatory" or "discretionary" is not the principal issue in evaluating whether on its face it is consistent with the WTO Agreements. Instead, the approach is to "examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination."[202]

2. The US law does not meet the requirements of Article 10

178. The deficiencies of Section 733(e) of the Tariff Act of 1930[203] fall into two categories: (a) elements of Article 10 that are totally absent, and (b) elements of Article 10 that are substantially weakened in the US statute. These defects are reinforced by the Policy Bulletin, which ensures that preliminary determinations of critical circumstances will never be made on the basis of the requirements of Articles 10.6 and 10.7.

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[197] *See* US Response to Panel Question 26, paras. 14-15.

[198] *United States—Anti-Dumping Act of 1916 (Complaint by the European Communities)*, Report of the Panel, 31 Mar. 2000, WT/DS136/R, at para. 6.86-6.88, *aff'd*, Report of the Appellate Body, 28 Aug. 2000, WT/DS136/AB/R & WT/DS162/AB/R, at para. 93 ("*U.S.—1916 Act*").

[199] *U.S.—Section 301*, paras. 7.25-7.27 (emphasis added).

[200] *U.S.—1916 Act*, para. 6.88.

[201] U.S.—Section 301, para. 7.42.

[202] *U.S.—Section 301*, para. 7.53.

[203] Codified at 19 U.S.C. § 1673b(e) **(Exh. JP-4(b))**.

(b) Absent findings

179. Article 10.6 requires a determination "for the dumped product in question" that "the injury {if any} is caused by massive dumped imports." Section 733(e)(1)(B), in contrast, requires only that "there have been massive imports" and there is no requirement anywhere in the statute that the imports be "dumped." This prong of the US statute thus looks only to an increase in the volume of imports. Unlike the corresponding section of the AD Agreement, the US statute does not require that the massive imports be determined to have been dumped or to have caused injury. This defect is reinforced by the Policy Bulletin, which directs USDOC to make its "preliminary finding on critical circumstances *before* the preliminary determination {of dumping}."[204]

180. Moreover, at the preliminary stage, US law provides for no finding at all that the massive dumped imports are "likely to seriously undermine the remedial effect." Article 10.6 requires authorities to "determine for the dumped product in question that . . . the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." There is no corresponding requirement at all in Section 733(e). At the preliminary stages, the US statute does not even require a "reasonable basis to believe or suspect" this element. Only in the statute governing final determinations is there a requirement that an authority make the determination whether the imports "are likely to undermine seriously the remedial effect" of the duties.[205] (This statute requires such determination to be made by the USITC, not USDOC.)

181. Notwithstanding the total absence of any finding that the "massive imports" were "dumped" or that they are "likely to seriously undermine the remedial effect" of the duty, the United States claims such findings are implicit in USDOC's ultimate finding that critical circumstances exist.[206] The United States does not respond at all to the point about the absence of any finding that the "massive imports" were dumped, apart from claiming that its "25 percent test" demonstrates that the imports were dumped.[207] But this test asks a different question—whether the importers should have known about dumping, rather than whether the massive imports injuring the US industry during the short period were dumped. More importantly, as illustrated by the investigation of hot-rolled steel from Japan, USDOC apparently considers mere allegations of dumping in excess of 25 percent to be "evidence" of dumping; as demonstrated above and in Japan's First Submission,[208] mere allegations are not sufficient evidence of dumping.

182. As to the point about undermining the remedial effect, the United States claims that element exists because that phrase appears once in a policy bulletin and because USDOC "specifically looks to the timing and volume of the *dumped* imports to determine whether critical circumstances exist."[209] The United States is being glib: the US statute does not require USDOC to determine that the imports were dumped for purposes of the preliminary determination of critical circumstances, and merely examining the timing and volume of the imports does not address whether the remedy is being undermined *seriously* by the dumped imports. For example, if the US industry was not in fact injured by the imports during the measurement period, then a simple growth in imports would not undermine seriously the duty. Yet that growth alone is all the US statute requires.

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

[205] Section 735(b)(4)(A) (19 U.S.C. § 1673d(b)(4)(A)) **(Exh. JP-4(c))**.

[206] *See* US First Submission, paras. B-281, B-287.

[207] *See* US First Submission, para. B-285.

[208] *See* Japan's First Submission, paras. 197-207.

[209] *See* US First Submission, para. B-281 (emphasis added).

(c) Insufficient findings

183. US law also contains an impermissibly weak standard of evidence. Article 10.7 requires "sufficient evidence" of the elements of Article 10.6. The United States makes the astonishing argument that its statute — requiring only a "reasonable basis to believe or suspect" — is *equivalent* to Article 10.7's requirement of sufficient evidence.[210] The principal basis for this assertion is the use of the phrase "sufficient evidence" in proximity to "reasonable basis to believe or suspect" in USDOC critical circumstances determinations in just two anti-dumping investigations.[211] It is clear, however, that USDOC is asking itself a different question than Article 10.7 contemplates. It is one thing to have "sufficient evidence" that an element of Article 10.6 truly exists; it is quite another to have "sufficient evidence" of only a "reasonable basis to believe or suspect" that an element of Article 10.6 exists. This distinction appears to be totally lost on the United States, which has laden its response to Panel Question 31 with quotations (from US court cases and countervailing-duty determinations) discussing this second, lower standard.[212]

184. The differences are real, as illustrated by the ordinary meanings of the words used. *New Shorter Oxford English Dictionary* first defines "sufficient" as "legally satisfactory," citing its origin in law. "Evidence," in that dictionary, is broken into two categories: "general" and "legal." The general definition includes "{f}acts or testimony in support of a conclusion, statement, or belief. . . . Something serving as proof." The legal definition of the word "evidence" is "{i}nformation . . . tending or used to establish facts in a legal investigation." In contrast, Section 733(e) requires only a "reasonable basis to believe or suspect" certain elements. "Reasonable" is defined in the *New Shorter Oxford English Dictionary* as "{w}ithin the limits of reason; not greatly less or more than might be thought likely or appropriate, moderate." To "believe" is defined as to "{h}ave confidence or faith in," to "*trust*," and to "*hold an opinion, think*." (Emphasis added.) The verb to "suspect" means to "{i}magine something evil, wrong, or undesirable in (a person or thing) *on little or no evidence*; believe to be guilty *with insufficient proof or knowledge*." (Emphasis added.)

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

VII. CAPTIVE PRODUCTION

186. The United States attempts to rewrite the captive production provision, but ultimately cannot paper over the fundamental violations of the AD Agreement engendered by both the provision on its face and its application in this case. When applicable, the statute on its face compels the USITC to focus its analysis primarily on market share and financial performance in the merchant market segment without relating its findings to the domestic industry as a whole. Articles 3 and 4, as interpreted by numerous panel reports, permits authorities to conduct a segmented analysis only when

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[210] *See* US First Submission , paras. B-288 to B-290. Indeed, the United States goes so far as to claim that the two standards can be correctly used "interchangeably." US Response to Panel Question 31, para. 23.

[211] *See* US First Submission, para. B-290, **US/B-46 & US/B-47**; US Response to Panel Question 31, para. 24 n.6.

[212] This lower standard is not acceptable simply because it applies to preliminary determinations. As the United States acknowledges in Paragraph 18 of its Response to Panel Question 28, the "sufficient evidence" standard applies equally to preliminary and final critical-circumstances determinations.

it is explicitly related back to the industry as a whole. The captive production provision requires no such relating back, and in fact encourages USITC impermissibly to accentuate merchant market data in its determinations. The United States cannot finesse this issue by referencing additional statutory provisions or emphasizing that the captive production provision does not force USITC to exclude captive production entirely.

187. Moreover, the USITC's application of the captive production provision in this case violated the AD Agreement by forcing it to ignore the shielding effect of captive production. USITC not only omitted this key finding from its analysis of conditions of competition – upon which the 1993 hot-rolled steel case hinged -- but also highlighted merchant market conditions throughout its determination, without relating its relevance to the industry as a whole.

A. THE CAPTIVE PRODUCTION PROVISION VIOLATES THE AD AGREEMENT ON ITS FACE

3. The plain text of the captive production provision impermissibly focuses USITC's analysis on an industry segment

188. The United States asserts that Japan "fundamentally misinterprets" the "plain meaning" of the captive production provision,[213] but spends much of its "plain meaning" argument by running away from the provision's explicit text and underlying logic. The logical fallacy of the US interpretation can be seen in Paragraph C-5 of the US First Submission. To say that imports might be having an impact in the merchant market certainly justifies considering the merchant market. The United States then takes the completely unjustified step of saying the merchant market "should be a focus of the injury analysis," to allow "a more complete picture of the competitive impact of imports." This US claim has two fundamental flaws.

189. First, the United States understates the effect of the captive production provision. The provision does not require that USITC merely consider the merchant market, or make the merchant market merely a part of the analysis. Rather, the provision requires the USITC to "focus primarily" on the merchant market. Not surprisingly, the United States tries to hide from this inconvenient language with several rhetorical devices:

- The statute does not require an ***exclusive*** focus on the merchant market. The United States uses this device repeatedly,[214] but Japan has never made this argument. The statute need not require an exclusive focus on the merchant market to violate the AD Agreement. If the statute skews the analysis, and precludes a balanced assessment of the impact of imports on the domestic industry as a whole, it violates Articles 3 and 4.

- The statute only requires ***consideration or examination*** of the merchant market. Although the United States might wish the statute used this phrase, it does not. Repeating this phrase in the US First Submission[215] cannot change the actual wording of the statute. Perhaps the most egregious use of this concept occurs in the US Answer to Panel Question 45. The United States innocently explains that certain factors "are considered as they relate to the merchant market as well as to the industry as whole."[216] This statement reflects the extent to which the USITC tries to hide from the explicit statutory requirement to "focus primarily" on one segment, necessarily at the expense of the other segment and the domestic industry as a whole.

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[213] US First Submission, paras. C-8, C-20.
[214] *Id*. paras. C-6, C-13 to C-15, C-31, C-38.
[215] *Id*. paras. C-22 to C-24, C-31, C-38.
[216] US Response to Panel Question 45, para. 56.

- Japan would require the USITC to ***ignore*** the merchant market. This repeated statement[217] distorts the Japanese position. Japan has never argued that the authorities cannot consider the merchant market at all. Rather, Japan has argued that any such consideration must be balanced. The merchant segment and the captive segment must both be considered, and that consideration must then be related back to an analysis of the industry as a whole.

190. Second, the United States forgets that ultimately the task is to assess the impact of subject imports on the domestic industry as a whole. The purpose is not to study the "competitive impact of imports" in isolation, or on one segment of the domestic industry, but to consider the impact of imports on the domestic industry *as a whole*. To focus primarily on that part of the domestic industry where imports compete most directly, and then to downplay the market share and financial performance of the domestic industry as a whole, fundamentally skews the analysis.

(a) The captive production provision does not add another factor to USITC's analysis of the domestic industry as a whole

191. Seeking to moderate the captive production provision, the United States highlights an entirely different provision of the anti-dumping statute that enumerates factors USITC must consider — including market share and financial performance — with respect to the domestic industry as a whole.[218] According to the United States, the captive production provision merely adds an additional factor to this list, without detracting from the required overall industry analysis.

192. The captive production provision cannot be understood merely to bring an additional relevant factor to USITC's attention. Indeed, such a revision would have been unnecessary, because USITC already long considered merchant market performance to be a relevant economic factor, sometimes at the urging of petitioners.[219] For example, USITC considered merchant market data in the *1993 Flat-Rolled Steel Case* as a relevant economic factor, but refused to predicate its determination on the merchant market segment, as argued by petitioners.[220]

193. Rather, the provision *privileges* merchant market data over overall industry data when applicable. It is an accepted canon of statutory construction that if two provisions are in conflict, the more specific and more recent provision takes precedent over the more general and older provision.[221] When applicable, the captive production provision's primary focus on the merchant market segment unquestionably conflicts with the 19 U.S.C. §1677(7)(C) requirement to focus on the domestic industry as a whole. As between subsection (iii) and subsection (iv) of Section 1677(7)(C), the

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[217] US First Submission, paras. C-6 to C-7, C- 9, C-33.

[218] *Id.* paras. C-19, C-22.

[219] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**) ("{W}e have in previous cases recognized that imports may not affect the merchant market production and captive market production in the same way. In such instances, we have given separate consideration to the effect of subject imports on the merchant market segment of the industry as part of our analysis in determination whether the imports are materially injuring the total domestic industry, including captive production.") (citing *Industrial Phosphoric Acid from Belgium and Israel*, USITC Pub. 2000; *Titanium Sponge from Japan and the United Kingdom*, Invs. Nos. 731-TA-161 and 162 (Final), USITC Pub. 1600 (Nov. 1984); *Electrolytic Manganese Dioxide from Greece and Japan*, Inv. Nos. 731-TA-406 and 408 (Final), USITC Pub. 2177 (April 1989)).

[220] *Id.* (**Exh. JP-59**) ("We followed this approach in the preliminary investigations of these industries, and adopt this analysis, when appropriate, in these final determinations.").

[221] *See* 2B Sutherland Stat Constr § 51.02 (5th Ed. 1992) ("{T}he more recent enactment prevails"); *Watt v. Alaska*, 451 US 259, 266, 68 L. Ed. 80, 88 (1981) (acknowledging the general rule that "the more recent of two irreconcilably conflicting statutes governs"); *see also* Sutherland Stat Constr § 51.05 ("{I}f there is any conflict, the {more specific provision} will prevail."); *Busic v. United States*, 446 US 398, 406, 65 L. Ed. 2d 381, 389 (1980) (stating that a "more specific statute will be given precedence over a general one . . ."). Excerpts are attached as **Exh. JP-101**.

captive production provision in subsection (iv) is the more specific provision. Therefore, the captive production provision supersedes Section 1677(7)(C)(iii), and when applicable, USITC is to "focus primarily" on the merchant market segment in its analysis of market share and financial performance, and de-emphasize its consideration of these same factors for the domestic industry as a whole under Section 1677(7)(C).

194. The flaw in the US argument is that the USITC cannot fairly consider the market share and financial performance of the domestic industry as a whole under subsection (iii) while at the same time "focusing primarily" on the market share and financial performance of the merchant market only under subsection (iv). To emphasize one necessarily means to de-emphasize the other. Articles 3 and 4 require that the evaluation of the market share and financial performance be more than just an afterthought or a loose end to wrap up after focusing primarily on one segment at the expense of the other segments.

195. In what may be the single most surprising statement in this dispute, the United States brazenly claims that the captive production provision "does not in any way place emphasis on the merchant market segment over the entire industry."[222] This statement simply cannot be reconciled with the explicit command of the statute to "focus primarily" on the merchant market for market share and financial performance. It is hard to imagine how anyone could construe "focus primarily" as not placing "emphasis" on the merchant market segment.

196. The United States seems to think that 19 U.S.C. § 1677(7)(E)(ii) somehow offsets the distorting effects of the captive production provision.[223] This provision, clarifying that no single factor can "necessarily give decisive guidance," however, speaks to a different issue. Japan has never argued that the captive production provision results in giving merchant market data decisive guidance. Rather, Japan has argued that the captive production provision improperly focuses on the merchant market segment at the expense of a proper analysis of the captive segment and, in turn, the industry as a whole. The residual left after focusing primarily on one segment at the expense of the other segment simply does not meet the standards of the AD Agreement.

(b) The captive production provision leaves USITC with no discretion to weigh overall industry data as it sees fit

197. Considering the language of the captive production provision itself, the United States also contends that the words "primarily focus" imply more than one focus, and that nothing in the captive production provision precludes USITC from focusing on any and all evidence, giving weight to factors as it sees fit.[224] Boiled down to its essentials, the United States argues that because the captive production provision does not require USITC to focus *exclusively* on the merchant market, but only *primarily*, it is consistent with the Agreement.[225]

198. The US interpretation of "primarily" simply repeats the error of the US argument about "exclusive." The United States seems to believe because the word primarily does not affirmatively exclude all consideration of the captive segment, that the analytic approach is consistent with the AD Agreement.[226] But the United States never addresses Japan's real argument: that "primarily" modifies "focus," and that the phrase "primarily focus" read together so narrows the authority's discretion that this analytic approach violates the requirement of Articles 3 and 4 to consider the

[222] US Response to Japan's Question 22, para. 30.
[223] *Id.* at Question 23, para. 32.
[224] US First Submission, para. C-22.
[225] *Id.* paras. C-6, C-21 to C-22, C-32.
[226] *Id*. para. C-13.

domestic industry as a whole. The United States seems to believe that whatever limited consideration is left over after primarily focusing on the merchant market is enough.[227] It is not.

199. Moreover, the US interpretation of the word "primarily" (that USITC is free to weigh merchant market data and overall industry data as it sees fit) would completely nullify the captive production provision, given that USITC possessed, and indeed used, such discretion prior to the captive production provision's enactment. It is an accepted canon of statutory construction that statutes are to be read so as to give meaning to their provisions.[228] Accordingly, the captive production provision cannot be read as simply restating the discretion USITC already possessed to weigh market share and financial performance data as it deems appropriate.[229] When the captive production provision applies, USITC cannot choose to accord the market share and financial performance of the domestic industry as a whole decisive weight or even balanced weight in its analysis and still "focus primarily" on the merchant market for these factors.[230] The captive production provision makes market share in the merchant market and financial performance more than just additional relevant economic factors — they become the *dominant* economic factors.

200. If USITC were genuinely to exercise its discretion to weigh market segment data and overall industry data as it sees fit, it would probably not choose to "focus primarily" on merchant market data, given past practice. In the *1993 Flat-Rolled Steel Case*, petitioners argued that USITC should limit its analysis to the merchant market, excluding captive production as "work in progress."[231] USITC rejected the petitioners' argument, finding "the practical effect would be to skew our analysis," but did separately consider the effect of imports on the merchant market segment, as it had in previous cases.[232] The low weight USITC chose to ascribe to this particular factor is evident from the fact that merchant market segment data is mentioned nowhere in the determination.[233] By contrast, USITC highlighted merchant market data throughout its determination in this case, when the captive production provision applied.[234] The captive production provision overrides USITC's discretion, compelling it to emphasize factors that accentuate injury by reason of subject imports, and preventing it from performing the "objective analysis" required by Article 3.1 of the AD Agreement.[235]

(c) The purported logic behind the captive production provision only underscores its inconsistency with the AD Agreement

201. Additional arguments proffered by the United States concerning the logic behind the captive production provision only underscore the impermissible distortions it wreaks on USITC's analysis. The United States asserts that because the captive production provision only applies when an industry sells significant production into the merchant market, the impact of imports on the merchant market is likely also to impact the industry as a whole when the captive production provision is applicable.[236] Yet USITC's determination that merchant market sales are "significant" in no way guarantees that

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[227] US Response to Japan's Question 22, para. 31.

[228] 2A Sutherland Stat Constr § 46.06 (6th Ed. 2000) (excerpts attached as **Exh. JP-101**) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence, of a statute.").

[229] *See 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**).

[230] If the USITC were to ignore the statute and make a balanced judgment for the domestic industry as a whole, and find no injury, the disgruntled domestic petitioner would have an excellent legal basis under US law to challenge that USITC determination.

[231] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 15 (excerpts in **Exh. JP-59**).

[232] *Id.* at 17 (excerpts in **Exh. JP-59**).

[233] *Id.* at 44-54 (excerpts in **Exh. JP-59**) (excluding pricing product data, which is necessarily from the merchant market).

[234] *USITC Final Injury Determination*, USITC Pub. 3202 at 10-21 (**Exh. JP-14**).

[235] Article 3.1 provides, in relevant part: "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination. . . ."

[236] US First Submission, para. C-11.

material injury in the merchant market segment has in fact resulted in material injury to the industry as a whole. Such a conclusion can only be reached through a careful and balanced examination of overall industry data.[237]

202. The United States further argues that the captive production provision properly recognizes that the ill-effect of imports are most evident in the merchant market, and that by limiting its analysis to overall industry data, USITC risks obscuring the impact of flagging merchant market segment performance on the domestic industry as a whole.[238] Japan thoroughly agrees with both observations, but these observations miss the point. The captive production provision violates the AD Agreement precisely because it *prevents* the robust performance of the domestic industry as a whole from minimizing material injury in the merchant market segment. In the *1993 Flat-Rolled Steel case*, USITC found that "any impact {LTFV imports} may have had on {the merchant market segment} is not significant when evaluated in terms of their effect on the domestic industry as a whole."[239] If the merchant market segment is materially injured by reason of imports but the domestic industry as a whole are not, the AD Agreement permits only one result: a negative determination. Under the same circumstances, the captive production provision practically guarantees an affirmative determination.

203. Consider this simple example. In the merchant market segment, the domestic industry earns an operating profit only of 0.5 percent. Yet in the captive segment, the domestic industry is earning a much stronger operating profit of 3.5 percent. Because the captive segment is larger, overall the domestic industry as a whole is earning an operating profit of 2.5 percent.[240] The authorities might well decide that an operating margin of 2.5 percent does not reflect material injury, particularly if that operating margin is higher than earlier years in the period being investigated. Yet the captive production provision forces the authorities to "focus primarily" on the 0.5 percent, to ignore the 3.5 percent operating margin in the captive-only segment, and to give only residual consideration to the 2.5 percent operating margin in the domestic market overall. Such an analytic approach does not allow for a balanced assessment. Instead, the approach focuses on the most adverse segment, and then elevates that segment at the expense of other segments and the industry as a whole.

(d) The US Congress' rejection of a more draconian captive production provision does not imply that the steel industry did not get what it wanted

204. The United States speculates that the US Congress intended USITC to examine the impact of dumped imports on the merchant market segment, and assess how that competition impacts the domestic industry as a whole, in the manner contemplated by the panel report in *Mexico—High Fructose Corn Syrup*.[241]

205. The legislative history of the captive production provision contradicts this benign interpretation. Japan agrees that Congress may not have intended to exclude captive production entirely, but this is irrelevant. After losing the 1993 hot-rolled steel case, the domestic steel industry lobbied hard for a new statute to force USITC to concentrate on the merchant market segment, where import competition is most pronounced.[242] The draconian language of early drafts of the captive production provision only illuminates the intentions of the industry advocates. Although the captive production provision as enacted was moderated in expectation of a WTO challenge, it is animated by the same spirit. When the captive production provision applies, and USITC must focus primarily on

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[237] In particular, the Article 4.1 definition of domestic industry, which is cited throughout Article 3, provides: "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of he like products."

[238] US First Submission, para. C-23.

[239] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 53 (excerpts in **Exh. JP-59**).

[240] Note these stylised facts are actually quite close to the facts of this case.

[241] US First Submission, para. C-6, C-24.

[242] Japan's First Submission, para. 219.

merchant market data, import penetration is exaggerated and financial performance is understated, making an affirmative determination more likely. The industry received most of what it wanted.

206. Nor does the text of the captive production provision support the US contention that Congress somehow intended USITC to relate its merchant market segment findings back to the domestic industry as a whole.[243] Such an intention appears nowhere in the statute or the Statement of Administrative Action; indeed, and no such analysis was conducted in the hot-rolled steel case by those Commissioners applying the captive production provision.[244]

4. The captive production provision on its face violates Article 3 of the AD Agreement

(a) Article 3.2

207. The United States argues that the captive production provision does not alter the requirement that USITC examine a host of factors with respect to domestic industry as a whole, including market share, in keeping with Article 3.2.[245] This argument forgets that the captive production provision -- subsection (iv) -- supersedes subsection (iii), as the more recent and specific provision. When the captive production provision applies, USITC must "focus primarily" on merchant market import penetration, which will by definition always be higher than overall import penetration.[246] This primary focus precludes USITC from granting overall import penetration the balanced weight Article 3.2 demands. One cannot primarily focus on the merchant market without necessarily downplaying and according much less attention to the domestic industry as a whole.

(b) Article 3.4

208. Article 3.4 explicitly stipulates that all relevant economic factors are to be considered with respect to the *domestic industry*, defined by Article 4.1 as domestic producers as a whole.[247] The US argument that nothing in Article 3.4 prevents USITC from considering merchant market data as a relevant economic factor either primarily or secondarily is misplaced.[248] The captive production provision was not enacted because USITC was overlooking the merchant market segment as a relevant economic factor; USITC had long recognized it as such.[249] Rather, the captive production provision, when applicable, emphasizes market share and financial performance for the merchant market over that for the domestic industry as a whole — the merchant market becomes USITC's "primary focus" for these factors.

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[243] US First Submission, para. C-24.

[244] *See USITC Final Injury Determination*, USITC Pub. 3202, at 12-13, 18 (**Exh. JP-14**) (noting merchant market data is followed by industry as a whole data, but making no attempt to relate the former to the latter).

[245] US First Submission, para. C-22 (citing 19 U.S.C. § 1677(7)(C)).

[246] *See* Japan's First Submission, para. 230.

[247] Article 3.4 provides, in relevant part: "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry . . . ." Article 4.1 defines domestic industry as "domestic producers as a whole."

[248] US First Submission, para. C-22. The United States asserts that Article 3.4's enumeration of "sales" as a relevant factor sanctions an authority to focus primarily on the merchant market segment, because sales only occur in the merchant market. *See* Oral Statement of the United States, para. 36. The captive production provision, however, does not mention sales. When applicable, the provision compels USITC to focus primarily on merchant market import penetration and financial performance. Article 3.4 does not enumerate merchant market import penetration and financial performance as relevant economic factors, but directs authorities to evaluate both factors with respect to the domestic industry as a whole.

[249] *See 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 17-18 (excerpts in **Exh. JP-59**); Japan's First Submission, paras. 219, 237.

209. The United States conveniently overlooks the historical context of the captive production provision. Congress did not change the law as a technical correction to fix an oversight. Rather, Congress sought to change the way the USITC had been making its decisions. Congress succeeded, as the contrast between the 1993 decision on hot-rolled steel and the 1999 decision in this case makes clear.

210. In *Mexico—High Fructose Corn Syrup*, the Panel clarified that this requirement is undiminished by an authority's decision also to examine industry segment data. Specifically, when an authority examines data for an industry segment, it must specifically relate its findings back to the domestic industry as a whole, and predicate its determination on a consideration of the domestic industry as a whole.[250] The captive production provision does not require USITC to relate its merchant market findings to the domestic industry as a whole, but instead invites USITC to ground affirmative determinations in the higher import penetration and lower profits inevitably displayed by an industry's merchant market segment.

(c) Article 3.5

211. The United States argues that the captive production provision is consistent with Article 3.5 because it does not prevent USITC from recognizing the shielding effect of captive production, and because merchant market data is relevant to USITC's consideration of causation.[251] Article 3.5 and Footnote 9 unquestionably require USITC to demonstrate that subject imports are causing injury to the domestic industry as a whole, not just the merchant market segment.[252] By privileging injury in the merchant market over injury to the domestic industry as a whole, the captive production provision allows USITC to violate Article 3.5 by establishing causation with respect to injury to an industry segment, in whole or in large part.

212. More importantly, the captive production provision *does* prevent USITC from recognizing the shielding effect of captive production. It would be logically inconsistent for USITC both to find that captive production shields a significant portion of domestic production from import competition while at the same time "primarily focusing" on merchant market data that amplifies import penetration. Recognizing this inconsistency, USITC omitted any mention of the shielding effect of captive production in this case,[253] which is otherwise a time-honoured fixture of its anti-dumping determinations.[254] By contrast, Commissioner Askey, who did not apply the captive production provision and dissented on the issue of current injury, expressly noted that substantial captive production attenuated subject import competition.[255] USITC also recognized the shielding effect of

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[250] *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, adopted 24 Feb. 2000, WT/DS132/R, at para. 7.155 n.625 (authorities must relate a segmented analysis to producers as a whole), at para. 7.160 (conduct of a segmented analysis does not excuse authorities from rendering a determination based on producers as a whole) ("*Mexico—High Fructose Corn Syrup*").

[251] US First Submission, paras. C-32 to C-33.

[252] Article 3.5 provides, in relevant part: "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." Footnote 9 defines injury as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry."

[253] *USITC Final Injury Determination*, USITC Pub. 3202, at 9-21 (**Exh. JP-14**).

[254] *See, e.g., 1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 22 (excerpts in **Exh. JP-59**); *Fresh Garlic From the People's Republic of China*, Inv. No. 731-TA-683 (Final), USITC Pub. 2825, at I-14 n. 67 (Nov. 1994) (excerpts in **Exh. JP-62**); *Stainless Steel Wire Rod From Brazil and France*, Inv. Nos. 731-TA-636 and 637 (Final), USITC Pub. 2721, at I-10 to I-11 (Jan. 1994) (excerpts in **Exh. JP-62)**; *Stainless Steel Wire Rod From India*, Inv. No. 731-TA-338 (Final), USITC Pub. 2704, at I-10 to I-11 (Nov. 1993) (excerpts in **Exh. JP-62)**; *DRAMs of One Megabyte and Above From the Republic of Korea*, Inv. No. 731-TA-472 (Final), USITC Pub. 2629, at 29-30 n.109 (Jun. 1991) (excerpts in **Exh. JP-62)**; *Silicon Metal From the People's Republic of China*, Inv. No. 731-TA-556 (Final), USITC Pub. 2385, at 10-11 (May 1993) (excerpts in **Exh. JP-62**).

[255] USITC Final Injury Determination, at 51 (**Exh. JP-14**).

captive production in its contemporaneous cold-rolled steel determination, in which it found a similar degree of captive production, but did not apply the captive production provision.[256] The 1993 hot-rolled steel case hinged on the degree to which substantial captive production mitigated causation between subject imports and the domestic industry's widening financial losses. By precluding such a finding, the captive production provision prevents USITC from complying with Article 3.5.

213. The United States deceptively argues that Japan's insistence that captive production mitigates import competition is no less of a segmented approach than that required by the captive production provision, because it privileges the captive segment — reflected only in output — over the merchant market segment — reflected only in sales.[257] Japan argues nothing of the sort. The AD Agreement unambiguously favours *overall* industry data over *segmented* industry data, through the Article 4.1 definition of the industry as "domestic producers as a whole." To analyze the industry as a whole, USITC must examine the impact of subject imports on both the merchant market and captive segments. In this regard, USITC cannot examine captive production without recognizing that it shields domestic producers from import competition. It therefore does not reflect an impermissible segmented approach, but is integral to USITC's analysis of the domestic industry as a whole. To find that imports have more effect on the merchant segment requires the recognition that imports have less effect on the captive segment. By suppressing this powerful insight, the captive production provision sabotages a balanced analysis of causation in violation of Article 3.5.

214. This US argument thus ignores the relationship of the merchant market to the industry as a whole. As aforementioned, the panel in *Mexico—High Fructose Corn Syrup* held that a segmented analysis must be related to an industry as a whole for a determination to be predicated on an industry as a whole.[258] Yet the USITC cannot relate its analysis of the merchant market segment to the industry as a whole without also analyzing the captive segment; the whole cannot be understood without an understanding of both parts. The USITC could not possibly shed any light on the condition of an industry as a whole through an analysis of the segment most impacted by imports alone, without also performing and relating a separate analysis of the captive segment, which is shielded from import competition.

215. Nor does Japan's argument that USITC inadequately analyzed mini-mills as an alternative cause of injury represent a segmented approach analogous to the segmented approach required by the captive production provision.[259] Japan does not argue that USITC should primarily focus its analysis and base its determination on the market share and financial performance of the mini-mill segment, without analyzing the segment's impact on the domestic industry as a whole, which would clearly violate the AD Agreement.[260] Rather, Japan only maintains that USITC abrogated its responsibility under Article 3.5 by failing to isolate the injury caused by alternative factors — including mini-mills — and implicitly attributing this injury to subject imports.[261] USITC does not adopt impermissibly a segmented approach to causation by merely analyzing the impact of a new, low cost industry segment on the domestic industry as a whole.[262] On the other hand, USITC does impermissibly base its determination on an industry segment when the captive production provision applies, and it must focus its consideration of market share and financial performance primarily on the merchant market segment, without having to relate its findings back to the domestic industry as a whole.

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[256] *Cold-Rolled Steel Case*, USITC Pub. 3283, at 19 (excerpts in **Exh. JP-86**) ("{T}he extent of competition between domestic production and subject imports is somewhat limited, given the domestic producers' large volume of internal transfers and contractual sales.").

[257] US First Submission, paras. C-29 to C-30.

[258] *Mexico—High Fructose Corn Syrup*, para. 7.155, n.625.

[259] US First Submission, para. C-26.

[260] *See* Japan First Submission, paras. 271-275.

[261] *Id.* para. 271.

[262] Significantly, the United States does not argue that Japan's arguments concerning the General Motors strike or non-subject imports represent segmented approaches.

216. In fact, this aspect of the captive production provision — a segmented analysis that need not be related back to the domestic industry as a whole — distinguishes it from the type of segmented analysis traditionally conducted by USITC. For example, in *Disposable Lighters From Thailand*, USITC found that the disposable lighter market was divided into two distinct segments: high end and low end.[263] Because domestic production was concentrated in the high end, and subject imports in the low end, USITC determined that the volume and price impact of subject imports on the domestic industry as a whole was limited, with subject imports increasing primarily at the expense of non-subject imports.[264] Hence, USITC analyzed the high and low end industry segments in a balanced way, but then extended its findings to the domestic industry as a whole. The captive production provision requires no such analysis. The provision does not allow the USITC to give balanced consideration to the captive segment.

(d) Article 3.6

217. The United States disingenuously argues that the captive production provision is consistent with Article 3.6, by asserting that import effects on output and sales — only evident in the merchant market — are equally important measures of import effects on "production."[265] First and foremost, the word "production" unambiguously refers to output, and cannot be understood to mean sales, which excludes "production" for internal consumption. Article 3.6 mentions sales only as a means of identifying production.[266]

218. Second, the United States draws a false distinction between production and sales. Captive production is transformed into downstream products that are ultimately sold at a higher profit than the upstream product. Firms choose to consume merchandise captively, rather than sell it on the merchant market, precisely because it is more profitable to do so. It is not accidental that Article 3.6 stipulates that authorities analyze the effects of imports on production, and not sales. Production as a whole yields a far more complete picture of an industry's performance than sales, because it reflects the economic benefits from both merchant market sales and transfers for downstream sales. Consequently, Article 3.6 does not treat output and sales equally, but privileges output. The captive production provision violates Article 3.6 insofar as it directs USITC to focus primarily on sales to the detriment of output.

5. Panel reports do not support the captive production provision

219. The United States seeks to justify the captive production provision by claiming that the Panel report in *Mexico—High Fructose Corn Syrup* only holds that the exclusion of an entire industry segment violates the AD Agreement, while the analysis of industry segments is both permissible and useful.[267] The difference between Mexico's practice in *Mexico—High Fructose Corn Syrup* and the captive production provision, however, is not a matter of kind but of degree. The Panel held that a segmented analysis is consistent with the AD Agreement so long as an authority's ultimate determination is based on its analysis of the domestic industry as a whole:

> {W}hile an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from

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[263] *Disposable Lighters From Thailand*, Inv. No. 731-TA-701 (Final), USITC Pub. 2876, at I-9 (Apr. 1995), at I-9 (excerpts attached as **Exh. JP-102(a)**).

[264] *Id.* at I-15 (excerpts attached as **Exh. JP-102(a)**) (volume), I-16 (price), I-19 (non-subject imports).

[265] US First Submission, paras. C-30, C-34 to C-35.

[266] Article 3.6 provides, in relevant part: "The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production. . . ."

[267] US First Submission, paras. C-36 to C-38.

> making the determination required by that Agreement — whether dumped imports injure of threaten injury to the domestic industry as a whole.[268]

220. Although the captive production provision does not force USITC to exclude captive production from its analysis, as the Mexican authority excluded the household industry segment, the provision does force USITC to emphasize merchant market data in its analysis of market share and financial performance, necessarily marginalizing its consideration of overall industry data. USITC cannot render a determination "based on its analysis of the domestic industry as a whole" after the captive production provision has focused a vital portion of its analysis on the merchant market segment, and ignored any separate consideration of the captive segment.

221. In its analysis of *Mexico—High Fructose Corn Syrup*, the United States conveniently sidesteps *Korea—Dairy* and *Argentina—Footwear*, both of which are impossible to reconcile with the captive production provision. The *Mexico—High Fructose Corn Syrup* Panel itself commented on the applicability of these panel reports to the anti-dumping context: "Both Panels concluded that the failure of the investigating authorities to either consider all sectors, *or to relate their conclusions concerning specific sectors to the industry as a whole*, resulted in injury determinations that were not based on injury to the industry 'as a whole', inconsistent with the requirements of the Safeguards Agreement."[269] The captive production provision is inconsistent with these panel reports in directing USITC to focus primarily on the merchant market segment for certain factors without requiring USITC to relate its conclusions back to the industry as a whole in its determination.

222. Nowhere does the statute require or even allow the relating back of both industry segments to the industry as a whole. USITC considers the industry as a whole for some facts, but under the captive production provision USITC elevates the importance of the market share and financial performance of one segment. USITC does not relate the merchant market segment to the captive segment. Moreover, USITC never relates its findings in *either* segment to the domestic industry as a whole. The USITC seems to think that by merely mentioning the results of the domestic industry as a whole, it can make up for the fact that the statute required primary focus on one segment at the expense of the other segment.

223. In addition, the captive production provision is inconsistent on its face with the recent panel report in *U.S.—Wheat Gluten*. That panel held that in the safeguards context, authorities must subtract injury caused by alternative factors to ensure that the injury caused by subject imports alone rises to the level of serious injury.[270] By extension, authorities must also subtract injury caused by alternative factors in the anti-dumping context to determine whether injury caused by subject imports alone rises to the level of "material injury." The captive production provision seriously distorts this analysis by amplifying the injury caused by subject imports in the merchant market segment, as revealed in market share and financial performance data. When the captive production provision applies, USITC cannot simply conclude that injury caused by subject imports to the domestic industry as a whole is immaterial without focusing primarily on injury caused by subject imports to the merchant market segment, which is far more likely to be material.

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[268] *Mexico—High Fructose Corn Syrup*, para. 7.160.

[269] *Id.* para. 7.155, n.625 (emphasis added).

[270] *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, unadopted 31 July 2000, WT/DS166/R, at para 8.138 ("There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement.") ("*U.S.—Wheat Gluten*").

6. Canadian and European Communities' practices do not support the Agreement-consistency of the captive production provision

224. The United States justifies the captive production provision by arguing that both Canada and the European Communities ("EC") take similar approaches to anti-dumping investigations; Canada has analyzed the merchant market separately in at least three recent cases and EC appears to exclude captive production from its analysis entirely.[271] Although the practice of other Members may be useful for interpreting ambiguous provisions of the WTO agreement, it is not particularly relevant to the Panel's consideration of the US captive production provision's adherence to the AD Agreement's unambiguous definition of domestic industry. Moreover, neither practice cited by the United States suggests that the captive production provision complies with the Agreement. Indeed, Canada's practice is different in one critical respect: the Canadian International Trade Tribunal merely exercises its discretion to analyze merchant market data, as USITC did prior to the captive production provision's enactment, and is not compelled by any statutory mandate to accentuate merchant market data under any circumstances.[272]

D. THE CAPTIVE PRODUCTION PROVISION VIOLATES THE AD AGREEMENT AS APPLIED IN THIS CASE

1. USITC might have reached a different conclusion had the captive production provision not been applied

225. The United States disingenuously asserts that Japan's as-applied challenge must fail because the three Commissioners not applying the captive production provision voted in the affirmative, meaning that the Commission would have reached an affirmative determination regardless of the captive production provision's application.[273] Two vital facts are ignored. First, Commissioner Askey's dissenting opinion demonstrates that an affirmative material injury determination is by no means assured without the application of the captive production provision.[274] Accordingly, the three Commissioners writing the majority opinion might not have voted affirmative on material injury had their analysis not been tainted by the captive production provision. Second, because Chairman Bragg joined the majority opinion, though she did not apply the captive production provision, her analysis is no less tainted and her affirmative material injury finding no less subject to revision.[275] These four votes could conceivably have been different in the absence of the distortions wrought by the captive production provision's application, making Japan's as-applied challenge far from academic.

226. The United States further argues that Chairman Bragg's vote would have remained affirmative in the absence of the captive production provision's application because she did not apply the captive production provision and yet agreed with the majority's reasoning in its entirety.[276] In other words, these four Commissioners shared the exact same views. But it is precisely for this reason that Chairman Bragg's views could change. By passively endorsing the majority's views, Chairman Bragg adopted findings and conclusions distorted by the application of the captive production

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[271] US First Submission, paras. C-44 to C-47. As the EC points out in its answers to Panel Questions, its law is not subject to this proceeding. The EC therefore declined to clarify the US misstatements about its practice. European Communities' Response to the Questions to the Third Parties, at Question 51.

[272] Canada's Third Party Submission, at 5 n.5 ("While an analogous provision does not exist in Canada's anti-dumping legislation. . .this practice has been developed by the Canadian International Trade Tribunal").

[273] US First Submission, para. C-72.

[274] *See* Japan's First Submission, paras. 251-252.

[275] *USITC Final Injury Determination*, USITC Pub. 3202, at 29-30 n.24 (**Exh. JP-14**) ("Much of the Commission's views focuses first on merchant market data and secondly on total market data. Although this order of discussion does not reflect the sequence of Chairman Bragg's analysis, she joins in the discussion of volume, price, and impact, except as otherwise noted.")

[276] US First Submission, para. C-83.

provision. In particular, Chairman Bragg adopted the majority's failure to relate its analysis of the merchant market segment to the domestic industry as a whole, as required under Articles 3 and 4.[277] There is simply no telling how Chairman Bragg's views would have changed had the majority not focused primarily on the merchant market in analyzing market share and financial performance.

227. The United States uses the affirmative determinations of Commissioners Crawford and Askey to argue that the majority might have reached an affirmative determination even if it had recognized the shielding effect of captive production.[278] Besides admitting that the majority did not consider the shielding effect of captive production, the United States mischaracterizes these two votes. The question is only whether the three Commissioners who applied the captive production provision, and the one who adopted their reasoning without applying the captive production provision, might have changed their affirmative material injury votes in the absence of the captive production provision's distortions. Commissioner Askey's dissenting views, and negative material injury determination, suggests that these votes might indeed have been different had the captive production provision not been applied. It is immaterial whether these four votes would have become negative determinations or affirmative threat determinations. The very fact that these Commissioners might have voted differently is sufficient to warrant reconsideration.[279]

228. The Panel should also understand that Commissioner Crawford's idiosyncratic mode of anti-dumping analysis differs from that of all other Commissioners, and consequently is a poor predictor of how other Commissioners might have voted had they not applied the captive production provision. Under her unique approach, Commissioner Crawford first gauges the substitutability of subject imports for the domestic like product, and then assesses whether subject imports caused material injury by considering the extent to which domestic producers could have increased their sales volume and profits had subject imports not been sold at dumped or subsidized prices.[280] By contrast, every other Commissioner methodically analyzes the statutory factors of import volume, price effects, and impact on industry performance.[281] As the more mechanical approach, Commissioner Crawford's analysis tends to de-emphasize conditions of competition such as captive production. For example, in her concurring views, she finds that captive production reduced the substitutability between subject imports and the domestic like product, rather than shielding domestic producers from import competition.[282] Thus, Commissioner Crawford's analysis affords little guidance whatsoever on how other Commissioners might have voted had they not applied the captive production provision, and recognized the shielding effect of captive production.

2. USITC did not properly recognize the shielding effect of captive production

229. Reaching the merits, the United States disingenuously argues that Japan is wrong on the facts, asserting that USITC *did* consider that the hot-rolled steel industry captively consumes over 60 percent of its production and that this production is relatively shielded from import competition.[283] The United States is manipulating the record. In actuality, USITC only noted the 60 percent figure in conjunction with its captive production provision analysis, and not with respect to its analysis of

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[277] *See Mexico—High Fructose Corn Syrup*, para. 7.155, n.625 (providing that authorities must relate a segmented analysis to producers as a whole), para. 7.160 (conducting a segmented analysis does not excuse authorities from rendering a determination based on producers as a whole).

[278] US First Submission, paras. C-85 to C-86.

[279] Nor is the distinction between current injury and threat of future injury merely academic. Under US law and the AD Agreement, duties may only be assessed prospectively in cases of threat of injury. The US determination to subject imports after the USDOC preliminary determination to duties would be legally void if USITC switched its decision from current injury to threat of injury. The distinction matters a great deal.

[280] *USITC Final Injury Determination*, USITC Pub. 3202, at 40-41 (**Exh. JP-14**).

[281] *Compare id.* at 12-21 (**Exh. JP-14**).

[282] *Id.* at 44 (**Exh. JP-14**).

[283] US First Submission, para. C-57.

conditions of competition, causation, or injury.[284] Nor does USITC recognize that the hot-rolled steel industry's substantial captive production is sheltered from import competition. The United States refers to a passage in which USITC only notes that mini-mills face more import competition than integrated mills due to their greater dependence on the merchant market.[285] USITC made this observation to dismiss mini-mills as an alternative cause of injury, not to recognize the shielding effect of captive production.

230. The glaring omission of this key condition of competition from USITC's hot-rolled steel determination in this case stands in stark contrast with its subsequent cold-rolled steel determination, in which the captive production provision was *not* applied. There, USITC expressly found that the high level of captive production attenuated import competition, though the percentage of captive production was no higher than in this case.[286] In every case in which the captive production provision has not applied, and there has been substantial captive production, USITC has recognized that captive production attenuates import competition. The omission of this finding from this case is not a fluke, but confirmation that this finding is logically incompatible with the captive production provision's directive to "primarily focus" on the merchant market segment.

231. The United States further argues that the three Commissioners applying the captive production provision fulfilled their obligation to render a determination based upon the domestic industry as a whole by following merchant market segment data with corresponding overall industry data throughout their views.[287] Though USITC may mention both merchant market data and overall industry data, this in no way diminishes USITC's impermissible emphasis on merchant market data, reflected by pervasive citations. USITC would not have addressed merchant market data prior to overall industry data throughout its determination had merchant market segment performance been merely another relevant factor among many going into a determination otherwise predicated on the domestic industry as a whole.[288] Without these constant citations to the much higher import penetration and much lower profitability of the merchant market segment, USITC would have been hard pressed to justify an affirmative material injury determination, as demonstrated by Commissioner Askey's dissent. Merely citing overall industry data is not enough. Articles 3 and 4 explicitly require USITC to base its determination on the domestic industry as a whole.

232. Under a balanced analysis, USITC would have considered *both* the merchant and captive segments. This would be the only way USITC could relate its segmented approach to an industry as a whole, as required. Yet one searches in vain for any discussion in USITC determination of the captive segment alone. Rather, USITC discusses the merchant market and the overall market separately, with no explanation of how the two relate to each other.

233. This analytic oversight is particularly acute when considering financial performance. To note that overall domestic industry operating profits in 1998 were only 2.6 percent of sales masks the fact that captive segment profits were 3.6 percent of sales.[289] The USITC dutifully followed the captive production provision and stressed the merchant market segment performance of only 0.6 percent, but ignored the counterpart performance of 3.6 percent. Such analysis simply fails the test of objectivity.

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[284] *USITC Final Injury Determination*, USITC Pub. 3202, at 9 (**Exh. JP-14**).

[285] *Id*. at 11, 19 (**Exh. JP-14**).

[286] *Id*. at 10 (**Exh. JP-14**) (56.0 percent of hot-rolled steel production was captively consumed in 1998); *Cold-Rolled Steel Case*, USITC Pub. 3283, at 19 (excerpts in **Exh. JP-86**) ("{T}he majority of all domestic production of certain cold-rolled steel is destined for further downstream processing by the producers.").

[287] US First Submission, paras. C-74 to C-82.

[288] *USITC Final Injury Determination*, USITC Pub. 3202, at 10 (**Exh. JP-14**) (merchant market apparent consumption is mentioned after overall apparent consumption), 12 (market share, shipments), 18 (operating income), 19 (mini-mill operating income, sales), and 20 (apparent consumption).

[289] *See id*. at VI-2, IV-6 (**Exh. JP-14)**). (Total profit - $560.5 million - minus merchant market profit - $43.3 million - divided by captive segment revenue - $14.4 billion - equals 3.6 percent).

3. The negative determination in the 1993 hot-rolled steel case resulted directly from the shielding effect of captive consumption and demonstrates the decisive impact of the captive production provision in this case

234. The United States argues that USITC's negative determination in the 1993 hot-rolled steel case had nothing to do with captive production, asserting that it is mentioned only as an afterthought, but instead was predicated on slab sales, mixed underselling, low subject import market share, and the recession.[290] The United States is simply wrong on the facts — captive production was central to USITC's determination in the 1993 case.

235. USITC begins its 1993 determination with a four-page section devoted to considering and rejecting the petitioners' request that captive production be excluded from the Commission's analysis.[291] The conditions of competition section contains an entire Paragraph devoted to the *shielding* effect of captive production, observing that "petitioners themselves strongly argued that competition between captive production. . .and merchant market supply is virtually non-existent" and "two-third of the production in this industry is shielded to a large extent from any potential adverse effects of subsidized and LTFV imports."[292] These findings are all made well in advance of USITC's discussion of causation.

236. In the heart of its discussion of causation, namely the "impact" section, USITC again devotes an entire Paragraph to the shielding effect of captive production.[293] Specifically, USITC found that the negative impact of subject imports on the merchant market segment was "not significant when evaluated in terms of their effect on the domestic industry as a whole."[294] USITC did not consider captive production as an afterthought, as the United States contends, and it is by no means clear that USITC would have rendered a negative determination in the absence of these key findings.

237. The United States further argues that the greater injury suffered by the domestic industry in 1993 than 1998 is immaterial because USITC's negative determination in 1993 was based on the lack of causation, while its affirmative determination in 1998 was based on its finding that import volume and underselling prevented the domestic industry from benefiting from record hot-rolled steel demand.[295] While certain causation factors might have been weaker on an overall industry basis in the 1993 case, petitioners then clearly believed that these same factors supported an affirmative determination if viewed on a merchant market only basis. Petitioners argued vociferously for USITC to focus on the merchant market,[296] and USITC acknowledged that petitioners' causation case was stronger in the merchant market, though still insufficient when viewed against the industry as a whole.[297] Had USITC been compelled by the captive production provision to focus primarily on the merchant market in the 1993 case — as petitioners' urged — it might have reached a different result, especially given the much greater injury suffered by the hot-rolled steel industry in the 1993 case, as compared to the 1999 case.

VII. CAUSATION DETERMINATION

238. The USITC's consideration of causation in the hot-rolled steel case ignored the requirement in Article 3.1 to make an "objective examination." The USITC's use of a two year period of investigation to analyze the impact of subject imports on the domestic industry is unprecedented, and US assertions to the contrary are clearly calculated to bolster its affirmative determination. The

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[290] US First Submission, para. C-90.
[291] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 15-18 (excerpts in **Exh. JP-59**).
[292] *Id*. at 21 (excerpts in **Exh. JP-59**).
[293] *Id*. at 53 (excerpts in **Exh. JP-59**).
[294] *Id*. (excerpts in **Exh. JP-59**).
[295] US First Submission, para. C-97.
[296] *1993 Flat-Rolled Steel Case*, USITC Pub. 2664, at 15 (excerpts in **Exh. JP-59**).
[297] *Id*. at 53 (excerpts in **Exh. JP-59**).

USITC's selective and nebulous analysis of alternative causes of injury would not have permitted it to determine whether injury caused by subject imports alone was "material," as the AD Agreement requires. Though the United States reviews the USITC's analysis of alternative causes in detail, it is what this analysis omits that constitutes a violation of the AD Agreement.

A. USITC FAILED TO RENDER AN OBJECTIVE DETERMINATION BY MANIPULATING ITS PERIOD OF INVESTIGATION TO JUSTIFY AN AFFIRMATIVE DETERMINATION

2. USITC selectively considered different periods to rationalize an outcome

239. The United States denies that USITC impermissibly limited its analysis to 1997 and 1998, arguing that in fact, USITC examined a wide range of factors over the entire three-year period investigated, including subject import volume, market share, and price trends.[298] Conspicuously absent from this expansive list of factors USITC considered over the three-year period, however, are shipments and financial performance, both of which *improved* between 1996 and 1998. *Nowhere in its discussion of impact does USITC even mention that shipments and profits increased between 1996 and 1998.*[299] USITC examined certain factors over three years, and others over two years, depending on which trends best supported an affirmative material injury determination. It is immaterial that the omitted data appears in an appendix to the determination, as USITC declined to factor them into its analysis or even mention them.

240. Moreover, USITC's selective use of two-year trends for some factors and three-year trends for others only undermines its own rationalization for the two-year approach. If 1997 and 1998 were genuinely the most appropriate years for analysis, then USITC should have analyzed *all* trends over these two years. Just because certain factors declined between 1996 and 1998, does not meant that they did not improve between 1997 and 1998, yet USITC did not even contemplate this possibility in its determination, confining its two-year analysis to shipments and profits.[300]

241. The United States claims that even if 1997 had been a peak year, it would not have distorted USITC's analysis, because USITC expressly found that declining costs and increasing demand should have made 1998 an even better one.[301] USITC's logic, however, ignores the 12 million tons of new mini-mill capacity commissioned in 1996 and 1997, but only fully ramped up in 1998.[302] Although increasing demand and declining costs — due to the new low-cost mini-mills — might suggest that 1998 shipments and profits should have surpassed 1997, mini-mills expanded effective capacity, and depressed prices, in 1998.[303] To have objectively distinguished the impact of mini-mills from the

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[298] US First Submission, paras. C-101 to C-102. The United States notes that Table C-1, in the appendix to USITC's staff report, reports all relevant data over the entire period investigated. *Id.* at para. C-99.

[299] *USITC Final Injury Determination*, USITC Pub. 3202, at 16-21 (**Exh. JP-14**). USITC determinations typically discuss volume, price, and impact. The Section on "impact" is where the USITC relates the volume and price trends to the alleged adverse effect on the domestic industry, particularly the domestic industry financial performance.

[300] *Id.* (**Exh. JP-14**).

[301] US First Submission, para. C-105.

[302] USITC did not agree with respondents that mini-mill capacity commissioned in 1996 and 1997 was not fully ramped up until 1998, instead arguing that the new mini-mill capacity commissioned by 1997 could not have materially contributed to injury occurring in 1998. This finding, however, could not excuse USITC from analyzing the relative impact of mini-mills and subject imports over the entire three-year period of investigation. *Compare USITC Final Injury Determination*, USITC Pub. 3202, at 19 (**Exh. JP-14**); *with* Respondents' USITC Prehearing Brief (29 Apr. 1999) at 81 (additional excerpts attached as **Exh. JP-103**) (12 million tons of new mini-mill hot-rolled steel capacity between 1996 and 1998), and 96-97 (excerpts in **Exh. JP-30**) (new mini-mills take two years to fully ramp up and produce at full rated capacity).

[303] *See* Respondents' USITC Prehearing Brief, at 89-91 (29 Apr. 1999) (additional excerpts attached as **Exh. JP-103**) (new mini-mills used lower costs to increasingly undersell integrated mills); Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, at 10-11 (additional excerpts attached as **Exh. JP-104**) (mini-mills undersold integrated mills on an average unit value and pricing product basis).

impact of subject imports in 1998, USITC would have had to examine industry performance trends over the three-year period, which it did not. Thus, USITC's very justification for using 1997 in fact highlights its failure to consider the interplay of alternative causes of injury, shipments, and financial performance over the three-year period, compounding its violation of Article 3.5.[304]

242. The US assertion that Japan is impermissibly attacking USITC's discretion to weigh trends as it deems fit under Article 3.4 is similarly unfounded.[305] USITC could not have objectively assessed the industry's increased shipments and profitability over the three-year period when it did not even mention these trends in its consideration of impact. In *Mexico—High Fructose Corn Syrup*, the Panel held that an authority must consider each Article 3.4 factor, and make its consideration apparent in the final determination, even if a factor is held to be not probative.[306] In *Argentina—Footwear*, the Panel held that trends only can be discerned if viewed over the entire period investigated, and not simply two years.[307] If USITC genuinely made a conscious decision to discount certain trends over the three-year period, in favor of other trends between 1997 and 1998, it had an affirmative obligation under the AD Agreement to discuss both the excluded trends and its reasoning. It did neither.

243. The United States directly admits that USITC made no effort to reconcile the conflicting trends between 1996 and 1998, and 1997 and 1998, but maintains that it "only had an obligation to consider all relevant economic factors bearing on the state of the industry."[308] Its assertion that "the USITC considered the operating profits for the 1996 to 1998 period for the merchant market and the entire industry"[309] is completely groundless -- the two footnotes cited concern only the cost of goods sold and the decline in operating profit between 1997 and 1998, not operating profits between 1996 and 1998.[310] The United States is left to speculate as to why USITC might have deemed the increase in operating profits between 1996 and 1998 irrelevant: "It is possible (although USITC made no findings to this fact) that USITC would have found the domestic industry performing poorly in 1996 *and* 1998."[311] This post hoc rationalization cannot substitute for USITC's obligation under Article 3.4 to consider "all relevant economic factors and indices having a bearing on the industry" including "sales" and "profits," and explain why it might consider otherwise relevant factors to not be probative.[312] Profit and sales trends over the three year period of investigation are clearly relevant economic factors, and the USITC violated Article 3.4 by omitting them from its analysis of impact.

3. USITC has always considered the entire investigation period in analyzing causation

244. The United States claims that USITC has often focused on the year or years of the investigation period it deems most probative, as when there is a dramatic change in industry trends, citing four cases in which USITC focused on either the beginning or the end of a investigation period.[313] Yet, the United States mischaracterizes prior USITC decisions, and selectively identifies trends to justify its conclusion rather than assessing all trends to make an "objective examination" as required by Article 3.1.

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[304] Article 3.5 provides, in relevant part: "The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities."

[305] US First Submission, para. C-106.

[306] *Mexico—High Fructose Corn Syrup*, at 7.128.

[307] *Argentina—Safeguard Measures on Imports of Footwear*, adopted 12 Jan. 2000, WT/DS121/R, at para. 8.230 ("Argentina—Footwear").

[308] US Response to Japan's Questions, para. 36.

[309] *Id.*

[310] *Id.* para. 36 n.7 (citing *Final Injury Determination*, USITC Pub. 3202, at 16, n.88, 18, n.99).

[311] *Id.* para. 38 (emphasis in original).

[312] *Mexico—High Fructose Corn Syrup*, at 7.128.

[313] US First Submission, paras. C-107 to C-108.

245. Although USITC may sometimes consider the end of a period most probative, especially for assessing present material injury, it has never before ignored the first year of the period in assessing shipment or financial performance trends. In fact, USITC at least *considered* these factors over the entire period in each of the cases cited by the United States, despite its particular emphasis on certain years.[314] Thus, USITC tacitly recognizes in these cases that trends can only be assessed when viewed over at least three years. Indeed, *Fresh Atlantic Salmon from Chile* undermines the US contention that USITC regularly ignores the early years of an investigation period. There, USITC actually had to resort to an even longer, four-year period "to obtain a more precise understanding of the growth in demand. . .and the manner in which subject imports are competing within the market."[315]

246. As for dramatic changes in the market warranting USITC's focus on 1997 and 1998, dramatic trends occurred throughout the period, from the commissioning of new mini-mills between 1996 and 1997, to the doubling of subject import volume between 1996 and 1997, and again between 1997 and 1998.[316] To have accurately assessed the causation between mini-mills or subject imports and industry performance, however, USITC would had to have analyzed industry performance over the entire period. An objective examination requires considering all changes, not just those changes that justify a particular conclusion.

4. USITC has expressly refused to predicate past determinations on a two-year analysis

247. The United States also grossly mischaracterizes the three past cases in which USITC refused to draw any conclusions based on comparisons with an anomalous peak year — a convention ignored in this case, when 1997 was used as a baseline despite being a peak year. The United States claims that these three cases "do not have any bearing on the issue at hand,"[317] but in fact they demonstrate that USITC had to have recognized that an emphasis on 1997 and 1998 would distort its analysis.

248. With respect to *Elastic Rubber Tape From India*, the United States claims that USITC only ignored the last two years of the investigation period because it was distorted by an "anomalous event," and not because 1997 was a peak year.[318] In actuality, the same "anomalous event" took place in both the rubber tape and the hot-rolled steel cases: unusually strong demand in 1997 distorting industry trends between 1997 and 1998.[319] USITC's response to this anomaly, however, could not have been more different in the two cases. In *Elastic Rubber Tape From India*, USITC expressly discounted 1997-1998 trends as uninformative, stating: "{u}nder the circumstances, we find the more informative comparison to be that of the overall period of investigation from 1996 to 1998."[320] By contrast, in the hot-rolled steel case, USITC focused exclusively on 1997-1998 trends for key factors, ignoring trends over the full three-year investigation period.

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[314] *Fresh Atlantic Salmon From Chile*, Inv. No. 731-TA-768 (Final), USITC Pub. 3116, at 22 (Jul. 1998); *Fresh Garlic From the People's Republic of China*, Inv. No. 731-TA-683 (Final), USITC Pub. 2825, at I-21-22 (Nov. 1994); *Certain Emulsion Styrene-Butadiene Rubber From Brazil, Korea, and Mexico*, Inv. Nos. 731-TA-794 through 796 (Final), USITC Pub. 3190, at 19, n. 144, n. 145, 20, n. 147 (May 1999); *Nitrocellulose From France*, Inv. No. 701-TA-190 (Preliminary), USITC Pub. 1304, at 5-6 (Oct. 1982). Excerpts from these determinations are attached as **Exh. JP-102**.

[315] *Fresh Atlantic Salmon From Chile*, USITC Pub. 3116, at 14 (excerpts attached as **Exh. JP-102(b)**).

[316] *USITC Final Injury Determination*, USITC Pub. 3202, at 11 (**Exh. JP-14**) (mini-mills), 12 (subject imports doubled every two years over the period investigated).

[317] US First Submission, para. C-109.

[318] *Id*.

[319] *Elastic Rubber Tape From India*, Inv. No. 731-TA-805 (Final), USITC Pub. 3200, at 14 (June 1999) (excerpts attached as **Exh. JP-102(f)**) ("the record indicates that the upward spike in apparent consumption in 1997 was an anomaly caused by an unanticipated high volume of orders at the end of 1997 and a corresponding drop in 1998").

[320] *Id*. at 14 (excerpts attached as **Exh. JP-102(f)**).

249. With respect to *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*, the United States contends that USITC actually did focus on 1997 and 1998, voting negative because industry performance improved between those two years.[321] The United States has the facts wrong. USITC found that industry performance *declined* between 1997 and 1998, including production, shipments, and profits,[322] but that these same measures improved between 1996 and 1998.[323] USITC made a negative determination because "this fairly steady level of performance occurred at the same time that subject imports increased 34 percent and their average values decreased by 16.8 percent."[324] In this case, USITC ignored similar trends over the investigation period — industry performance improved between 1996 and 1998 as imports increased — and focused on 1997 and 1998 to justify an affirmative determination.

250. With respect to *Certain Carbon Steel Plate From China, Russia, South Africa, and Ukraine*, the United States cryptically notes that USITC rendered a negative determination not because of trends in the latter part of its investigation period, but because it found that the adverse impact was not of sufficient magnitude.[325] The United States is correct that USITC declined to predicate its determination on the industry's declining performance between 1995 and 1996, but obfuscates its reasoning. In explaining its negative material injury determination, USITC placed particular emphasis on the fact that "many important indicators of the industry's condition improved overall" from 1994 to 1996, though some declined between 1995 and 1996.[326] It concluded that the decline between 1995 and 1996 was not of sufficient magnitude to outweigh the improvement between 1994 and 1996.[327] In this case, USITC did not even bother to compare the industry's improved performance between 1996 and 1998 with its performance declines between 1997 and 1998, preferring to accentuate the latter to justify its affirmative determination.

B. USITC INADEQUATELY ANALYZED ALTERNATIVE CAUSES OF INJURY

251. The United States claims that USITC's cursory treatment of alternative causes of injury complies with the AD Agreement because Article 3.5 only requires an authority to demonstrate a causal link between subject imports and injury, not a demonstration concerning other known factors.[328] The United States depends upon an outdated, strictly advisory GATT panel report,[329] that

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[321] US First Submission, para. C-109.

[322] *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan,* Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194, at 16 (May 1999) (excerpts attached as **Exh. JP-102(g)**) (Between 1997 and 1998, production declined from 163 million pounds to 159 million pounds, shipments declined from 155 million pounds to 152 million pounds, and operating income declined from $12 million, or 3.4 percent of sales, to $8.3 million, or 2.4 percent of sales.).

[323] *Id.* at 16 (excerpts attached as **Exh. JP-102(g)**) (Between 1996 and 1998, production increased from 153 million pounds to 159 million pounds, and shipments increased from 148 million pounds to 152 million pounds.), 17 (Gross profits increased between 1996 and 1998.).

[324] *Id.* at 17 (excerpts attached as **Exh. JP-102(g)**).

[325] US First Submission, para. C-109.

[326] *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. No. 731-TA-753-756 (Final), USITC Pub. 3076, at 22 (Dec. 1997) (excerpts attached as **Exh. JP-102(h)**) ("Many important indicators of the domestic industry's condition improved overall during the first three years of the investigative period....However, several important financial indicators. . .began to decline in 1996 from 1995 levels.").

[327] *Id.* (excerpts attached as **Exh. JP-102(h)**) ("Taking all factors into account, we do not believe that the adverse impact of the subject imports on the domestic industry is sufficient in magnitude to conclude that the domestic industry is currently materially injured by reason of subject imports. As noted, the deterioration in the domestic industry's condition is reflected primarily in the interim 1997 data.").

[328] US First Submission, para. C-112, C-114.

[329] Addressing *U.S.—Atlantic Salmon*, the panel in *U.S.—Wheat Gluten* agreed generally with its finding that "{a} Member is not necessarily required to quantify, on an individual basis, the precise extent of 'injury' caused by each other possible factor" but adds that "a Member must conduct an examination that ensures that any injury caused by such other factors is not attributed to increased imports." *U.S.—Wheat Gluten*, para. 8.142. The Panel Report goes on to suggest that a certain degree of quantification is required, however

has been superceded by more recent panel reports interpreting the post-Uruguay Round Safeguards Agreement: *U.S.—Wheat Gluten* and *Argentina—Footwear.* Both panel reports (*Argentina—Footwear* upheld by the Appellate Body) hold that authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury caused by imports rises to the level of "serious injury."

1. Recent panel reports make clear that authorities must isolate the injury caused by alternative factors so as to not attribute this injury to subject imports

252. The panel in *U.S.—Wheat Gluten* considered whether USITC's consideration of each alternative cause of injury satisfied Article 4.2(b), which, like Article 3.5 of the Agreement, "prohibits the attribution to increased imports of injury caused by other factors."[330] It found that USITC "weighed each other factor individually against imports to determine whether such factor was 'a more important cause of injury,' and then excluded such other factor as a 'cause of injury' when it did not."[331] After dismissing all other alternative causes, USITC only presumed that the injury caused by imports alone remained "serious."[332] The Panel held this approach to be inconsistent with the Safeguards Agreement:

> In our view, under USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause "*serious* injury" to the domestic industry. We consider that USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.[333]

In other words, authorities must ensure that when injury caused by other factors is subtracted, the remaining injury caused by subject imports rises to the level of "serious injury." This echoes and elaborates upon the Panel Report in *Argentina—Footwear*, which holds that authorities must perform an analysis separating the effects of alternative causes of injury from the effects of subject imports.[334]

253. By extension, the anti-dumping authority must ensure that when injury caused by alternative factors is subtracted, the remaining injury rises to the level of "material injury." But to the extent USITC considered alternative causes of injury at all, it held that each only "partly explained" the industry's declining performance in 1998, concluding that subject imports "materially contributed" to the industry's declining performance.[335] A finding that subject imports "materially contributed" to injury, however, is not the same as a finding that the injury ***caused*** by subject imports is "material." As it had in *U.S.—Wheat Gluten* with respect to the serious injury standard, USITC only found subject imports to be a more important cause of injury than any other, without considering whether the injury caused by subject imports alone was material, as required by Article 3.5.

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imprecise: "We consider that the USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause serious injury to the domestic industry once injury caused by other factors is not attributed to imports." *Id.* para. 8.152.

[330] *Id.* para. 8.151.

[331] *Id.* para. 8.146.

[332] *Id.* para. 8.151.

[333] *Id.* para. 8.152.

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

[335] *USITC Final Injury Determination*, USITC Pub. 3202, at 20-21 (**Exh. JP-14**) ("Having taken these {other economic factors} into account, however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's declining performance….").

254. The Panel should reject the US argument that *US —Wheat Gluten* is irrelevant for interpreting the AD Agreement.[336] First, panels regularly interpret the AD Agreement by utilizing panel reports interpreting similar provisions of the Safeguards Agreement. For example, the panel in *Mexico—High Fructose Corn Syrup* cites two Safeguards panel reports in analyzing the permissibility of a segmented analysis under the AD Agreement, noting that the applicable standards are "almost identical."[337] Second, the United States argues that Article 3.5 of the AD Agreement mirrors Article 3:4 of the Tokyo Round Code (interpreted in *U.S.—Atlantic Salmon*) "virtually verbatim,"[338] but ignores the fact that Article 3.5 mirrors Article 4.2(b) of the Safeguards Agreement just as closely.[339] Finally, the United States selectively quotes from the *U.S.—Wheat Gluten* panel report to imply that the panel found *US —Atlantic Salmon* irrelevant to its analysis, as not concerning the Safeguards Agreement.[340] In actuality, the panel expressly held that "to the extent it is relevant to our examination in this dispute, we believe that. . .the *United States—Salmon* panel report provides guidance," and devoted an entire Paragraph to explaining its relevance.[341] The *U.S.—Wheat Gluten* panel report is no less relevant to this Panel's examination of Article 3.5 of the AD Agreement.

255. The United States seems to forget the that Uruguay Round negotiations changed the Tokyo Round legal texts. It makes no sense to analogize to GATT panel decisions interpreting old language rather than WTO panel decisions interpreting the new language and context of the WTO Agreements. Japan explained in its First Submission how Article 3.5 of the AD Agreement changed and strengthened the old Tokyo Round Code language.[342] The addition of the phrase "authorities shall also *examine*" (emphasis added) changed the old Tokyo Round language. Yet the key phrase "must not be attributed" in Article 3.5 of the AD Agreement almost perfectly mirrors the phrase "shall not be attributed" of Article 4.2(b) of the Safeguards Agreement.

256. Moreover, the *U.S.—Atlantic Salmon* decision explicitly rested on what Article 3:4 of the Tokyo Round Anti-Dumping Code did *not* require: an examination of the causes of injury other than subject imports.[343] Article 3.5 of the Uruguay Round AD Agreement now explicitly requires authorities to "examine" these other known factors. This significant substantive change in the underlying treaty text renders *U.S.—Atlantic Salmon* totally inapposite. Indeed, the new word "examine" arguably seeks to address precisely what the *U.S.—Atlantic Salmon* panel found to be missing in the old Article 3:4 from the Tokyo Round Code. In light of this background, we believe the *U.S.—Wheat Gluten* panel more persuasively interprets the word and concept "attribute" in the WTO context than the *U.S.—Atlantic Salmon* panel.

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[336] US Response to Panel Question 46, paras. 58 to 69.

[337] *Mexico—High Fructose Corn Syrup*, at para. 7.155, n.625 ("Article 4.1(c) of the Safeguards Agreement defines the domestic industry in terms almost identical to those of the AD Agreement. . .). The United States itself cites *Argentina—Footwear* to bolster an argument in its First Submission. US First Submission, para. 102, n.218 (Arguing that "{t}he USITC may reasonably find that the overall picture shows material injury even when some of the indicators are not declining.").

[338] US Response to Panel Question 46, para. 66.

[339] *See* Japan Response to Panel Question 46, para. 105, n.59.

[340] US Response to Panel Question 46, para. 60.

[341] *U.S.—Wheat Gluten*, para. 8.142.

[342] Japan's First Submission, para. 260, n. 242.

[343] *See U.S.—Atlantic Salmon*, paras. 549 ("The basic question of interpretation before the Panel was whether … the investigating authorities were required to carry out a thorough examination of all possible causes of injury and 'isolate' or 'exclude' injury caused by such other factors from the effects of the imports subject to investigation."), para. 552 (holding that "the text of Article 3:4 did not support the view that this provision required a thorough examination of all possible causes of injury"); *see also id.* para. 546 (summarizing US arguments, including the following: "Nor did this provision {i.e., Article 3:4} require investigating authorities to carry out a thorough examination of all possible causes of injury in order to exclude injury caused by factors other than imports under investigation").

2. USITC's examination of each alternative cause of injury was inadequate

257. The United States attempts to explain away USITC's perfunctory treatment of each alternative cause of injury, without performing the in depth analysis the panels in *U.S.—Wheat Gluten* and *Argentina—Footwear* found necessary. Yet, USITC's omission of both key alternative causes of injury, and key facts concerning the alternative causes of injury it did address, cannot comply with the Article 3.5 requirement that all such factors be thoroughly considered, and any injury therefrom not attributed to subject imports. The manner is which the USITC addressed the facts before it show the absence of the "objective examination" required by Article 3.1.

(a) Mini-mills

258. Although the United States asserts that USITC extensively analyzed the contribution of mini-mills to injury, and concluded that they were only partly responsible for the injury suffered by hot-rolled steel producers,[344] in actuality, USITC's analysis of mini-mills could charitably be called selective. Consider the following summary of what the USITC said compared to what it ignored:

[344] US First Submission, paras. C-121 to C-127.

USITC Finding (**Exh. JP-14**)	Record Facts Ignored
Minimills might have lower costs and higher productivity, but both minimill and integrated mill prices declined over the period, including those of established minimill Nucor. Therefore, factors other than increased domestic competition had to have contributed to price declines towards the end of the period.[345]	Fierce discounting by new minimills to attract wary customers hurt the profits of minimills and integrated mills alike, including established minimills like Nucor.[346] Seven months after the case had forced subject imports from the market, hot-rolled steel prices remained depressed.[347]
Most minimill capacity was commissioned between 1996 and 1997, yet the domestic industry performed well in 1997.[348]	New minimills take two years to fully ramp up, and produce at rated capacity. Minimills commissioned in 1996 would not have fully impacted the market until 1998.[349]
Minimills actually fared worse than integrated mills between 1997 and 1998, suffering a steeper drop in operating profits. This reflects their greater dependence on the merchant market, where imports are concentrated.[350]	Minimills suffered no less than integrated mills from the new minimills' steep discounting. New minimills commissioned by Northstar BHP, Beta Steel, and IPSCO suffered from costly start-up problems, inflating start-up costs, and hammering profitability.[351]
Even the established minimill leader Nucor showed declining results in line with other minimills between 1997 and 1998.[352]	Similarly well established minimill Steel Dynamics Inc. was highly profitable in 1998.[353]

259. The United States asserts that respondents claimed mini-mill shipments peaked in 1998, when they in fact declined.[354] Respondents made no such claim in any of their submissions. Rather,

[345] *Final Injury Determination*, USITC Pub. 3202, at 15.

[346] Respondents' USITC Prehearing Brief, at 89 (additional excerpts attached as **Exh. JP-103**) (citing Charles Bradford, "U.S.: Strong Dollar, Capacity Main Issues," *AMMOnline* (29 May 1997) (Charles Bradford of Smith Barney observed, "We have never seen a situation where a large amount of new capacity has entered the market without an offer of reduced prices to bet new product out the door, at least initially."); George Cheverley, "A year of reckoning for sheet?" *AMMOnline* (29 May 1997) (Predicts discounting from new minimills will depress hot-rolled steel prices); Scott Robertson, "Caronb Steel Flying High into New Year," *American Metal Market* (8 Jan. 1998) (service centers report steep discounts from new minimills "to get their foot in the door".)).

[347] Respondents' USITC Posthearing Brief, at 28 (additional excerpts attached as **Exh. JP-104**) (citing Hearing Transcript at 195 (Testimony of Stephen A. Szymanski, manager of sales, US Steel Group, that he expected only half of the recently announced $40 hot-rolled steel price hike to stick.)).

[348] *Final Injury Determination*, USITC Pub. 3202, at 19.

[349] Respondents' USITC Prehearing Brief, at 96-97 (excerpts in **Exh. JP-30**) (citing Bradford, *supra*.; Kenneth Iverson, Chairman, Nucor Corp., prepared remarks presented 18 June 1996 at Steel Survival Strategies XI).

[350] *Final Injury Determination*, USITC Pub. 3202, at 19.

[351] Respondent's USITC Prehearing Brief, at 97, 105 (excerpts in **Exh. JP-30**) (citing "Co-Steel Earns $2.7 Million," *New Steel* (29 Apr. 1997); SBC Warburg, Steel Industry Report, TFN Investext 1893253 (4 Apr. 1997)); Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, at 32-33 (additional excerpts attached as **Exh. JP-104**).

[352] *Final Injury Determination*, USITC Pub. 3202, at 19, n. 107.

[353] Respondents' USITC Posthearing Brief, Answers to Questions From Commissioners, 31 (additional excerpts attached as **Exh. JP-104**). Petitioner SDI's questionnaire response is summarized in Table VI-6, on page VI-7 of the Staff Report, and is confidential. SDI's 1999 Annual Report, however, reveals that its operating profits increased from $65.154 million in 1997 to $65.171 million in 1998. SDI's 1999 Annual Report, at 2.

[354] US First Submission, para. C-126.

respondents argued that mini-mill market share increased substantially between 1996 and 1998.[355] This observation was confirmed in USITC's own staff report:

> If BOF and EAF-based shipments are separated. . .a striking difference becomes apparent. As BOF mill's total US shipments have declined in each year and by 3.2 percent during the period of investigation, EAF mills have increased their shipments by 31.5 percent from 1996 to 1998 . . . .[356]

Despite this overwhelming evidence, USITC makes no mention of increasing mini-mill market share and widening underselling between 1996 and 1998 in its analysis of impact, instead minimizing these trends by focusing on 1997 and 1998. It made no effort to isolate the injury caused by mini-mills, and not attribute it to subject imports, other than by noting that "we recognize increased competition within the domestic industry has contributed to the domestic industry's poorer performance in 1998."[357] Hence, USITC's analysis of mini-mills violated Article 3.5.

260. One of the most reliable signs of an objective analysis is the willingness to acknowledge and address contrary facts. Yet in this case, USITC conveniently ignored contrary facts rather than confront them. This approach does not constitute an "objective examination" within the meaning of Article 3.1.

(b) The General Motors strike

261. The United States maintains that USITC's analysis of the General Motors strike complied with the AD Agreement, because its assessment that the strike caused some but not all of the industry's declining performance was supported by the fact that the strike impacted only 685,000 tons of flat-rolled steel compared with the 75 million ton hot-rolled steel market.[358] Japan could not have better highlighted the two facets of USITC's analysis that run afoul of Article 3.5. First, USITC's finding that the General Motors strike is "at most, a partial explanation for the industry's declining performance in 1998" makes no attempt to identify this contribution and not attribute it to subject imports.[359] USITC had sufficient information on the record, including the quantity of hot-rolled steel production foregone by the strike, and hot-rolled steel prices during the strike, to have conducted such an analysis. USITC ignored the facts that:

- Integrated steel mills sold hot-rolled steel on the merchant market that would otherwise have been processed into cold-rolled and galvanized steel for General Motors, as demand for hot-rolled steel was least effected by the strike, and stopping and restarting steelmaking operations would have been prohibitively expensive.[360]

- Orphaned hot-rolled steel unloaded on the merchant market had to meet or beat extremely competitive minimill pricing.[361]

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[355] *See* Respondents' USITC Prehearing Brief, at 90-91 (additional excerpts attached as **Exh. JP-103**); Respondents' USITC Posthearing Brief, at 21 (additional excerpts attached as **Exh. JP-104**); Respondents USITC Posthearing Brief, Answers to Questions From Commissioners, at 7-8 (additional excerpts attached as **Exh. JP-104**).

[356] *USITC Final Injury Determination*, USITC Pub. 3202, at III-5 (**Exh. JP-14**).

[357] *Id*. at 19 (**Exh. JP-14**).

[358] US First Submission, paras. C-117 to C-120.

[359] *USITC Final Injury Determination*, USITC Pub. 3202, at 16 (**Exh. JP-14**).

[360] Respondents' USITC Prehearing Brief, at 122 (additional excerpts attached as **Exh. JP-103**). The argument itself can be seen clearly in the public version, although the underlying documentation cites confidential information.

[361] *Id*. at 124 (additional excerpts attached as **Exh. JP-103**) (citing discussion of lower minimill pricing.).

- At least ten purchaser questionnaire responses confirmed that the General Motors strike had depressed hot-rolled steel prices, as did public pronouncements of John Correnti, President of Nucor.[362]

- Though the strike ended on July 28, General Motors's production did not return to normal until two weeks after the strike had ended.[363] Steelmakers did not resume normal production and delivery schedules until the fourth quarter.[364]

262. Second, USITC minimizes the importance of the General Motors strike by placing it in the wrong context. The 685,000 tons of flat-rolled steel orphaned by the strike should not be compared to total apparent consumption, but to merchant market consumption during the strike. In this context, the tonnage displaced by the General Motors strike represented fully 13.7 percent of the total domestic merchant market hot-rolled steel supply during the strike, which record evidence indicates had been aggressively sold off.[365] Such a sudden spike in supply would clearly have had a dramatic impact on hot-rolled steel prices, and industry performance, and USITC completely ignored extensive purchaser confirmation of the General Motors strike's price depressing effect in the second half of 1998.[366] Hence, USITC failed to meet its obligation under Article 3.5 to identify the extent of the injury caused by the General Motors strike, and not attribute it to subject imports.

(c) Non-subject imports and the pipe and tube recession

263. It is instructive that the thorough US exposition of the hot-rolled steel determination summarizes USITC's analysis of mini-mills and the General Motors strike, but entirely omits USITC's analysis of non-subject imports and the pipe and tube recession.[367] The United States cannot summarize what does not exist.

264. Concerning non-subject imports, the United States only argues that USITC found their market share stable over the period investigated, and that subject import volume injured the domestic industry as much as underselling.[368] In other words, the United States admits that USITC failed to analyze non-subject import *price* effects, but argues that such an analysis was unnecessary. Yet, USITC made no effort to analyze non-subject import prices in the aggregate, much less on a disaggregated basis, which might have revealed surging volume from the lowest cost sources. Accordingly, USITC's analysis of non-subject imports was inadequate, and an insufficient basis for ensuring that injury caused by non-subject imports was not attributed to subject imports, as required by Article 3.5.

265. The United States argues that USITC was not obligated to analyze the price effects of non-subject imports because if non-subject imports showed price effects, "it would be expected" that their volume and market share would have increased.[369] This post hoc rationalization, however, appears nowhere in USITC's final injury determination. It is also incorrect: non-subject imports can maintain a constant market share and still injure domestic producers through declining prices alone. Lower-priced non-subject imports can gain market share at the expense of higher-priced non-subject imports, leaving overall non-subject import penetration unchanged. In other words, non-subject import price

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[362] *Id*. at 121-123 (additional excerpts attached as **Exh. JP-103**) (These responses are summarized in ten bullet points, though the specifics are confidential).

[363] *Id*. at 118 (additional excerpts attached as **Exh. JP-103**) (citing *AMMOnline*, Industry News (13 Aug. 1998)).

[364] *Id*. at 119 (additional excerpts attached as **Exh. JP-103**) (citing *AMMOnline*, Industry News (13 Aug. 1998)).

[365] *Id*. at 120-123 (additional excerpts attached as **Exh. JP-103**).

[366] *Id*. at 120-122 (additional excerpts attached as **Exh. JP-103**) (providing ten bullet point summaries of purchaser questionnaire responses detailing impact of General Motors strike on hot-rolled steel prices).

[367] US First Submission, paras. C-67 to C-71.

[368] *Id.* paras. C-128 to C-131.

[369] US Response to Japan's Questions, para. 42.

effects are a factual matter.[370] Article 3.5 expressly enumerates "the volume *and prices* of imports not sold at dumped prices (emphasis added)" as a factor which "may be relevant" to an authority's analysis of alternative causes of injury thus recognizing the importance of both volume and price to an analysis of non-subject imports. USITC recognized non-subject imports to be a relevant factor, yet performed only half of the analysis envisaged by Article 3.5. Consequently, it could not have ensured that injury caused by non-subject imports was not attributed to subject imports.

266. Japan is not asking the Panel to reweigh evidence, but the Panel must evaluate whether USITC objectively, completely, and reasonably evaluated all the economic factors. A self-serving recitation of selected facts, with no explanation of why contrary facts are being ignored, does not satisfy the obligations in the AD Agreement. Moreover, a complete failure to collect data on or analysis on economic factors explicitly enumerated in Article 3.5 -- the price of non-subject imports -- also represents a clear violation of the AD Agreement.

267. The United States has a harder time explaining USITC's complete omission of the pipe and tube recession. It speculates that USITC dismissed this alternative cause of injury as immaterial because overall apparent consumption increased over the period investigated to a record high in 1998[371], but this explanation is nowhere found in the determination itself. Moreover, even though overall apparent consumption increased between 1997 and 1998, the pipe and tube recession would have disproportionately depressed the profits of firms most exposed to the pipe and tube market, such as Lone Star Steel and Newport Steel,[372] causing injury unrelated to subject imports. As USITC made no attempt whatsoever to identity such injury, it had to have been attributed to subject imports, in violation of Article 3.5.

VIII. ARTICLE X CLAIM

A. THE US ADMINISTRATION OF ITS ANTI-DUMPING LAWS, RULES, REGULATIONS, AND PRACTICES WAS NOT "UNIFORM, IMPARTIAL, AND REASONABLE"

268. The United States misunderstands Japan's claim with respect to GATT 1994 Article X:3. Japan has not brought this claim in the alternative. Rather, Japan has brought its Article X:3 claim *in conjunction* with its claims under the AD Agreement. Both sets of claims deserve equal consideration by the Panel. The United States violated both agreements in distinct manners.

B. THERE IS NO DOUBT THAT ARTICLE X APPLIES TO A MEMBER'S ANTI-DUMPING ACTIONS

269. The principles embodied in Article X represent a cornerstone of the WTO system that cannot be set aside in the anti-dumping context. In its First Submission, the United States does not question the overarching importance of the Article X protections, nor their embodiment of the obligation of good faith. Rather, the United States questions only the application of these protections to anti-dumping measures.

270. The Appellate Body has recognized the importance and overriding application of Article X to *all* "laws, regulations, judicial decisions and administrative rulings." In *U.S.—Shrimp*, the Appellate Body stated:

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[370] The United States disingenuously implies that USITC cannot easily analyze non-subject import price effect on a disaggregated basis; the Department of Commerce, Bureau of Census, maintains the requisite statistics. US Response to Japan's Questions, para. 43.

[371] US First Submission, paras. C-132 to C-135.

[372] *See* <<www.newportsteel.com/about.html>> ("NS Group, Inc. is a leading producer of tubular products serving the energy industry."); <<www.lonestarsteel.com>> ("Lone Star Steel Company is a manufacturer and distributor of quality tubular products for energy, industrial, and automotive applications throughout the world.") The information from these web pages are attached as **Exh. JP-105**.

> Inasmuch as there are due process requirements generally for measures *that are otherwise imposed in compliance with WTO obligations*, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* treaty rights of other Members.[373]

It is clear that Article X protections apply to all measures, even those that "are otherwise in compliance with WTO obligations."

271. In its unsuccessful effort to negate the application of this essential WTO provision to anti-dumping measures, the United States claims there is a conflict between Article X and Article 1 of the AD Agreement. Article 1, however, simply ensures that Members' anti-dumping actions conform to both sets of rules governing anti-dumping set forth in the WTO Agreement – the AD Agreement *and* Article VI of GATT 1994. Article 1 does not limit the application of other general WTO provisions. Indeed, Article 1 of the AD Agreement recognizes that anti-dumping measures cannot escape the disciplines of Article VI of the GATT 1994.

272. Underlying the US claim of conflict is an assumption that since the AD Agreement establishes a quasi-judicial system encompassing such procedural requirements as notice and the opportunity to be heard, no other due process concerns are recognizable. This assertion threatens the foundation of fairness and due process upon which the WTO system is built. Article X:3(a) goes beyond the structural elements of due process established in the AD Agreement, to examine the *administration* of those structures. Article X:3(a) is a *comparative provision* that, *inter alia*, seeks to ensure that certain parties are not afforded less due process opportunities than others.[374] When parties are treated differently in different cases or within one investigation, based simply upon differences in *administration* of anti-dumping rules (rules that may or may not be consistent with the AD Agreement), these fundamental principles are violated.

C. THE UNITED STATES VIOLATED ARTICLE X:3(A) IN ITS INVESTIGATION OF HOT-ROLLED STEEL FROM JAPAN

273. In this case, even if the Panel were to decide that the United States did not violate any provisions of the AD Agreement (which is not the case), the Panel should still decide that the United States administered its rules in a manner so as to violate Article X:3(a) of GATT 1994:

- The United States consistently penalized foreign exporters at every opportunity with adverse facts available, but then chose not to penalize domestic petitioners for arguably worse behaviour. USDOC cannot administer these punishments in such an impartial or disproportionate manner.
- The United States adopted a regulatory practice of correcting significant ministerial errors, applied it consistently in other cases, but then refused to apply it for a Japanese respondent in this case, claiming oversight.

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[373] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 Nov. 1998, WT/DS58/AB/R, at para. 182 ("*U.S.—Shrimp*") (emphasis added). Anti-dumping measures result in the suspension of treaty rights by allowing a Member to impose duties above their bound GATT rates.

[374] A primary example would be the following: The United States cannot afford respondents with the minimum notice and opportunity to be heard under the AD Agreement, but then favor domestic parties by providing them with *more* notice or *more* opportunities to be heard. In other words, while the notice and hearing rules themselves may not violate the AD, the discriminatory administration of the rules violates Article X:3(a).

- The United States unreasonably accelerated the investigation and thereby prejudiced the position of the foreign respondents, simply because domestic petitioners demanded quick results.

- The United States adopted a new critical circumstances policy at the specific request of the domestic industry and applied it *retroactively* to the already initiated hot-rolled steel investigation.

- The United States ignored its general practice to consider a three-year period of investigation in this case, in an effort to justify an affirmative injury determination in a politically charged case.

1. USDOC improperly administered rules governing the use of facts available

(b) Inconsistent treatment accorded to the individual respondents

274. USDOC treated each individual respondent in a manner inconsistent with Article X:3(a) of GATT 1994 in its administration of its facts available rules. With respect to KSC, USDOC administered the rules so as to assist a petitioner (CSI) and harm a respondent, despite the fact that it was the petitioner that was withholding the requisite information. Moreover, despite the defiance of the petitioner, USDOC chose the harshest penalty it could justify under its law. This punishment was disproportionate in respect of KSC's actions such that it was "unreasonable" under Article X:3(a).

275. Similarly, USDOC afforded a disproportionate and therefore "unreasonable" punishment under Article X:3(a) to NKK and NSC. Despite their good faith actions to provide minor information as soon as practicable and in time for verification, USDOC aggressively utilized the harshest penalty possible under its facts available rules. As Brazil noted in its Third Party Submission, the punishment "does not fit the crime."[375]

276. Under the AD Agreement, Japan challenged the US overall use of punitive facts available as violating Article 6.8 and its related provisions. These claims, therefore, attack the structural foundation of the US practice on facts available under the AD Agreement. Japan's Article X:3(a) claim, on the other hand, goes to the *administration* of the rules relating to the use of adverse inferences in the hot-rolled steel investigation. From the perspective of *administration*, the concept of "reasonable" becomes a test of proportionality or moderation. In applying its law, did the authority administer its discretion "reasonably?" The difference is subtle, but essential to maintaining the integrity of Article X:3(a) in serving as a check on the administration by Members of rules of general application.

(c) USDOC's non-uniform, partial, and unreasonable administration of facts available rules as compared to USITC

277. USDOC's harsh treatment of the Japanese respondents compared to the lenient treatment USITC granted domestic petitioners is a further violation of Article X:3(a).[376] The US response to Panel Question 44 confirms the differential treatment in this case in terms of the administration of "facts available." The Panel asked the parties whether information was submitted and accepted by the USITC "after applicable deadlines." Yet, rather than explain to the Panel when petitioner's initial questionnaire response was due, and when the actual information was finally provided, the USITC cites a general date representing the absolute last day on which, under its regulations, the USITC was

[375] Brazil Third Party Submission, para. 22.

[376] Japan is not challenging USITC's failure to address petitioners' inaction *per se*, but rather the disparate treatment accorded petitioners versus respondents by the US Government as a whole. *See* US First Submission, para. D-16.

willing to accept certain information.[377] This date is not a "deadline" for the information requested, but rather a final date for closing the record.

278. The asymmetry here is incredible.[378] This provision is analogous to a similar regulation maintained by USDOC establishing a final date for the submission of factual information: seven days prior to the verification.[379] Ironically, while the United States claims that the more general USDOC regulation has nothing to do with NKK and NSC's late corrections of their weight conversion factors,[380] the United States also claims that petitioners' information was *timely* because it met the requirements of this analogous USITC regulation. The US Government cannot have it both ways. Petitioners cannot have until the final deadline for new factual information to provide information that they failed to provide by questionnaire deadlines, while respondents must meet the actual submission deadlines for information that they, in good faith, were unable to correct until later.

279. The United States would have this Panel believe that important domestic producer information provided 34 days before the final opportunity to comment was "timely," yet trivial foreign producer information provided at least a full 42 days before the final opportunity to comment was "untimely."[381] Moreover, the information sought from foreign respondents by USDOC was 28 days late,[382] while the information sought from the domestic producers by USITC was at least 42 days late,[383] yet the United States now argues that the situations cannot be compared. The foreign respondent information was not as late, and arrived with more time before final comments. This US position defies belief.

280. The United States claims that this disparate treatment is permissible because it was perpetrated by two separate agencies carrying out two separate fact-finding tasks. In particular, the United States implies that disparate treatment is justifiable because USITC must engage in a subjective analysis that bases its conclusions on the totality of the circumstances, while USDOC does not engage in meaningful analysis, but simply plugs numbers into a formula.[384]

281. This defense fails. Regardless of which US agency carried out the statute, the fact remains that the US Government as a whole treated respondents and petitioners in a non-uniform, partial, and unreasonable manner in contravention of Article X:3(a). The US attempt to distinguish between the activities of the two agencies is nonsensical. Both agencies adhere to the identical statute governing

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[377] US Response to Panel Question 44, para. 55, n.14 (citing 19 C.F.R. § 207.30).

[378] Moreover, the new factual information submitted by petitioners can hardly be described as "comments."

[379] *See* 19 C.F.R. § 351.301(b)(1) (**Exh. JP-5(e)**). The regulations are analogous because of their general application. Questionnaires from the agencies always come with stated deadlines, but each agency also has a regulation governing the date on which the record closes and no further factual information of any sort will be accepted.

[380] *See* US Response to Japan's Questions, para. 13.

[381] The number of days identified in this Paragraph have been calculated as follows. The public administrative record does not reveal the exact date petitioners finally provided complete questionnaire responses to USITC, but it was no earlier than the May 4th hearing at which the Commissioners complained about the missing data, and the last day to comment on new information was 7 June, *see* US Response to Panel Question 44, para. 55, leaving a difference of 10 days. NKK submitted its conversion factors to USDOC on 23 February 1999, *see* Japan's First Submission, para. 97 & n.89, NSC submitted its conversion factors on 22 February, *see id*., para. 98 & n.92, and NSC submitted additional backup data 1 March, *see id*., para. 98 & n.93. The *latest* of these three dates is 1 March. The last day to comment on factual information before USDOC is the date of the initial case briefs, 12 April. *See USDOC Final Dumping Determination*, 64 Fed. Reg. at 24330 (**Exh. JP-12**) (noting that case briefs were filed 12 April). There were 42 days between 1 March and 12 April.

[382] The US producers responses were due on 22 March, see **Exh. JP-66**, but the data requested did not arrive until after the USITC hearing on 4 May, see **Exh. JP-73.**

[383] *See* US First Submission, para. B-27 (due date of supplemental questionnaire was 25 January), para. B-29 (requested information submitted on 22 February).

[384] *See* US First Submission, para. D-22.

the application of facts available by the US anti-dumping authority. Moreover, *both* agencies engage in different types of decision-making – one that involves simply plugging data into a mechanical formula or spreadsheet, and a second that involves reaching a more subjective conclusion based on a consideration of various facts.

282. The truth is that both agencies engage in a certain degree of substantive analysis and a certain degree of simple mechanical calculations. [385] There is no meaningful difference in their tasks, therefore, upon which to justify blatantly disparate treatment under the same general facts available rules. Indeed, the only meaningful difference between the agencies' analyses is that USITC focuses on the domestic industry, while USDOC focuses on the foreign respondents. A non-uniform application of the facts available rules, therefore, not surprisingly, biases the system against the foreign respondents. Article X:3(a) prohibits this type of discriminatory administration.

283. In its First Submission, the United States implies that because under Article 3.4 of the AD Agreement, USITC was obligated to consider all relevant factors, it had to accept the untimely submissions. But, USDOC is also obligated to make a "fair comparison" under Article 2.4 and to render the specific calculation set forth in Article 2.3. Yet, USDOC chose non-representative substitutes for its data, despite reasonable and non-prejudicial alternatives available to it. This discriminatory treatment is inconsistent with the requirements of Article X:3(a).

2. USDOC failed to correct ministerial errors

284. NKK specifically requested in writing a correction of a ministerial error that had inflated its preliminary margin by twelve percentage points. Now, in a post hoc rationalization, the United States claims that this failure was a simple "oversight" and not an act of bad faith or "bias." This US plea for the Panel to assume that its untimely response was a good faith "oversight" contrasts directly with USDOC's refusal to assume good faith with respect to NKK and NSC's "untimely" yet non-prejudicial corrections of their weight conversion factors during the investigation.

285. The irony of USDOC's position is clear. At the same time that USDOC was conveniently "forgetting" about NKK's written request for the correction of a significant ministerial error, USDOC was instructing NKK to expunge from the record accurate information regarding the weight conversion factor that USDOC had verified in Japan. Similar to what USDOC now claims about its own mistake, NKK's untimeliness was the result of a simple misunderstanding -- a misunderstanding that NKK in fact tried to clarify with USDOC, but was misled with curt and unresponsive instructions from USDOC staff. According to the US view, therefore, it is reasonable for the US authority to make mistakes and correct them in an untimely manner, but not for the Japanese exporters.

286. Given that NKK made its request for the correction *in writing* and pursuant to the USDOC's *own regulations*, this USDOC claim of "oversight" is hard to believe. Importantly, this failure contributed directly to USDOC's ratification of its earlier critical circumstances finding against NKK, a finding which USDOC later reversed based on NKK's corrected margin. The circumstances of bias and clear indications of non-uniformity in administration here are overwhelming.

287. In answer to Question 30 from Japan, the United States cites to two other examples of such "oversight." But these two examples just underscore the unique situation with respect to NKK. In both of these other cases, there were substantial issues about whether there was in fact a clerical

[385] The US reference to its Statement of Administrative Action in Paragraph D-23 of its First Submission is inapposite. The information kept from USITC officials by petitioners was company-specific information of the type that USDOC also collects from respondents. The United States cannot rely on theoretical situations to defend concrete disparate steps taken by its agencies under the same rules in the same investigation.

error[386] or how to correct the admitted clerical error.[387] In the NKK case, however, there was no disagreement about the clerical error or confusion about how to correct the error. The need to wait to sort out substantial disagreements or to understand the precise error at issue cannot justify the alleged "oversight" in this case.

3. This case was unfairly accelerated

288. The United States fails to recognize the comparative nature of an Article X:3(a) analysis. The aberrant and prejudicial acceleration of this case as compared to the uniform standard by which the United States carries out nearly all of its other cases *does* matter under Article X:3(a).

289. The United States has essentially admitted the acceleration in this case deviated from its standard practice.[388] Contrary to the US assertion, for purposes of Article X:3(a), it does matter what the United States did in 70 out of 76 cases when administering the identical anti-dumping rules,[389] because Article X:3(a) looks at the uniformity of a Member's administration of a rule. Moreover, this acceleration was implemented in an impartial manner, as the result of a promise made by the Secretary of Commerce to the members of the Congressional Steel Caucus. Finally, this acceleration was unreasonable as it decreased respondents' time to prepare responses in the investigation and led to multiple ministerial errors on the part of USDOC officials.

4. The new critical circumstances policy applied retroactively to the Japanese respondents

290. The United States refused to address Japan's Article X:3(a) claims regarding critical circumstances in its brief, and, thus, has failed to meet its burden to overcome Japan's *prima facie* case under Article X:3(a). Japan's argument is clear: the United States changed its general critical circumstances policy *one week after initiation of the hot-rolled steel case in response to a specific request by petitioners*. This behaviour represents exactly the type of non-uniform, partial, and unreasonable behaviour that Article X:3(a) seeks to preclude. The question here is not whether this new policy is consistent with the requirements set forth in Article 10 of the AD Agreement, but whether the *administration* of US anti-dumping rules supposedly attempting to implement Article 10 meets with the fundamental fairness requirements found in Article X:3(a). The sudden and retroactive change in policy directed at the Japanese respondents in the hot-rolled steel case pursuant to specific demands made by the domestic industry is a prime example of biased behaviour.

291. Similarly, USDOC's administration of its new critical circumstances policy failed to meet the "uniform" and "impartial" requirements of Article X:3(a). USDOC administered the new standard so as to rely only upon allegations in the petition, thereby favoring one side in an impartial manner.[390] Similarly, USDOC ignored USITC's preliminary finding of no current injury, thereby leading to non-uniform determinations within the US Government.

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[386] Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Ammonium Nitrate from the Russian Federation, 65 Fed. Reg. 42669, at cmt. 2 (11 Jul. 2000), <http://ia.ita.doc.gov./frn/summary/russia/00-17514-1.txt> (noting that petitioners disagreed with respect to whether certain allegations in fact represented clerical errors.).

[387] *Certain Stainless Steel Wire Rods From France: Amended Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 47169, 47169 (30 Aug. 1999) ("Petitioners acknowledge that they did not provide exact programming language nor locate the exact cause of the alleged clerical error at the time of their original clerical errors comments were filed.…").

[388] USDOC just recently adopted a new policy on expedited investigations. *See* Import Administration Policy Bulletin No. 00.1 on Expediting Antidumping Duty Investigations (8 June 2000) (**Exh. JP-81**).

[389] *See* US First Submission, para. D-13.

[390] US First Submission, para. B-62 ("{I}t is generally understood that applicants will document the highest degree of dumping {in the petition} that the available evidence will support . . . . {I}t generally is presumed to be adverse.").

5. USITC deviated from prior injury practice

292. Until this case, USITC maintained a 10-year-old standard practice of examining a three-year period of investigation. In the hot-rolled steel investigation, USITC acted in a non-uniform manner and based its determination on an unreasonable comparison of only two years. Again, the key issue here is the uniformity with which the United States conducts its injury analysis. It cannot alter its rules in certain investigations to ensure an affirmative injury finding.

IX. CONCLUSION

293. Japan reiterates that the Panel findings in this case should be quite specific and concrete. The Panel should not make general findings, noting violations without specifying precisely what the US authorities did incorrectly, and then leave it to the US authorities to decide what to do. The Panel findings, when considered and implemented in good faith by the US authorities,[391] should lead to lower dumping margins by the USDOC and to a revised determination by USITC. The Panel's duty is to provide a very clear and detailed roadmap for how the US authorities can fulfill their international obligations in this case.

294. That roadmap should include findings about the specific US actions in the hot-rolled steel case under the AD Agreement, and findings about the generally applicable policies and statutes that lead to those actions under the AD Agreement. It should also include the judgment by the Panel on whether the US interpretations of the provisions of AD Agreement are permissible in the context and in the light of the object and purpose of the AD Agreement. In addition, the roadmap should describe the ways in which the United States violated Article X of GATT 1994, a claim separate from and independent of Japan's claims under the AD Agreement. Where necessary, the United States should be requested to change its laws and policies to comply with the US obligations under the AD Agreement, and under Article XVI of the WTO Agreement and Article 18.4 of the AD Agreement.

[391] Japan wishes to clarify that is it not requesting specific remedies in this case. Japan did not mean to imply in Paragraph 325 of its First Submission that the Panel itself must re-determine either the dumping margins in the case, or whether there was injury by reason of imports. Those tasks clearly belong to the US authorities.

ANNEX C-2

Second Submission of the United States

(13 September 2000)

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1. The United States hereby submits its second written submission in this proceeding. This submission is divided into two parts. First, the United States demonstrates that the US laws and practices concerning the calculation of the anti-dumping duty margins and critical circumstances are consistent with the United States' WTO obligations, and that their application in this investigation was in accordance with these obligations. Second, the United States demonstrates that the US laws pertaining to injury determinations, and their application in this investigation, are in accordance with WTO rules. As indicated in the discussions below, the United States will not here address all arguments that Japan has raised, but rather will address most particularly new positions that Japan has taken in its statements and submissions since the parties' first written submissions.

PART 1: THE ANTI-DUMPING DUTY MARGINS AND CRITICAL CIRCUMSTANCES

I. AN INVESTIGATING AUTHORITY MAY MAKE ADVERSE INFERENCES ABOUT INFORMATION THAT A RESPONDENT IN AN ANTI-DUMPING INVESTIGATION HAS FAILED TO PROVIDE

2. Japan's written answer to the United States' third question indicates that Japan has not moderated its extreme position that, in selecting from the facts available, an investigating authority may never intentionally make an adverse inference about information that a respondent has failed to provide, no matter how blatant the respondent's failure to cooperate.[1] Japan has not offered a *single* instance in which an adverse instance would be permitted - - not even the case in which *its own anti-dumping authorities* made an adverse inference concerning uncooperative respondents.[2] Evidently, Japan has put its doubts aside and decided to stick with its original goal of persuading this Panel to strip from the AD Agreement the incentive it now provides for respondents to cooperate in anti-dumping investigations.[3] We explained in our first written submission how this argument runs contrary to many specific provisions in Article 6.8 and Annex II, and is, in fact, designed to defeat the purpose of those provisions.[4]

3. Japan's final answer is that its position is not really extreme.[5] As supporting evidence, it repeats its argument that "less favourable" outcomes are permitted, provided that they are "coincidental,"[6] but that less favourable outcomes that result from deliberately adverse inferences are punishments not authorized by the Agreement.[7] We explained in our first written submission that this nominal concession is, in fact, no concession at all, and would leave respondents with virtually no incentive to participate in anti-dumping proceedings.[8]

4. Like its token concession about coincidentally adverse results, most of Japan's answers attempt to obfuscate the real implications of its current position. We respond to Japan's specific points below.

5. First, Japan notes that Article 6.8 does not "directly address the level of cooperation provided by a party . . . but merely gives the authority for resorting to facts available, assuming the

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[1] First Submission of Japan at para. 58.

[2] First Submission of the United States at Part B, para. 72, n. 147. In its investigation of Cotton Yarn from Pakistan, the Japanese anti-dumping authorities calculated the dumping margin for non-cooperative Pakistani companies by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value of the cooperating suppliers.

[3] First Submission of Japan at para. 59.

[4] First Submission of the United States at Part B, paras. 58 - 71.

[5] Japan's Answer to US Question 3 at para.4.

[6] First Submission of Japan at para. 58.

[7] Japan's Answer to US Question 3 at 5.

[8] First Submission of the United States at Part B, paras. 73 - 76.

circumstances identified in Article 6.8 exist."[9] This is highly misleading. Pretending that Article 6.8 does not concern the level of cooperation of the respondent ignores the fact that Article 6.8 addresses "refus[ing] access to information," "not provid[ing] information," and "significantly impeding" anti-dumping proceedings. The United States' collective characterization of these actions as "failing to cooperate" is fair, to say the least. Thus, when Paragraph 7 of Annex II states that non cooperation may result in a less favourable outcome for the respondent, it is referring to the types of behaviour described in Article 6.8.

6. Second, Japan asserts that "Paragraph 7 of Annex II requires investigating authorities, in selecting the facts available, "to find information that most closely approximates reality."[10] By this, Japan means that adverse inferences are not permitted, because, *presumably*, they do not closely approximate reality. Japan's answer ignores a fundamental point - - the only way for the Department to know what information "most closely approximates reality" is *to obtain the real information.* Where a respondent has failed to provide the real information, an investigating authority *has no choice* but to make inferences about that information.[11] And, when the *reason* that the respondent has failed to provide the real information is that it simply has not cooperated in the investigation, the most reasonable inference about the missing information is that it is adverse to the respondent. This inference is not punitive - - it is the most reasonable assumption about the nature of the missing information under the circumstances.

7. Third, Japan argues that the requirement that investigating authorities use "special circumspection" in selecting information from secondary sources indicates that the use of adverse inferences is precluded. The opposite is true. Special circumspection is required precisely because the secondary information (such as information from the petition) is generally presumed to be adverse to the respondent (although an investigating authority can never know for certain whether it is adverse, because it does not have access to the real information).

8. Fourth, Japan misreads the requirement that investigating authorities "should, where practicable, check the information from other independent sources." This does not mean that the information selected may not be adverse. It means that the inference upon which the selection is based should be reasonable in light of other information on the record. A reasonable adverse inference is one at the adverse end of the range of possibilities, to the extent that range is ascertainable.

9. Fifth, Japan argues that Paragraph 7 of Annex II justifies "not rewarding" a respondent for failing to cooperate, but does not justify making an adverse inference about the data not provided. There are two flaws in this argument. First, a result "less favourable" to a non-cooperating party is not merely the absence of a more favourable result (or reward). Cooperative parties are not "rewarded" with automatically low dumping margins. They receive margins calculated *neutrally* on the basis of the data provided. Therefore, a "less favourable" result than if the party had cooperated is a result that is less favourable than a neutral result - - an adverse result. Second, Japan's argument ignores the obvious point that, if the worst that can happen to a respondent for failing to provide information is the application of neutral gap-filler, no respondent in its right mind would ever submit adverse information to an investigating authority.

10. Sixth, Japan suggests that, where a respondent has been generally cooperative, an investigating authority may not make an adverse inference regarding a specific matter with respect to

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[9] Japan's Answer to Panel Question 4 at para. 15.

[10] Japan's Answer to Panel Question 4 at para. 15.

[11] Japan will respond that, in the case of the weight conversion factors, the Department actually had the relevant information in its possession. As we have explained, this ignores the Department's clear authority under the Agreement to impose reasonable deadlines.

which that respondent has not supplied necessary information. Neither Article 6.8 nor Annex II provides any basis for this limitation. Article 6.8 refers to parties that do not provide necessary information. It does not suggest that some necessary information may be withheld, if most necessary information is provided. Similarly, Paragraph 7 of Annex II states that a less favourable result may be obtained where "relevant information is being withheld." It does not imply that some relevant information may be withheld if most relevant information is provided. Acceptance of Japan's argument would license every respondent in every dumping proceeding to withhold the single most damaging category of information from the investigating authority.

11. Seventh, Japan charges that the Department reads the sentence in Paragraph 7 of Annex II authorizing a less favourable result for uncooperative parties "as giving it carte blanche to use any facts available it chooses."[12] Japan evidently believes that the Department would feel free to fill in gaps in its administrative record with the team batting average of the Tokyo Giants[13], as long as that would be adverse to the respondents. Of course, any such notion is frivolous. The Department tries to select facts available that are at the adverse end of the likely range, not arbitrary numbers. The object is not to punish parties that fail to provide information, but to attempt to ensure that such parties do not profit from their non-cooperation. As we have explained in detail in our first submission, the Department was extremely circumspect in using adverse inferences to select from the facts available and carefully limited the results of those selections to the scope of the information not provided, or not timely provided.[14]

12. Eighth, Japan implies that failing to supply necessary information within a reasonable period does not "significantly impede" an investigation.[15] This cannot be true, unless the information withheld is insignificant. If the information is significant, then withholding that information must be significant.

13. Finally, Japan argues that information from "secondary sources" is not information from sources other than the respondent, but information from sources other than the questionnaire response (or, possibly, information other than the actual data specifically requested in the questionnaire).[16] This is neither the plain meaning of "secondary sources" nor logical. The most obvious meaning of the "primary source" is the respondent. Therefore, the most obvious meaning of "secondary sources" is "sources other than the respondent." This interpretation is supported by the term "other independent sources" in the second sentence of Paragraph 7, which indicates that secondary sources are independent from the primary source. This makes sense if secondary sources are independent *from the respondent.* But it would be a strained use of the language to describe information from a respondent as "independent from" other information from that same respondent.

14. If accepted, Japan's definition of "secondary sources" would mean that other information from a respondent, *even if verified*, would constitute secondary information that would need to be corroborated from other sources. Japan does not explain why it would be necessary, or how it would be possible, to corroborate such verified information. There is no evident explanation.

15. Japan is also incorrect in asserting that, if "information from secondary sources" in Paragraph 7 means information from sources other than the respondent, then the "less favourable" language does not support the use of adverse inferences.[17] Because the logic, if any, of this argument

[12] Japan's Answer to Panel Question 6 at para. 26.
[13] More precisely, the Yomiuri Giants.
[14] First Submission of the United States, Part B, at paras. 109 - 112 and 163.
[15] Japan's answer to Panel Question 7 at para. 28.
[16] Japan 's answer to Panel Question 8 at para. 30.
[17] Japan's Answer to Panel Question 8 at para. 32.

has eluded the United States, it seems best to respond by explaining our reading of Paragraph 7 as a whole.

16. Paragraph 7 contains three sentences. The first provides that, where investigating authorities base their findings on information from secondary sources (from sources other than the respondent), they should use special circumspection. The second sentence, which begins "[i]n such cases . . ." plainly applies to the use of information from secondary sources, and requires that such information be checked against other independent sources. The third sentence does not provide more procedural safeguards for the selection of information from the secondary sources. Having a different function than the second sentence, it logically is not limited by the opening clause of that sentence. Rather, the third sentence provides a general counterweight to all of the limitations in Annex II on the application of facts available and, more specifically, makes clear that the special circumspection and corroboration requirements do not preclude "less favourable results than if the party did cooperate."[18]

II. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO KSC WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

17. The Department's application of facts available to KSC because of its failure to act to the best of its ability to report the necessary sales and further manufacturing cost data for its sales through its US affiliate, CSI, was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. We will not burden the Panel with a repetition of the facts establishing KSC's failure to use its full authority, as a fifty-per cent owner of CSI, to attempt to obtain that information. Instead, we take this opportunity to show how the arguments that Japan continues to assert on this issue lack any basis in the facts or under the AD Agreement.

18. First, we draw the Panel's attention to Japan's response to the Panel's fifth question, regarding KSC's alleged requests to the Department for assistance concerning this issue.[19] While claiming that there "are many examples of KSC's request for assistance,"[20] Japan cites only three record documents, none of which support its claim. The first letter which Japan cites[21] nowhere requests the Department's assistance. Instead, it repeatedly requests that Commerce excuse KSC from answering Section E of the questionnaire, with respect to the sales through its affiliated further manufacturer, CSI. Japan cites two other letters by KSC to the Department[22] which likewise reiterate KSC's request to be excused from reporting the CSI information.[23] Moreover, these are not the only documents in which KSC requested to be excused from reporting the CSI information: on 21 December 1998, KSC informed Commerce that KSC would not be reporting the CSI information;[24] on 19 January 1999, KSC again informed Commerce that it would not provide the

[18] *See* First Submission of the United States at Part B, paras. 152 and 161.

[19] Japan's Answer to Panel Question 5 at para. 19.

[20] *Id*.

[21] KSC's letter to Commerce of November 10, 1998 (**Exh. JP-42(i)**).

[22] KSC letter of December 3, 1998, (**Exh. JP-78**), and KSC letter of December 18, 1998, (**Exh. JP-42(n)**).

[23] Japan claims that the phrase "[w]e have received no information, guidance, or response from the Department," in KSC's letter of 18 December 1998, constitutes a "specific" request for assistance. Japan's Answer to Panel Question 5 at. para. 20. However, a more reasonable interpretation of that phrase is that KSC wanted confirmation from the Department that it would excuse KSC from providing the CSI information. The meaning is evident from the fact that, in the preceding (and first) paragraph of that letter, KSC informed the Department that, at its recent meeting with Commerce officials, "we asked that KSC be excused from reporting CSI's sales of subject merchandise and of further manufactured subject merchandise because of ... its conflict of interest as a petitioner." (**Exh. JP-42(n)**) (business confidential information omitted). Furthermore, on each of the following two pages of that letter, KSC renewed its request that it be excused from reporting the CSI information. *Id*.

[24] KSC response to section C of the Department's questionnaire, (**Exh. JP-42(p)**).

information;[25] and, on 25 January 1999, KSC reiterated the same position.[26] In none of these letters did KSC request assistance regarding this issue. Thus, the Department's establishment of the facts on this matter is fully supported by record evidence, whereas Japan's factual claim is supported by none.

19. In addition, the Department's interpretation of Articles 2.3, 6.8, and Annex II with regard to the selection of facts available for KSC's sales through CSI is a permissible one. Once Commerce established that it would apply facts available to KSC with regard to the CSI sales, and that it would take an adverse inference with respect to KSC for its failure to act to the best of its ability, it reasonably turned to KSC's calculated dumping margins for actual, verified sales to the United States as a source of facts otherwise available. The reasonableness of this choice is shown by one of Japan's own affidavits.[27] At paragraph 32 of this affidavit, KSC calculated the dumping margin for the non-CSI portion of its US sales. This calculation, representing the non-adverse facts available rate applicable to Kawasaki, shows dumping.[28] The increase resulting from the Department's choice of facts available represents the logical inference that the information not provided was probably adverse to KSC.-- *i.e.*, that the dumping margins on the unreported sales were generally greater than the margins on the reported sales. Commerce chose a margin from those sales that were reported, and thus based on KSC's own selling practices, and applied it only in proportion to the unreported sales. This was a measured approach and reflected an appropriate adverse inference. Japan, however, would interpret the Agreement to reward respondents with a "neutral" choice of facts available, thereby giving them license to play a shell game by hiding dumped sales through their affiliates and directing non-dumped sales, or sales with lower dumping margins, to their non-affiliated importers.[29] Neither Article 2.3 of the Agreement, nor the facts available provisions of Article 6.8 and Annex II, should be interpreted to require such a result.

20. Finally, we draw the Panel's attention to Japan's persistent claim that it supplied the Department with reliable transfer price data between KSC and CSI that Commerce should have used.[30] Japan has ignored, or chosen not to rebut, the fact that KSC did not supply these data, as we have pointed out.[31] More important, however, is the fact that, if Commerce accepted such data as facts otherwise available, it would give respondents *carte blanche* to set those prices to their affiliates at whatever level they deemed convenient to shelter dumping. Thus, the Department's choice of facts available with respect to the affected sales represented a permissible interpretation of the Agreement.

III. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO NSC AND NKK WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

21. The Department's application of the facts available to NSC and NKK's theoretical weight sales for which they did not timely provide a theoretical-to-actual weight conversion factor was fully in accordance with the Agreement. Japan's position, that the Department should be compelled either to ignore altogether the sales affected by the missing factors or to accept the factors which NSC and NKK could have timely provided, but did not provide until well after the reasonable deadlines

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[25] KSC response to the first section A supplemental questionnaire, (**Exh. JP-42(u)**).

[26] KSC response to sections B and C of the Department's supplemental request for information (**Exh. JP-42(v)**).

[27] Affidavit of Robert H. Huey, Counsel to KSC, (**Exh. JP-44**). The United States has asked the Panel to disregard Japan's affidavits because they are extra-record evidence. Thus, we cite to this affidavit only in the event that the Panel does examine it.

[28] The exact level is business confidential information. *See id*., paragraphs 32 and 33.

[29] Japan's Answer to Panel Question 42 at para. 93. Japan also expresses the startling view that anti-dumping investigations are usually a "surprise." *Id*. That certainly was not the case in this instance, as the Department's critical circumstances determination shows.

[30] *Id*. at paras. 93 and 18.

[31] *See* First Submission of United States at Part B, para. 123.

established for this purpose in the questionnaires, would write out of the Agreement an administering authority's ability to establish and enforce reasonable deadlines for the submission of information. This right is guaranteed by Articles 6.1, 6.8, and Annex II at paragraphs 1 and 6. Likewise, for the reasons discussed above, the Department's use of an adverse inference in selecting from the facts available with respect to the affected sales, was authorized under Article 6.8 and Annex II, paragraph 7.

22. We will not burden the Panel with a repetition of all of the facts regarding the conversion factor issue. The following pertinent points have been demonstrated in our First Submission and in our responses to the questions posed by the Panel and Japan: (1) The conversion factors were presented well after questionnaire deadlines that were twice extended and provided more than ample opportunity to respond. (2) Despite the fact that NSC and NKK both argued that such factors were unnecessary and impossible to provide, they proved to be necessary and possible to provide for both companies. (3) Despite claiming that a factor was impossible to provide, NKK's counsel received KSC's submission demonstrating how they calculated the factor when KSC filed and served its questionnaire response on December 21, 1998. (4) When finally provided by NSC and NKK, the factors were not timely because the so-called "seven day rule" (19 CFR § 351.301(b)((1)), upon which Japan relies, expressly does not apply to deadlines for responses to questionnaires, which are governed by 19 CFR § 351.301(c)(2). (5) The Department's practice of accepting minor corrections to timely presented data also does not constitute a blanket loophole covering data respondents have declined to submit (at all) in response to questionnaires. (6) The facts available the Department selected with respect to this issue were based on NSC and NKK's own data and were reasonably related to the affected sales. In sum, NSC's and NKK's theoretical weight factor submissions were rejected because they were untimely, and Article 6.8 and Annex II expressly permit the Department to enforce reasonable deadlines by use of facts available. Accordingly, the Department's application of facts available to NSC and NKK was consistent with the Agreement.

23. Finally, because this question is so clearly one of deadline enforcement, rather than of bias, the Department objects to Japan's characterization of the Department's treatment of the conversion factor issue as the result of an "effort to apply adverse facts available."[32] Had the Department been making an "effort" to apply adverse facts available, rather than conducting this investigation strictly on the merits of the case, a much better target existed. The most hotly contested substantive issue at the administrative level of this case before the Department of Commerce was the question of whether invoice/shipment date or date of order confirmation should be used as the date of sale for reporting US and home market databases.[33] Despite being asked by the Department to report separate US and home market sales databases using the date of order confirmation, as well as the date of invoice/shipment it had originally used to report its sales, NKK declined to report its sales databases using order confirmation date.[34] Had the Department been acting in a biased manner, motivated only by an "effort to apply adverse facts available," it could have determined that the order confirmation date was the proper date of sale, and could have applied facts available much more extensively to NKK. Instead, the Department made the date of sale determination, as it made all of its determinations, on the merits, and used the invoice/shipment date as the date of sale.

[32] Japan's Answer to Panel Question 1 at para. 4.
[33] *See Final Determination*, 64 Fed. Reg. at 243331-24335 (Comment 1)(**Exh. JP-12**).
[34] *See Preliminary Determination*, 64 Fed. Reg. at 8294 (**Exh. JP-11**).

IV. THE DEPARTMENT'S APPLICATION OF ITS "99.5 PER CENT" ARM'S LENGTH TEST, TO DETERMINE THAT SOME EXPORTERS' HOME MARKET SALES TO AFFILIATES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE, AND ITS SUBSEQUENT USE OF HOME MARKET DOWNSTREAM SALES TO CALCULATE THE NORMAL VALUE FOR SUCH SALES, WERE CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

24. The Department's application of its 99.5 per cent test to determine which home market sales to affiliates could be used in the normal value calculation embodies a permissible interpretation of the Agreement, as does its use of downstream sales. Although Japan has criticized the specifics of the 99.5 per cent test, it is clear from Japan's response to Panel Question 17 that Japan's primary goal with respect to the arm's length test is not to require the Department to improve it. Instead, Japan urges upon the Panel an interpretation that would write out of the Agreement any interpretation of "ordinary course of trade" that would permit any scrutiny of prices to affiliates. Because Japan has not demonstrated that the Agreement compels such an interpretation, the standard of review requires that the Panel find that the Department permissibly interprets the Agreement to allow it to assume that sales to affiliates are *not* made in the ordinary course of trade absent a showing that sales to the affiliate are made at not less than average market prices despite the affiliation. Furthermore, because Japan has not demonstrated that the Department's 99.5 per cent test is biased against respondents or otherwise fails to achieve this reasonable goal, it should likewise uphold the Department's use of this test.

25. As the Panel has recognized, Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade.[35] What Japan does not appear to accept is that a Member may permissibly consider that sales to an affiliated customer may be outside the ordinary course of trade precisely *because* the affiliation may cause the pricing relationship to be "unreliable because of association." In its response to Panel Question 17, Japan appears to argue that the Agreement requires the Department to use "all these ordinary course sales – including sales to companies that did not survive the 99.5 per cent test." Although this states Japan's preferred outcome, it also begs the question of whether all of its sales to affiliates <u>are</u> sales in the ordinary course of trade. Japan seeks to compel an interpretation that they are, absent some reason not necessarily related to affiliation, such as having been made at below-cost prices. Because the Department's interpretation that sales to affiliates are inherently "unreliable because of association," and may be deemed outside the ordinary course of trade *unless* it is demonstrated that the affiliation has not resulted in favourable pricing, is a permissible one, it must be upheld. To do otherwise would compel authorities to base normal value on sales to affiliates, regardless of whether these are real market prices or not, and despite the considerable potential for a manufacturer to manipulate the results of an anti-dumping proceeding by selling to affiliates at low-margin-generating prices before re-selling the merchandise into the open marketplace. Such an interpretation would seriously interfere with the administration of the Agreement.

26. The 99.5 per cent test is a perfectly reasonable methodology by which to determine whether affiliated party sales can be considered equivalent to arm's-length sales, as demonstrated by the fact that it is virtually the same as the margin calculation – itself prescribed by the Agreement. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is nearly identical to the margin calculation. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and target-country export sales; the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated home market customer sales.

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[35] *See* Panel Question 17 to Japan.

27. Japan claims that the 99.5 per cent test is a "results-oriented approach" because it excludes only lower-priced sales as outside the ordinary course of trade.[36] But this simply is not the case. When an affiliated customer passes the 99.5 per cent test, all of the sales to that customer are retained, including those for products sold at prices below the average price to the unaffiliated customers. Conversely, when an affiliated customer fails the 99.5 per cent test, all of the sales to that customer are rejected, including those for products sold at above average prices that would otherwise have been used to calculate normal value. Thus, application of the 99.5 per cent test may increase or decrease normal value.

28. Furthermore, as Japan readily acknowledges, "[p]rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit."[37] In most situations, therefore, the fact that the test does not "fail" affiliates based on high-priced sales and results in the use of those sales in lieu of the downstream sales may have the effect of reducing margins, compared to the margins that would have resulted from normal values based on even higher priced downstream sales.

29. Although Japan attacks the 99.5 per cent test on the basis that it imposes a floor, but not a ceiling, on prices treated as being in the ordinary course of trade, the Agreement does not require such symmetry. One of the reasons that prices involved in affiliated party transactions are inherently suspect is that they may be manipulated so as to reduce normal value (and hence reduce dumping margins). This concern is simply not implicated where such prices are higher than average prices to unaffiliated customers. There is, therefore, no basis for Japan's contention that the 99.5 per cent test is "biased."[38]

30. Nor is there any merit to Japan's contention that the Agreement precludes the use of downstream home market sales where an affiliated reseller fails the 99.5 per cent test.[39] Japan's argument hinges solely on the fact that Article 2.3 expressly permits the use of downstream sales from affiliated importers in the export market, while Article 2.2 is silent with respect to the use of such sales in the home market.[40] Japan fails to realize, however, that Article 2.1 already authorizes the use of downstream home market sales. That provision defines normal value simply as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product for consumption in Japan were made in the ordinary course of trade and clearly come within this definition.

31. Article 2.2 plainly states that normal value may be based on third-country sales price or on constructed value only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country." Moreover, in response to Panel Question 17, Japan concurs that the Article 2.2 alternatives to a normal value based on home market prices become relevant only if the administering agency "concludes there are no sales in the home market in the ordinary course of trade." In other words, Japan does not propose to substitute either constructed value or third country sales for sales to affiliates that are outside the ordinary course of trade when other valid home market sales (which would include downstream sales made by affiliates) remain. Instead, Japan claims, in essence, that the Agreement requires that an authority must simply ignore any sales to customers failing the arm's length test, and base the margin solely on "the respondent's home market sales to other customers."[41] The result of such a general policy, however, would be that a producer could shield a large percentage of its home market sales from scrutiny simply by passing

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[36] Japan's Opening Statement at para. 38.
[37] Japan's First Submission at para. 170.
[38] Japan's Opening Statement at para 36.
[39] Japan's Opening Statement at para. 41-43.
[40] *Id*.
[41] *See* Japan's Answer to Panel Question 17 at para. 59.

them through an affiliate at below-average prices before selling them to unaffiliated customers in the home country. Indeed, under Japan's preferred approach, producers could make all of their home market sales through affiliated resellers, forcing investigating authorities to use third-country sales or constructed value – a result plainly not intended by the Agreement.

32. Finally, we note that the treatment of sales to and through affiliated parties is an area in which different Member States have evolved different interpretations and practices to deal with this general concern. The approaches of the three third party interveners who provided responses to Panel Question 48 on this topic are at once diverse (demonstrating that the Agreement lends itself to multiple permissible interpretations in this respect) and much less concrete than the Department's arm's-length test. The EC, for example, apparently uses the remaining sales unless it determines that they are not "sufficiently representative" and Brazil has used sales to non-affiliated parties when they were "representative." If Korea determines that the affiliated party sales are "inappropriate" it considers "constructed export price or third country sales price." The United States is of the belief that its own practice, which is more transparent and concrete, not only embodies a permissible interpretation, but is better suited for its own administration of the dumping law. Even should the Panel find the approach of another Member State to be more in harmony with its own views on this issue, however, the Panel may not impose that approach upon the United States unless Japan has demonstrated that the Department's practice in this respect is contrary to the Agreement. Japan has not done so.

V. THE DEPARTMENT'S INTERPRETATION WITH RESPECT TO THE CALCULATION OF THE ALL OTHERS RATE, AS EMBODIED IN SECTION 735(C)(5)(A) OF THE TARIFF ACT OF 1930, IS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

33. The Department's calculation of the all others rate using a methodology which excluded from the calculation all margins which were, overall, zero, *de minimis* or based on the facts available, embodies a permissible interpretation of the Agreement. Article 9.4 of the Agreement makes *no* provision for eliminating the "portions of margins," affected by facts available while retaining all other "portions" of the margins, as Japan suggests in its response to Panel Question 10. Indeed, Japan has argued in its response to that question only that "its suggested approach *better reflects* Article 9.4."[42] Under Article 17.6(ii) of the Agreement, the question is not whether Japan's suggested approach "better reflects" Article 9.4 than the US interpretation, but whether the US interpretation is a permissible one.

34. Apart from the obvious fact that Article 9.4 says nothing about and therefore cannot compel such a reading[43], Japan's approach is seriously flawed in other ways. First, were the presumption underlying the approach described in Japan's reply to Panel Question 10 to be adopted as a general rule, the all-others rate would have to be calculated based solely on whatever more favourable data respondents chose to report – whether or not such data are representative of the overall extent to which the respondents are dumping, and thus whether or not they are representative of the overall level of dumping in the industry. This means, for example, that the same high-margin-generating data Japan seeks to remove from scrutiny through the stratagems described above would also not be reflected in the margins for the non-examined members of the industry.

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[42] Japan's Answer to Panel Question 10 at para 36 (emphasis added).

[43] For the same reason, the EC's suggestion that they might use one interpretation of Article 9.4 when portions of margins were "significant" and "adverse" (but presumably a different one when the facts available portions were less significant and non-adverse), is not compelled by the plain language of that Article, which does not distinguish between "significant" and non-significant or adverse and non-adverse use of facts available.

35. Second, Japan's *ad hoc* approach to this case is not workable as a general rule. As the EC, another frequent user of the dumping law, has observed in its response to Panel Question 50, most dumping calculations include small elements of facts available. Furthermore, these are not always sale-specific. Even small elements of facts available can affect large numbers of sales, especially when facts available affects cost databases that are used in calculating constructed value, which may be used for comparison to a wide range of export sales. Thus, even if it were desirable to do so, it is in many cases simply not possible to remove all "affected" sales from the margin calculation to create the "expunged" margins Japan would have authorities use to calculate all others rates.

36. Third, Japan's preferred solution can seriously underestimate the average dumping level of the mandatory respondents when, as in this case, the percentage of export sales affected by facts available varies greatly among such respondents. This is not merely a function of the fact that it disregards the high level of dumping that may have been masked by data withheld from the Department. It is true even if it is accepted, as Japan argues it should be, that the margins used in the weighted average calculation should be margins purged of any facts available and should reflect the level of dumping only on those sales for which the respondent was willing to provide full data. Japan argues that, in weight-averaging the purged margins, authorities should assume that the mandatory respondents exported only the volume of product associated with sales that were not affected by facts available. This means that the sales volume of the least-cooperative respondents (those most likely to be willing to dump at the highest rates) will be under-represented in the numerator of all others weighted average. It also means that the total amount of sales forming the denominator of the weighted-average calculation will be reduced to the same degree, thus over-representing the sales volume associated with the margin levels of the more cooperative mandatory respondents.[44] In addition, Japan's preferred solution underestimates the average dumping level of the mandatory respondents by purging their margins of individual sales affected by facts available, but not of individual sales that are not dumped. However a Member may interpret the reference to margins established based on the facts available, Article 9.4 clearly accords the same treatment to "zero and *de minimis* margins." The solution Japan proposes, in short, does not even come close to being the sole permissible interpretation of Article 9.4.

37. Finally, the United States notes that the document contained at **Exh. JP-79** and discussed in Japan's response to Panel Question 9, in no way suggests that the interpretation of the United States is an impermissible one. It merely shows that the United States was unsuccessful in seeking to add the word "solely" to the text and that Japan was similarly unsuccessful in seeking to add the word "primarily." This suggests only that the intent of the Members was that the language remain sufficiently ambiguous to allow for multiple interpretations. Indeed, the most important statement in that document is the final sentence: "No conclusion was reached owing to the conflict of opinions." If no conclusion was reached, the drafters clearly did not conclude that the interpretation suggested by the United States was impermissible.[45] Moreover, the fact that other parties did not agree to the insertion of the word "solely" before the word "established" could also simply mean that those parties believed that the word was unnecessary because the existing language in the provision already sufficiently established that point.

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[44] Should the Panel determine to use the attorney affidavits (the United States maintains the Panel should not do so), it may wish to compare the "non-CSI portion" of KSC's margin in **Exh. JP-44**, at para. 32 *with* the average margins for NSC and NKK given in the *Final Determination*, 64 Fed. Reg. at 34780, **Exh. JP-12**.

[45] This is similar to the drafters' decision not to adopt an illustrative list of the types of sales that could be considered outside the ordinary course of trade. *See* First Submission of the United States at para. 216 and fn. 297.

VI. JAPAN IS ATTEMPTING TO WRITE ARTICLE 10.7 OUT OF THE AD AGREEMENT

38. Japan suggests that, "as a practical matter," a critical circumstances finding (as referenced in Article 10.7) cannot be made prior to the preliminary determination of dumping. This position ignores the existence of, and writes out of the Agreement, Article 10.7. Article 10.7 is distinct from other provisions in the Agreement in two fundamental respects. *First*, it does not require administering authorities to await the preliminary determination of dumping prior to making a determination to withhold appraisement or assessment. In every other instance, the Agreement expressly provides that provisional measures may not be taken until after the preliminary determination of dumping. *Second*, Article 10.7 is unique in its directive that there be "sufficient evidence" to support the finding. The requirement for " sufficient evidence" arises in two places in the Agreement: Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). The presence of this standard in these provisions suggests a threshold - a quantum and quality of evidence that must be present despite the fact that the record is incomplete.

A. ARTICLE 10.7 EXPRESSLY AUTHORIZES CRITICAL CIRCUMSTANCES FINDINGS *PRIOR* TO THE PRELIMINARY DETERMINATION OF DUMPING

39. Japan argues that, "as a practical matter," the "sufficient evidence" standard cannot be met prior to the preliminary determination of dumping (as set forth in Article 7.1). This argument ignores the plain language and intent of Article 10.7. Although Article 10.1 of the Agreement generally requires, with respect to the application of provisional measures, that there first be a preliminary determination of dumping, injury, and causation.[46] Article 10.7 provides the express exception to this rule. Specifically, Article 10.7 provides that investigative authorities may make critical circumstances findings and withhold appraisement or assessment at any time "after initiating and investigation." Thus, Japan's claim that the "sufficient evidence" requirement in Article 10.7 mandates a delay until the preliminary finding of dumping is untenable.[47]

B. "SUFFICIENT" EVIDENCE DOES NOT MEAN ALL POTENTIAL EVIDENCE

40. The drafters of the Agreement expressly provided that certain decisions may be made on the basis of "sufficient evidence." These express statements are found in Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). Thus, the members of the Agreement have specifically denoted two instances in which there must be a certain quantum and quality of evidence - *despite the fact that the record may be incomplete*.

41. Japan contends that the evidentiary standard applied in preliminary dumping determinations (as provided for in Article 7.1) is the same as that to be applied in determinations made under Article 10.7. This argument is incorrect. Normally, provisional measures may not be applied until

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[46] *See* Article 10.1 ("Provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 {preliminary determination of dumping and injury} ... enters into force, *subject to the exceptions set out in this Article*.") (emphasis added); and Article 7.2 ("Withholding of appraisement is an appropriate provisional measure, ... as long as the withholding of appraisement is subject to the same conditions as other provisional measures.").

[47] Japan implies, with the use of the word "generally" that it is not taking an absolute position (which would be clearly contrary to the Agreement). *See* Japan's Answer to Panel Question 11 at para. 37. However, Japan does not provide any example of a situation in which an administering authority would have *more* evidence prior to the preliminary determination of dumping than was on the record for this case. In fact, the Department in this case not only relied on the overwhelming evidence in the petition, but conducted external research, corroborated the data in the petition, and relied upon the USITC preliminary finding of threat of injury.

parties have had the opportunity to submit evidence and comments, and the administering authority has made a preliminary determination of dumping and injury.[48] An exception to this rule, however, is found in Article 10.7, which provides simply that withholding of appraisement or other necessary measures may be taken "after initiating an investigation" as soon as there is "sufficient evidence." It does *not* state that the measures must await a preliminary determination of dumping, nor does it require that the decision occur after the receipt of information from respondents. Rather, in order to preserve the ultimate remedy, it simply states that the measures may be taken "after initiation" if there is sufficient evidence.

42. The US agrees that the evidence necessary to sustain a preliminary critical circumstances finding may be, and indeed often will be, different than that required for initiation of an investigation, even though the standards are the same. The inquiries involved are different, and as such, the evidence that is sufficient for each determination will depend on the factors being considered and the context of the inquiry.[49] As explained above, it is especially notable that the Agreement provides that the evidence simply be "sufficient" in two instances which occur early in the investigative proceedings.

43. Japan suggests that a petition, along with the Department's independent research and analysis, can never serve as a basis for a preliminary determination of critical circumstances, regardless of the strength and quality of the evidence on the record. Japan bases this conclusion on three arguments. First, Japan argues that the reference to "dumped imports" in Article 10.6 requires a preliminary dumping finding as described in Article 7.1. Second, Japan argues that an administering authority cannot possibly make a critical circumstances finding prior to the Article 7.1 finding, because it has not conducted any investigation whatsoever. Finally, Japan argues that the evidence cannot be sufficient prior to an Article 7.1 finding, because the margins are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities." These arguments are without merit.

44. As explained above, Japan's first argument, that a preliminary finding of dumping is required, is contrary to the Agreement because it ignores the existence of Article 10.7, which expressly contemplates that measures may be taken at any time after initiation. Japan's second claim, that the Department has conducted no investigation when making its early critical circumstances finding, is flatly incorrect. The Department indeed investigated the allegations, reviewed the evidence contained in the petition for adequacy and accuracy, supplemented that information with additional relevant data and analyzed and relied upon the USITC's preliminary determination of threat to the domestic industry. Furthermore, Japan implies that the evidence necessary for a preliminary dumping determination is the same evidence that is necessary for an early critical circumstances determination. This position, however, confuses the findings being made. Each determination is based upon distinct factors, and thus, at least in part, involves collection and analysis of different evidence. Finally, Japan's argument that the margins utilized are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities," is disingenuous. *Japan does not contest that the margins are based upon comparisons of actual sales*

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[48] *See* Article 7.1 (provisional measures may only be taken after "parties have been given adequate opportunities to submit information and make comments" and "a preliminary affirmative determination has been made of dumping....") and 10.1 (provisional measures are to be applied in accordance with Article 7.1 *subject to the exceptions set forth in Article 10*).

[49] This distinction was recognized by the Panel in *HFCS*. In that case, the panel explained that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation." Panel Report on *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From (HFCS) the United States*, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.94.

offers by NKK and NSC to US customers and actual transactions in the home market.[50] Indeed, Japan has not rebutted the legitimacy of any of the specific evidence contained in the petition. Rather, Japan simply argues that, because it is contained in the petition, it is meaningless. This absolute argument should be rejected by the Panel.

45. In fact, the evidence supporting each element of the preliminary critical circumstances determination in this case was sufficient, and indeed, substantial. Japan repeatedly claims that, "the only evidence USDOC had was the petition."[51] However, while much of the evidence was taken from the petition (after being corroborated and reviewed for accuracy), the determination did not rest entirely on the petition data. Japan cannot contest that the Department not only corroborated the petition evidence with external research sources (Internet trade publications and general news articles, US Customs Service data, and American Iron and Steel Institute data),[52] but also relied significantly on the USITC preliminary determination of threat to the US industry. Furthermore, Japan does not suggest that the plethora of newspaper articles, consultant reports, and industry publications attached to the petition are unreliable or otherwise unrepresentative. Again, Japan simply states that, because they were contained in the petition, they are "mere allegations."

46. Although Japan repeatedly argues that the findings made were not based upon "sufficient evidence," Japan has never addressed the specific information that was on the record to support the critical circumstances finding. For example, with respect to importer knowledge of dumping and consequent injury, as discussed above, the record contained *actual* evidence of significantly high margins, and widespread, publicly distributed, media, consultant, and industry reports detailing the massive dumping and the negative impacts on the domestic industry.[53] Japan cannot possibly claim

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[50] *See* Initiation Checklist, at 7 (**US/B-18)**. Furthermore, the calculation of the dumping margins that were based upon constructed value were calculated using *NSC's and NKK's own financial statements. Id.*

[51] *See, e.g.*, Japan's Answer to Panel Question 13 at para. 37 (emphasis added).

[52] *See* Initiation Checklist at 70-71 **(Exh. US/B-18)**.

[53] *See* **Exh. US/B-40(b) and (c)**. The Wall Street Journal, *"Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing,"* ("In the latest month, imports took 34 per cent of the domestic market for steel .... That lost market share has hit US steelmakers hard, particularly in the last three months as the US industry pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earning estimates for the third and fourth quarters. .... 'Japanese steel is just murdering' the US steelmakers."); Metal Bulletin (24 Sept. 1998) (" The July figure fully supports our industry's contention that massive levels of steel are being dumped."); Metal Bulletin (7 Sept. 1998) ("Nucor has cut production ... in response to low market prices ... because of market turmoil in the wake of a flood of cheap imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.... The collapse in steel prices on the world steel market this year has been almost unprecedented."); Japan Economic Newswire (19 Sept. 1998) ("officials of major US steelmakers ... made an appeal for the US government to take measures against what they view as unfair steel shipments from Japan ...."); Morgan Stanley, Dean Witter - Industry Report (21 July 1998) ("hot-rolled imports are coming in at ... 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in late September or early October."); The Wall Street Journal, *"Rising Imports Distress US Steelmakers,"* (8 Sept. 1998) ("And while it took months for major effects of inflows from overseas to show up in the US, industry analysts and executives now say they definitely have. 'The pricing has just collapsed....'"); American Metal Market (11 Sept. 1998) ("For the second time in less than two months, Nucor Corp., ... is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("We expect the US flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998."); Wall Street Transcript Corporation - Industry Report (20 July 1998) ("Imports were simply so large, and prices at which the entered markets so low, that steel pricing was compromised"); CRU Steel Monitor (April 1998) ("This decline in corporate profitability is being exacerbated by the Asian financial crisis.").

that the importers (many of which are sophisticated, large corporations) were not aware, or should not have been aware of the information reported in the Wall Street Journal, the PaineWebber reports and the other steel industry publications.[54] What is more, with respect to knowledge of injury, the Department also looked to the injury information in the petition (charts and industry data demonstrating drastic decreases in prices and resulting declines in profitability), the 101 per cent increase in imports during the surge period, and the USITC's preliminary determination of threat. As such, Japan's claims that the determination was based solely upon allegations from the petition are unfounded.

47. In sum, an administering authority is not merely capable of making an early critical circumstances determination based upon "sufficient evidence," like that presented here, but such an action is expressly authorized under the Agreement. The Panel should uphold the Department's preliminary critical circumstances determination in this case and the US statute upon which it is based.

PART 2: INJURY

I. THE CAPTIVE PRODUCTION PROVISION, ON ITS FACE AND AS APPLIED IN THIS CASE, IS CONSISTENT WITH THE OBLIGATIONS IN THE ANTI-DUMPING AGREEMENT

A. THE DIRECTION IN THE CAPTIVE PRODUCTION PROVISION TO "FOCUS PRIMARILY" ON THE MERCHANT MARKET PERMITS AN OBJECTIVE ANALYSIS OF RELEVANT ECONOMIC FACTORS CONSISTENT WITH ARTICLES 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

48. In arguing that the captive production provision of the United States' anti-dumping and countervailing duty statute on its face violates the Anti-dumping Agreement, Japan faces a high burden which its submissions fail entirely to meet. As GATT and WTO panels have repeatedly stated, only legislation that requires WTO-inconsistent action can itself be WTO-inconsistent.[55]

Japan also argues in its answer to Panel question 15, para. 9, that many of the newspaper articles do not establish knowledge of dumping and injury because they were published just weeks before the petition was filed. According to Japan, this was long after the date that USDOC concluded that importers knew or should have known of the dumping and consequent injury. If, however, the importers had knowledge at an earlier date, this only supports Commerce's finding of knowledge of dumping and injury for purposes of the critical circumstances determination. The Agreement does not specify *when* the importers had to be aware of dumping practices. Rather, it merely inquires as to whether dumping practices "exist," and whether importers should be aware that such dumping would cause injury. The newspaper articles and press releases demonstrate that dumping had been widespread for months and that the effects on the industry were widely apparent. This type of evidence (including both the early and later articles) certainly satisfies the question under Article 10.6(i). (Note, It also appears that Japan's reference the US First Submission Paragraph B-273, footnote 288, is incorrect. This cite should reference Paragraph B-476, footnote 388).

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

[55] Panel Report on Canada - Measures Affecting the Export of Civilian Aircraft, adopted on 14 April 1999, WT/DS70/R, para. 9.124 ("Canada – Aircraft"), citing the Panel Report on United States -

Panels have found that even legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action.[56] Indeed, these principles apply even where a Member has in fact used the provision to take action inconsistent with its obligations.[57]

49. Here, Japan seeks to have this Panel declare the United States' captive production provision unlawful on its face, even if the Panel should find that the determination by those Commissioners who applied the provision in this case is permissible. However, Japan's challenge must fail if the United States establishes, as it believes it has, that those three Commissioners who invoked the provision in the underlying investigation applied the provision in a way consistent with the Anti-dumping Agreement. If their findings here are consistent with the Agreement, the Panel should find that the provision that they applied is consistent as well.

50. Indeed, Japan's arguments in this proceeding appear to rest on the premise that the Panel should impose its own interpretation of US law in order to find the captive production provision contrary to the United States' obligations. This, however, is not the Panel's task. When examination of a law is solely for the purpose of determining whether a member meets its WTO obligations, the panel does not interpret the party's law "as such", the way it would, for instance, interpret provisions of the covered agreements.[58] Rather, a panel is called upon to establish the meaning of the provision as a factual element and to determine whether the factual element constitutes conduct contrary to WTO obligations.[59] When an interpretation of municipal law is at issue, a panel cannot assume that municipal authorities will choose an interpretation which is inconsistent with their international obligations.[60] This principle should apply all the more forcefully in the interpretation of an agreement, like the Anti-dumping Agreement, which specifically requires that independent judicial review of administrative decisions be available [61], an avenue that Japanese producers have declined to take in this case, and explicitly recognizes that Members may interpret the Agreement differently. [62] Thus, even if the application of the provision in this case were not consistent with the Anti-dumping Agreement, Japan must establish that a United States court could not interpret the provision in a manner consistent with the Agreement.

51. The captive production provision of United States law is entirely consistent with the Anti-dumping Agreement. The provision provides that, when certain prerequisites are met, the Commission shall "focus primarily" on the merchant market in its consideration of market share and financial indicators.[63] Japan ascribes two meanings to the "focus primarily" language that conflict

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Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted on 4 October 1994, BISD 41S/131, para 118 ("United States – Tobacco").

[56] Panel Report on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 138 ("US – Superfund").

[57] Panel Report on EEC - Regulation on Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132 ("EEC – Parts and Components"), at paras. 5.9, 5.21, 5.25-5.26.

[58] Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents"), WT/DS50/AB/R (19 December 1997) at para. 65, quoting Certain German Interests in Polish Upper Silesia, 1926, PCIJ Rep., Series A, No. 7, p. 19.

[59] *India-Patents* at para. 65.

[60] Under the municipal law of the United States, if a statute that an authority is charged with administering permits multiple interpretations, a court will uphold an authority's construction of the statute if that construction is reasonable; the interpretation's conformity with international obligations is a basis for finding the authority's action to be reasonable. *See, e.g., Chaparral Steel Corp. v. United States*, 901 F.2d 1097, 1101, 1103 n.5 (Fed. Cir. 1990) (**Exh. US/C 24**).

[61] Anti-dumping Agreement, Article 13.

[62] Anti-dumping Agreement, Article 17.6.

[63] Sec. 771(7)(C)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(C)(iv). (**Exh. Jp-4(e)**).

with the plain reading of the statute and that are not meanings the USITC has ascribed in applying the provision. In so doing, Japan is attempting to mischaracterize and reshape United States law in order to make it fit Japan's idea of a violation of the Anti-dumping Agreement. Japan cannot make out its case in this manner.

1. "Focus primarily" on the merchant market speaks to a segmented market analysis, but not to one where the USITC focuses exclusively on a particular market segment

52. The statutory provision at issue requires the USITC to focus *primarily* on the merchant market in evaluating certain factors. By definition, therefore, there is some *other* focus that the USITC should have as well. That is, under the statute's plain meaning, the inquiry does not end with examination of the merchant market. The statutory mandate that the impact upon the industry as a whole be assessed continues to be the overarching concern in the analysis.

53. Perhaps recognizing the flaw in its early reading of the statute, Japan retreats from its initial position that the statute mandates a focus exclusively on the merchant market. It now argues, instead, that, when the USITC focuses upon the merchant market, it improperly uses the entire industry as the other point of focus. According to Japan, an appropriate segmented analysis would look at the merchant market and the captive market separately.[64] Whether or not Japan's proposed alternative analysis would be consistent with the Agreement is not at issue here. "Conformity [with WTO obligations] can be assured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved."[65]

54. By advancing its alternative, Japan implicitly acknowledges that there are various ways to consider the fact that the performance of each segment of an industry may influence the performance of the whole industry differently. Japan has not articulated any basis for concluding that looking at the merchant market as a step in considering the market as a whole is less in accord with the Anti-dumping Agreement than the separate merchant/captive market analysis Japan suggests as an alternative. Indeed, Japan seems to concede that the US statute's initial focus on the segment in which imports primarily compete with domestic product is, as the *High Fructose Corn Syrup* panel suggested, calculated to allow the authority "to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry."[66] Japan's approach might also serve the same end; this would not mean, however, that its approach would be required.

55. Moreover, Japan does not show that the alternative approach it would prefer would be precluded by the United States statute, a burden that it must carry if it is to establish that the law is impermissible on its face. As the United States has previously indicated, a requirement to "focus primarily" on a certain segment does not prohibit other focuses, including on other segments. Moreover, under the United States statute, in evaluating the impact of dumped imports, the USITC is required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States".[67] In short, the form of segmented analysis preferred by Japan is neither required by the Agreement nor precluded by the United States statute.

56. As the United States has previously discussed, what the United States statute does require is a focus on the entire domestic industry after the merchant market is examined. This approach is clearly

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[64] Japan's Answer to Panel Question 19 at para. 70.

[65] Panel Report on *United States–Sections 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, at para. 7.24.

[66] See Panel Report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.154.

[67] 19 U.S.C. § 1677(7)(C)(iii).

consistent with the principle that the "determination of injury" under Article 3 concerns effects of dumped imports on the industry as a whole. In any event, consideration of the captive market data is inherent in such an analysis. Because the data for the entire industry incorporated data for the captive market, the side-by-side discussion of the merchant market and the entire industry inescapably reflected any similarities or differences between the merchant market and the captive market.

57. Contrary to Japan's claim that the USITC does not "relate its merchant market findings to producers as a whole"[68], the determination here shows how a primary focus on the merchant market for certain factors is consistent with such an analysis of the industry as a whole. In examining the volume of imports, the USITC set forth data and made parallel findings regarding the merchant market and the entire industry, finding on the basis of both that the volume of and increase in dumped imports was significant.[69] The USITC's findings as to the impact of dumped imports begin with an analysis that does not focus on the merchant market *per se*. Rather, the USITC found that the increased volume and market share of dumped imports led to the US industry's increased capacity becoming excess capacity almost immediately.[70] By these findings, the USITC's impact analysis tied its findings on market share, to which the captive production provision applies, to a key indicator of the performance of the industry as a whole -- capacity utilization -- to which the provision does not apply.

58. In analyzing financial performance, the USITC again made parallel findings, which showed that declines in the industry's performance on merchant market sales were mirrored by overall declines. Japan's claim[71], that the USITC discussed the data for the entire market only in its staff report, not in its determination, thus is belied by the face of the determination itself. The USITC found these trends not to be consistent with the industry's improvement in productivity and the rise in apparent consumption in the United States, both of which are overall measures not particular to the merchant market.[72] The USITC amply tied its findings concerning the merchant market segment to the industry as a whole.

59. The USITC's analysis, moreover, assured that the causal relationship that it saw between developments in the merchant market and the condition of the industry as a whole were not in fact due to developments in the captive sector of the industry. It compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition. It found their operating income to be falling both for merchant market sales and overall.[73] The USITC then compared the operating results of integrated producers to those of minimills. The USITC recognized that the minimills had "greater dependence on the merchant market, where imports are concentrated."[74] If this comparison had shown that minimills were performing as well or better overall as integrated producers, or that minimills were not similarly declining in performance, it might have indicated that the decline in the industry operating figures was not due in particular to the effects of imports. However, the USITC found minimills to be experiencing a "worse financial performance", evidently due to their greater exposure to import competition.[75] In short, contrary to Japan's contention, the USITC explicitly took into account that captive production is relatively shielded from the effects of imports. It nevertheless found that the record evidence supported the conclusion that the effects of imports in the merchant market adversely affected the industry as a whole.

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[68] Japan's Answer to Panel Question 19 at para. 66.
[69] USITC Views at 12-13 (**Exh. US/C-1**).
[70] USITC Views at 17.
[71] Japan's Opening Statement at para. 21.
[72] USITC Views at 18.
[73] USITC Views at 19.
[74] USITC Views at 19.
[75] USITC Views at 19.

60. As the USITC's determination shows, the captive production provision is entirely consistent with the Agreement. As the USITC's determination further shows, it examined the relevant economic factors and, on an objective basis, found a causal relationship between developments in the merchant market segment and the injury suffered by the industry as a whole.

2. "Focus primarily" does not dictate that any particular weight be given to the merchant market in the USITC 's evaluation of the relevant factors

61. Japan now states that it takes issue only with the particular analysis that it views as required by the captive production provision, not that an analysis of the merchant market violates the Agreement. In this regard, Japan acknowledges that it is permissible to consider "as a condition of competition, the merchant versus captive portions of the [market]."[76] It frames its challenge, therefore, in terms of the "weights" it believes the statute requires to be given to "factors."

62. It is unclear, however, whether Japan is arguing that the captive production provision requires the USITC to give weight to one factor over another or to give inappropriate weight to the merchant market segment. In either case, Japan misreads the captive production provision and misunderstands the USITC's application of the provision in this investigation.

63. To the extent that Japan claims the captive production provision requires greater weight to be given to some delineated factors over others, there is no basis for the claim. The "focus primarily" language does not require that emphasis be placed on any factor. The captive production provision gives direction to the USITC "*in determining* market share and the factors affecting financial performance"[77] (emphasis added). It therefore only implicates the evaluation *of those factors* and not the evaluation of *how those factors* relate to any of the other factors that the USITC must consider. The provisions of the Anti-dumping Agreement[78] and the US statute[79] that permit the USITC to give the weight it deems appropriate to any relevant factor is not affected by the terms of the captive production provision. As has been seen, in this case, the USITC gave emphasis to the effect of dumped imports on capacity utilization, a factor not implicated by the provision, in establishing the impact of dumped imports on the domestic industry. Japan's allegation that the captive production provision impermissibly constrains the USITC's ability to objectively assess all the relevant economic factors is belied both by the face of the statute and the determination at issue here.

64. To the extent that Japan is arguing that, in evaluating certain factors, the captive production provision requires that undue weight be given to the merchant market, this argument too should not hold sway. The USITC has not given any indication that the captive production provision requires it to place more weight on the merchant market data for any factor than on the data for the industry as a whole. As is reflected in the USITC's determination here, the requirement to "focus primarily" on the merchant market in establishing certain factors does not necessarily mean more than to collect and make specific findings based on merchant market data that, which always possible, might not otherwise be required. It does not mean that, having examined that data, the USITC is required to give weight to that data over what other evidence might show. And, indeed, on each relevant factor concerning market share and financial indicators, the USITC assured that it examined and gave weight to data for the industry as a whole.

65. Such a requirement is neither, as Japan asserts, meaningless, nor a violation of the Anti-dumping Agreement. The captive production provision requires the gathering and analysis of

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[76] Japan's Opening Statement at para. 23.
[77] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).
[78] Article 3.4 of the Anti-dumping Agreement.
[79] § 771(7)(E)(ii) of the Act, 19 U.S.C. § 1677(7)(E)(ii) (**Exh. Jpn-4(e)**).

evidence that the statute might not otherwise require of the USITC. The provision may be said to require, as a matter of municipal law, a form of segmented analysis such as that which the *HFCS* panel indicated was permitted under the Anti-dumping Agreement. This does not mean that, even as to the factors to which the provision applies, the USITC must give the merchant market segment data weight over contrary evidence on which it otherwise may also focus. The provision does not prevent an objective examination of all the information collected.

66. Japan's distrust of special examination of merchant market trends is based on the false premise that such an examination will necessarily skew data concerning the domestic industry's performance unfavourably to foreign producers.[80] This is not the case. First, as has been seen, the USITC nevertheless collects and assesses the data concerning the entire industry. Second, an examination of data particular to the segment where competition primarily occurs may disclose that trends concerning the industry as a whole, which might otherwise appear to disclose a connection between imports and injury, are misleading. Japan's allegation assumes that the domestic industry will always fare worse in the merchant market than it does in the captive market. The industry, however, could be performing worse in the captive market than in the merchant market. In that scenario, a failure to look at the merchant market may exaggerate the effects of dumped imports.

67. The captive production provision in no way mandates action in conflict with the Agreement. It does not preclude an objective evaluation consistent with the requirement of the Agreement, as well as US law, that the assessment be made, to the extent possible, in relation to the dumped imports' impact on domestic producers of the like product "as a whole". The law on its face does not constitute conduct by the United States contrary to its WTO obligations.

II. THE USITC'S ANALYSIS IN THIS CASE WAS IN ACCORDANCE WITH THE ANTI-DUMPING AGREEMENT

A. THE USITC PERFORMED AN OBJECTIVE EVALUATION OF ALL THE RELEVANT ECONOMIC FACTORS OVER THE ENTIRE PERIOD OF INVESTIGATION

68. Despite the fact that the USITC's determination clearly contains an analysis of data over the three year period of investigation, Japan continues to claim that the USITC did not evaluate data about the impact factors over the entire period.[81] By simply reading the USITC's determination, this panel can see that Japan's claim is patently false. With respect to the impact factors in particular, despite Japan's allegations to the contrary, the USITC explicitly evaluated capacity, capacity utilization, productivity, unit costs of goods sold, unit values, employment, wages, and capital expenditures from 1996 to 1998.[82] The USITC plainly examined trends over the full period investigated.

69. Japan then narrows its objection even further. From focusing on the impact factors, it turns to arguing that the USITC did not discuss the fact that the financial performance of the industry as a whole purportedly improved over the three year period of investigation.[83] Once again, this claim is specious. The USITC discussed three year trends of financial indicators, expressly noting that the cost of goods sold declined by more than the unit values over the entire period of investigation.[84] The USITC also found that the domestic industry "maintained an operating profit."[85] As the USITC explained, however, other evidence made this profitability less important to its determination.

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[80] Japan's Opening Statement at para. 21.
[81] Japan's Answer to Panel Question 18 at para. 60.
[82] USITC Views at 17-18 nn.100-101.
[83] Japan's Answer to Panel Question 18 at para. 65.
[84] USITC Views at 18 n.100.
[85] USITC Views at 18.

70. The fact that the USITC *also* examined the data from 1997 to 1998 does not detract from this full-period analysis. Japan attempts to characterize the decision of the USITC to consider the 1997 to 1998 data as a decision to reject an analysis of trends over the entire period. Japan's account does not comport, however, with what the USITC did. Consistent with Article 12.2 of the Agreement, the USITC provided its "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." In particular, importers and exporters before the USITC, like Japan here, contended that the USITC should rely on 1996-98 performance data to find the domestic industry not to be injured, rather than on the 1997-98 trends.[86]

71. The USITC's explanation of why it chose to rely on 1997-98 data rather than on the 1996-1998 data evidences the USITC's consideration of the 1996-98 data. Article 3.4 does not require that an authority's determination restate every index having a bearing on the state of the industry. Rather, Article 3.4 states that the examination of the impact of dumped imports shall include an "evaluation" of all relevant indices. The USITC's statement of its reasons for rejecting respondents' arguments concerning the 1996-98 data demonstrates its evaluation of that index.

72. Japan's argument confuses the USITC's justification for comparing the data from1997 to 1998 with an expression of its intention not to examine data over the 1996 to 1998 period. To the contrary, the USITC's justification for making a comparison between the 1997 and 1998 data reflected its evaluation of the probative value of the 1996-98 data in view of the changes in demand in the market that had occurred since 1996. Indeed, the USITC based the decision to rely on 1997 to 1998 data on the fact that "US apparent consumption increased throughout the period of investigation, both *from 1996 to 1997* and from 1997 to 1998, reaching record levels."[87] The USITC's determination shows that it evaluated "trends between the first and third years of a period that conflict with trends between the second and third years of a period," which Japan claims are "especially relevant."[88] What Japan couches as an argument that the USITC did not examine 1996-98 data is no more than a challenge to the weight that the USITC gave to 1997-98 data;[89] the weight of evidence, however, is for the authority to decide.

73. Japan cites *Argentina - Footwear*[90] as support for its position that the USITC improperly evaluated the data from 1997 to 1998 instead of comparing 1996 to 1998.[91] In fact, this decision shows the flaws in the Japanese position. *Argentina - Footwear* expressly rejects the notion that an authority should simply make a comparison of the data between the beginning and endpoints of the period of investigation. It states that trends within the period are an important part of any decision.[92] Thus, *Argentina - Footwear* in fact supports the USITC's determination.

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[86] USITC Views at 18.

[87] USITC Views at 18.

[88] Japan's Answers to Panel Question 18 at para. 60.

[89] Cf. United States -- Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87) ("Atlantic Salmon"), at ¶ 539.("Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 3:3 [now Article 3.4] that the positive developments reflected in the indicators referred to by Norway could not per se have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury.") (emphasis in original).

[90] Report of the Appellate Body, *Argentina -Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), adopted on 12 January 2000, WT/DS121/AB/R.

[91] Japan's Answer to Panel Question 18 at paras. 62-63

[92] *Argentina - Footwear* at para. 129.

74. Further, this panel should note that Japan makes inconsistent arguments about the appropriate time frame in an analysis of injury. With regard to the financial indicators, it is claiming that the USITC erred because it considered intervening trends, but when it discusses alternative causes of injury, it is alleging that the USITC erred because it did *not* consider trends within the period.[93] In the latter context, it argues that the USITC improperly did not compare data for the first half of 1998 with data from the second half of 1998 in order to fully appreciate the effect of the General Motors strike on the domestic industry.[94] Not only is Japan incorrect in stating that the USITC did not consider this time frame, but, in making this argument, it is conceding that an evaluation of trends within the period may, under certain circumstances, be more probative.

B. THE USITC PROPERLY DETERMINED THAT DUMPED IMPORTS WERE CAUSING MATERIAL INJURY TO THE DOMESTIC INDUSTRY

1. The USITC demonstrated a causal relationship between dumped imports and material injury

75. Contrary to Japan's argument, which it raised for the first time in its opening statement at the first panel meeting, the USITC amply established the causal relationship between dumped imports and the injury to the domestic industry. As has been seen, the USITC found that the increased dumped imports led the domestic industry to have excess capacity. Further, for example, it found that "at the same time as subject import volumes and market share increased dramatically, the domestic industry's market share declined;"[95] "domestic producers were prevented from participating in the increasing demand as subject imports increased their market share",[96] "declines [in prices] were most precipitous in the third and fourth quarters of 1998, at a time when the volume of subject imports was peaking;"[97] and "unit values fell significantly in 1998 as subject imports increased in volume and market share."[98] Such findings demonstrate "a causal relationship between the dumped imports and the injury to the domestic industry" as required by Article 3.5.

(a) The USITC properly found a correlation between the dumped imports and the price declines

76. Japan points to a three-month lag time between orders for Japanese product and its importation.[99] The existence of this lag time does not, however, defeat the USITC's conclusion that the increase in imports when price underselling increased supported the causal relationship between dumped imports and injury. First, this nexus was not established solely on the basis of a relationship between imports and prices in a particular quarter. Rather, the USITC found the instances of underselling to have increased in 1997 and 1998 as opposed to 1996, concurrently with a rise in import volume and market share and a decline in industry annual performance indicators.[100] As the USITC concluded, full year data was sufficient to support its affirmative determination.[101]

77. Moreover, evidence concerning the nature of pricing in the market supported the USITC's reliance on the fact that price declines were most precipitous in the third and fourth quarters of 1998, when import volumes peaked. The fact that some imports in those quarters were made pursuant to earlier contracts does not mean that the prices of those imports were not set when the importations

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[93] First Submission of Japan at para. 275.
[94] First Submission of Japan at para. 277.
[95] USITC Views at 12.
[96] USITC Views at 12.
[97] USITC Views at 14.
[98] USITC Views at 18.
[99] Japan's Answer to Panel Question 47 at para. 107.
[100] USITC Views at 14-15.
[101] USITC Views at 20.

were made. To the contrary, during the hearing, respondents' witnesses testified that, in many cases, purchasers demanded lower prices after a contract had been negotiated, threatening to cancel the order if the prices did not come down.[102] In fact, Japanese respondents testified that, if prices in the market fell between the time of an order and the time scheduled for delivery, the prices were renegotiated.[103] This evidence shows that the lag time for orders does not translate into a lag time for price effects of imports. Therefore, consistent with the Japanese parties' own witnesses, the correlations that the USITC drew between the time of entry of the imports and the declining prices for hot rolled steel in the United States are not affected by the lag time between date of order and date of delivery.

(b) The USITC determined that the dumped imports were causing material injury in accordance with Article 3.5 of the Anti-dumping Agreement.

78. As the United States has discussed in its answer to the Panel's questions[104], the phrase "imports are causing material injury" had been interpreted under the Tokyo Round Anti-dumping Code not to require that an authority isolate the particular quantum of injury due to imports from the injuries due to other causes and determine that quantum of injury to be "material". In adopting that phrase in Article 3.5, the negotiators of the Anti-dumping Agreement reflected that they would not change that conclusion. Rather, adopting also the phrase "a causal relationship", they indicated that a demonstration of causation must show a connection between the effects of imports and material injury, not that dumped imports are the only factor so connected. Such a demonstration, consistent with the requirement not to attribute to dumped imports the effects of other causes, must not mistakenly rely on indicators of such a relationship that are in fact due to other causes of injury.

79. Japan nevertheless argues that the USITC violated the Agreement by stating that "the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance."[105] The USITC's legal conclusion was that the domestic industry "is materially injured by reason of LTFV [*i.e.*, dumped] imports of hot rolled steel from Japan."[106] Japan does not contend that this conclusion differs from the conclusion that dumped imports are causing material injury.

80. The USITC's use of the phrase "materially contributed" in effect recognizes that, although in using the phrase "a causal relationship" Article 3.4 does not establish a precise degree of relationship that must be demonstrated between the effects of imports and injury, that relationship must not be trivial. Use of the phrase "materially contributed" is entirely in accord with the ordinary meaning of the term "cause." *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." *Webster' s* makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> CAUSE indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[107]

In short, the phrasing of which Japan complains is simply one way of restating the term "cause."

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[102] Transcript of 4 May 1999, Hearing at 242 (testimony of Mr. Curtis) (**Exh. US/C 25**).
[103] Transcript at 246-47 (testimony of Mr. Stapp).
[104] US Answer to Panel Question 46.
[105] USITC Views at 20-21.
[106] USITC Views at 23.
[107] Webster's Third New International Dictionary (Unabridged) at 356 (1981) (**Exh. US/C 26**).

81. In considering the adequacy of the USITC's demonstration of this causal relationship, it is instructive to compare the findings that it made here to those upheld by the panel in *Atlantic Salmon*, whose analysis was before the negotiators of the Anti-dumping Agreement. In *Atlantic Salmon*, the panel found that the "USITC had not failed to consider whether there had been a significant increase in the volume of subject imports."[108] The USITC's decision that the panel upheld discussed the existence of a surge in imports from Norway, but also found that market penetration of these dumped imports declined.[109] In the current case, not only did dumped imports double in volume; they doubled their market shares as well.[110]

82. As to price effects, the *Atlantic Salmon* panel found that, "on its face, the text of the USITC determination demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway."[111] As part of its analysis in that case, the USITC concluded that, "[a]lthough other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a role in the price decline."[112] The *Atlantic Salmon* panel reached this conclusion notwithstanding the fact that in that case the dumped imports persistently oversold the domestic product.[113] In the current case, the USITC found that imports that increased by 10 million tons over 1997 and 1998, including 7 million tons in 1998, and increasingly undersold the US product in that period, had significant price effects. Japan's argument that a strike at General Motors that affected no more than 685,000 tons of product over a period of five weeks had significant price effects only reinforces the USITC's conclusions about the price effects of the massively increased imports.

83. The panel in *Atlantic Salmon* also upheld the USITC's determination about the negative financial performance of the US industry[114] when the USITC found, "After posting a large operating loss in 1987, the domestic industry recorded an overall operating profit in 1988. However, the financial state of the US Atlantic salmon industry declined precipitously in 1989."[115] The USITC found a similar end-of-period trend in operating income in this case.

84. In short, the United States submits that, in order to establish that the USITC's demonstration of a causal relationship between dumped imports and material injury in this case violates the Anti-dumping Agreement, Japan must establish that the Anti-dumping Agreement requires an analysis significantly different from that upheld under the Tokyo Round Code. Japan has not attempted such a showing, and cannot make it.

III. THE USITC CONDUCTED THE PROCEEDINGS IN THIS INVESTIGATION IN AN UNBIASED AND FAIR MANNER

85. The United States has previously addressed Japan's argument that the USITC Commissioners should not have requested at the USITC's hearing that domestic producers provide information that they had not previously provided. The United States will not here reiterate its points on the matter. Japan now, however, takes issue with the USITC's acceptance of that submission because, it claims, "respondents literally had less than a week to comment on the corrected figures, and then only briefly,

[108] *Atlantic Salmon* at para. 501.
[109] *Atlantic Salmon* at para 499.
[110] USITC Views at 12.
[111] *Atlantic Salmon* at para. 514.
[112] *Atlantic Salmon* at para. 514.
[113] *Atlantic Salmon* at para. 518.
[114] *Atlantic Salmon* at para. 538.
[115] *Atlantic Salmon* at para. 535.

as final comments are strictly limited to fifteen pages in length per respondent country."[116] This contention fails to make out a claim under the Agreement.

86. As reflected in the final USITC's staff report, US producers submitted the requested data before the report issued, and that information was incorporated into the report.[117] The staff report was issued to the parties on 27 May 1999. In fact, the US producers had submitted to the USITC and served on the other parties the final piece of information on this point several weeks prior to issuance of the final report. Parties submitted their final comments on the information obtained in the investigation to the USITC on 7 June 1999. Thus, respondents had several weeks to prepare their comments on this information, not the seven days that Japan claims.

87. Further, respondents were not limited to a fifteen page submission. On 2 June 1999, respondents requested to file more than fifteen pages for their final comments. They made this request, not because of an issue with the information in the record, but because of the fact that one counsel was representing producers from several different countries.[118] In fact, respondents' final comments were 29 pages long.[119]

88. In any event, Japan's argument does not establish that the USITC in any way violated the applicable provision concerning parties' opportunity to comment on information. The relevant provision is Article 6.9, which provides that authorities, before a final determination is made, shall inform all interested parties of the essential facts under consideration. Article 6.9 further provides, "Such disclosure should take place in sufficient time for the parties to defend their interests."

89. Notably, Article 6.9 does not define what constitutes a "sufficient time" nor does it require authorities to afford parties unlimited numbers of pages in which to present their arguments. In the current case, respondent interested parties in fact commented on the US producers' data in final submissions. None complained that either the time or pages that they were afforded for comment was insufficient. None complained that, with more time or space, they would have had more to say. None requested that, as its rules allow, the USITC make an exception to the limitations set forth in its normal procedures.[120] They only requested clarification of the rule on comments, and they never made reference to the domestic industry's data in that request. In short, the Japanese respondents having failed in the administrative proceedings to object to the time and space they were given, Japan's argument at best consists of the contention that a week for response and a limitation of the number of pages in which to make that response is *per se* insufficient. Nothing in the Agreement supports such a contention.

90. Indeed, Japan should be barred from making such a contention. In arguing the USITC failed to afford parties sufficient time to defend their interests, that contention is beyond this Panel's terms of reference. Japan's panel request does not state any claim arising under Article 6.9 or mention that Article at all. Thus, unable to make a substantive claim under Article 6.9, Japan should not be permitted to substantiate this claim through vague and unsupported allegations of bias.

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[116] Japan's Answer to Question 44 at para. 98.
[117] USITC Views at VI-1.
[118] 2 June 1999 letter to Chairman Bragg (**Exh. US/C-27**).
[119] Selected pages from Respondents' Comments (**Exh. US/C-28**).
[120] *See* 19 C.F.R. §§ 201.4(b) & 201.14(b)(2) (**Exh. US/C-29**).

CONCLUSION

91. For the foregoing reasons, the United States requests that the Panel reject Japan's claims in their entirety.

ANNEX C-3

Letter from the United States to the Chairman of the Panel

(21 September 2000)

The United States has raised a preliminary objection to Japan's submission to the Panel of factual information not made available to the US authorities during the antidumping duty investigation, i.e., extra-record evidence. In its questions to the United States, the Panel asked the United States to list the exhibits that should not be considered by the Panel because they are extra-record evidence. The United States responded on 6 September. Since the time of that response, the United States notes that Japan has put before this Panel, in its second submission of 13 September, two additional pieces of extra-record evidence that should not be considered by the Panel.

First, at note 353, Japan cites profit figures from an annual report of a US producer. Japan apparently admits that the annual report was not submitted to the US International Trade Commission ("USITC"), but states that purportedly similar information was given to the USITC. As the United States has previously made clear, we have no objection to Japan's use of any information presented to the USITC, with respect to "injury" issues, but ask that the Panel disregard this new, extra-record evidence.

Second, Japan's exhibit JP-105 contains information from two web sites, described at note 372 of Japan's second submission. Neither these web sites nor their content were presented to the USITC during the course of the antidumping investigation. In addition, Japan retrieved these web sites on 5 September 2000, as the date on the pages demonstrates. Therefore, the information contained in those documents may not even be relevant to the time period under investigation, and may not even have existed at the time of the investigation.

We ask that the panel disregard the above extra-record evidence contained in Japan's second submission.

The United States is providing a copy of this submission directly to the Government of Japan.

ANNEX C-4

Letter from Japan to Chairman of the Panel

(25 September 2000)

On 21 September 2000, the United States filed a letter with your office registering its objection to certain evidence referenced in Japan's Second Submission. Japan believes that the items to which the United States now objects are properly before the Panel, for the following reasons:

The information contained in footnote 353 of Japan's Second Submission is from the 1999 annual report of Steel Dynamics Inc. ("SDI"). During the course of its investigations, USITC requests the annual reports of domestic producers in their questionnaires. Specifically, Question III-4 of the domestic producer questionnaire issued in the hot-rolled steel case requested the producers to submit their annual reports if they were not available on the internet.[1] (While the staff report does not state which domestic producers submitted completed questionnaires, it can be assumed that SDI did so given that it was named as a petitioner.[2]) Therefore, although USITC's confidential record has not been made available to the Panel, it is safe to assume that the information cited in footnote 353 - SDI's operating profits for 1997 and 1998 - was contained in the annual report(s) accompanying SDI's questionnaire response. Given that this 1997 and 1998 data is the only information referenced in footnote 353, it is irrelevant whether the 1999 annual report itself was on the record (Japan did not provide the entirety of the 1999 annual report as an exhibit to its Second Submission).

The documents in Exhibit JP-105 merely show that Lone Star Steel and Newport Steel specialize in supplying hot-rolled steel sheet for pipe and tube production. Question II-23 of USITC's domestic producers' questionnaire asked each company to report the percentage of its shipments devoted to pipe and tube products.[3] Japan admits that, unless Lone Star and Newport submitted questionnaire responses, USITC might not have had record information before it to suggest that they specialized in hot-rolled steel for pipe and tube production.

Neither producer was a petitioner, and the public staff report gives no indication that either firm returned a questionnaire response to the staff. The staff report does, however, identify both companies as hot-rolled steel producers[4], and it is a matter of public record that both companies specialize in pipe and tube production, as demonstrated by their websites. Further, Japan only offers Lone Star Steel and Newport Steel as examples of companies dependant on the pipe and tube market that would have been hard hit by the pipe and tube recession. Even without these examples, Japan's logic is irrefutable: Even though overall apparent consumption reached a record high in 1998, companies dependant on the pipe and tube market would have nevertheless lost money for reasons unrelated to subject imports. Nonetheless, USITC completely ignored this alternative cause in its determination.

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[1] **Exh. JP-106** (attached).
[2] *USITC Final Injury Determination*, USITC Pub. 3202 at III-3 (**Exh. JP-14**).
[3] **Exh. JP-106** (attached).
[4] *USITC Final Injury Determination*, USITC Pub.3202 at III-2 (**Exh. JP-14**).

ANNEX C-2

Second Submission of the United States

(13 September 2000)

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1. The United States hereby submits its second written submission in this proceeding. This submission is divided into two parts. First, the United States demonstrates that the US laws and practices concerning the calculation of the anti-dumping duty margins and critical circumstances are consistent with the United States' WTO obligations, and that their application in this investigation was in accordance with these obligations. Second, the United States demonstrates that the US laws pertaining to injury determinations, and their application in this investigation, are in accordance with WTO rules. As indicated in the discussions below, the United States will not here address all arguments that Japan has raised, but rather will address most particularly new positions that Japan has taken in its statements and submissions since the parties' first written submissions.

PART 1: THE ANTI-DUMPING DUTY MARGINS AND CRITICAL CIRCUMSTANCES

I. AN INVESTIGATING AUTHORITY MAY MAKE ADVERSE INFERENCES ABOUT INFORMATION THAT A RESPONDENT IN AN ANTI-DUMPING INVESTIGATION HAS FAILED TO PROVIDE

2. Japan's written answer to the United States' third question indicates that Japan has not moderated its extreme position that, in selecting from the facts available, an investigating authority may never intentionally make an adverse inference about information that a respondent has failed to provide, no matter how blatant the respondent's failure to cooperate.[1] Japan has not offered a *single* instance in which an adverse instance would be permitted - - not even the case in which *its own anti-dumping authorities* made an adverse inference concerning uncooperative respondents.[2] Evidently, Japan has put its doubts aside and decided to stick with its original goal of persuading this Panel to strip from the AD Agreement the incentive it now provides for respondents to cooperate in anti-dumping investigations.[3] We explained in our first written submission how this argument runs contrary to many specific provisions in Article 6.8 and Annex II, and is, in fact, designed to defeat the purpose of those provisions.[4]

3. Japan's final answer is that its position is not really extreme.[5] As supporting evidence, it repeats its argument that "less favourable" outcomes are permitted, provided that they are "coincidental,"[6] but that less favourable outcomes that result from deliberately adverse inferences are punishments not authorized by the Agreement.[7] We explained in our first written submission that this nominal concession is, in fact, no concession at all, and would leave respondents with virtually no incentive to participate in anti-dumping proceedings.[8]

4. Like its token concession about coincidentally adverse results, most of Japan's answers attempt to obfuscate the real implications of its current position. We respond to Japan's specific points below.

5. First, Japan notes that Article 6.8 does not "directly address the level of cooperation provided by a party . . . but merely gives the authority for resorting to facts available, assuming the

[1] First Submission of Japan at para. 58.

[2] First Submission of the United States at Part B, para. 72, n. 147. In its investigation of Cotton Yarn from Pakistan, the Japanese anti-dumping authorities calculated the dumping margin for non-cooperative Pakistani companies by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value of the cooperating suppliers.

[3] First Submission of Japan at para. 59.

[4] First Submission of the United States at Part B, paras. 58 - 71.

[5] Japan's Answer to US Question 3 at para.4.

[6] First Submission of Japan at para. 58.

[7] Japan's Answer to US Question 3 at 5.

[8] First Submission of the United States at Part B, paras. 73 - 76.

circumstances identified in Article 6.8 exist."[9] This is highly misleading. Pretending that Article 6.8 does not concern the level of cooperation of the respondent ignores the fact that Article 6.8 addresses "refus[ing] access to information," "not provid[ing] information," and "significantly impeding" anti-dumping proceedings. The United States' collective characterization of these actions as "failing to cooperate" is fair, to say the least. Thus, when Paragraph 7 of Annex II states that non cooperation may result in a less favourable outcome for the respondent, it is referring to the types of behaviour described in Article 6.8.

6. Second, Japan asserts that "Paragraph 7 of Annex II requires investigating authorities, in selecting the facts available, "to find information that most closely approximates reality."[10] By this, Japan means that adverse inferences are not permitted, because, *presumably*, they do not closely approximate reality. Japan's answer ignores a fundamental point - - the only way for the Department to know what information "most closely approximates reality" is *to obtain the real information.* Where a respondent has failed to provide the real information, an investigating authority *has no choice* but to make inferences about that information.[11] And, when the *reason* that the respondent has failed to provide the real information is that it simply has not cooperated in the investigation, the most reasonable inference about the missing information is that it is adverse to the respondent. This inference is not punitive - - it is the most reasonable assumption about the nature of the missing information under the circumstances.

7. Third, Japan argues that the requirement that investigating authorities use "special circumspection" in selecting information from secondary sources indicates that the use of adverse inferences is precluded. The opposite is true. Special circumspection is required precisely because the secondary information (such as information from the petition) is generally presumed to be adverse to the respondent (although an investigating authority can never know for certain whether it is adverse, because it does not have access to the real information).

8. Fourth, Japan misreads the requirement that investigating authorities "should, where practicable, check the information from other independent sources." This does not mean that the information selected may not be adverse. It means that the inference upon which the selection is based should be reasonable in light of other information on the record. A reasonable adverse inference is one at the adverse end of the range of possibilities, to the extent that range is ascertainable.

9. Fifth, Japan argues that Paragraph 7 of Annex II justifies "not rewarding" a respondent for failing to cooperate, but does not justify making an adverse inference about the data not provided. There are two flaws in this argument. First, a result "less favourable" to a non-cooperating party is not merely the absence of a more favourable result (or reward). Cooperative parties are not "rewarded" with automatically low dumping margins. They receive margins calculated *neutrally* on the basis of the data provided. Therefore, a "less favourable" result than if the party had cooperated is a result that is less favourable than a neutral result - - an adverse result. Second, Japan's argument ignores the obvious point that, if the worst that can happen to a respondent for failing to provide information is the application of neutral gap-filler, no respondent in its right mind would ever submit adverse information to an investigating authority.

10. Sixth, Japan suggests that, where a respondent has been generally cooperative, an investigating authority may not make an adverse inference regarding a specific matter with respect to

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[9] Japan's Answer to Panel Question 4 at para. 15.

[10] Japan's Answer to Panel Question 4 at para. 15.

[11] Japan will respond that, in the case of the weight conversion factors, the Department actually had the relevant information in its possession. As we have explained, this ignores the Department's clear authority under the Agreement to impose reasonable deadlines.

which that respondent has not supplied necessary information. Neither Article 6.8 nor Annex II provides any basis for this limitation. Article 6.8 refers to parties that do not provide necessary information. It does not suggest that some necessary information may be withheld, if most necessary information is provided. Similarly, Paragraph 7 of Annex II states that a less favourable result may be obtained where "relevant information is being withheld." It does not imply that some relevant information may be withheld if most relevant information is provided. Acceptance of Japan's argument would license every respondent in every dumping proceeding to withhold the single most damaging category of information from the investigating authority.

11. Seventh, Japan charges that the Department reads the sentence in Paragraph 7 of Annex II authorizing a less favourable result for uncooperative parties "as giving it carte blanche to use any facts available it chooses."[12] Japan evidently believes that the Department would feel free to fill in gaps in its administrative record with the team batting average of the Tokyo Giants[13], as long as that would be adverse to the respondents. Of course, any such notion is frivolous. The Department tries to select facts available that are at the adverse end of the likely range, not arbitrary numbers. The object is not to punish parties that fail to provide information, but to attempt to ensure that such parties do not profit from their non-cooperation. As we have explained in detail in our first submission, the Department was extremely circumspect in using adverse inferences to select from the facts available and carefully limited the results of those selections to the scope of the information not provided, or not timely provided.[14]

12. Eighth, Japan implies that failing to supply necessary information within a reasonable period does not "significantly impede" an investigation.[15] This cannot be true, unless the information withheld is insignificant. If the information is significant, then withholding that information must be significant.

13. Finally, Japan argues that information from "secondary sources" is not information from sources other than the respondent, but information from sources other than the questionnaire response (or, possibly, information other than the actual data specifically requested in the questionnaire).[16] This is neither the plain meaning of "secondary sources" nor logical. The most obvious meaning of the "primary source" is the respondent. Therefore, the most obvious meaning of "secondary sources" is "sources other than the respondent." This interpretation is supported by the term "other independent sources" in the second sentence of Paragraph 7, which indicates that secondary sources are independent from the primary source. This makes sense if secondary sources are independent *from the respondent.* But it would be a strained use of the language to describe information from a respondent as "independent from" other information from that same respondent.

14. If accepted, Japan's definition of "secondary sources" would mean that other information from a respondent, *even if verified*, would constitute secondary information that would need to be corroborated from other sources. Japan does not explain why it would be necessary, or how it would be possible, to corroborate such verified information. There is no evident explanation.

15. Japan is also incorrect in asserting that, if "information from secondary sources" in Paragraph 7 means information from sources other than the respondent, then the "less favourable" language does not support the use of adverse inferences.[17] Because the logic, if any, of this argument

[12] Japan's Answer to Panel Question 6 at para. 26.
[13] More precisely, the Yomiuri Giants.
[14] First Submission of the United States, Part B, at paras. 109 - 112 and 163.
[15] Japan's answer to Panel Question 7 at para. 28.
[16] Japan 's answer to Panel Question 8 at para. 30.
[17] Japan's Answer to Panel Question 8 at para. 32.

has eluded the United States, it seems best to respond by explaining our reading of Paragraph 7 as a whole.

16. Paragraph 7 contains three sentences. The first provides that, where investigating authorities base their findings on information from secondary sources (from sources other than the respondent), they should use special circumspection. The second sentence, which begins "[i]n such cases . . ." plainly applies to the use of information from secondary sources, and requires that such information be checked against other independent sources. The third sentence does not provide more procedural safeguards for the selection of information from the secondary sources. Having a different function than the second sentence, it logically is not limited by the opening clause of that sentence. Rather, the third sentence provides a general counterweight to all of the limitations in Annex II on the application of facts available and, more specifically, makes clear that the special circumspection and corroboration requirements do not preclude "less favourable results than if the party did cooperate."[18]

II. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO KSC WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

17. The Department's application of facts available to KSC because of its failure to act to the best of its ability to report the necessary sales and further manufacturing cost data for its sales through its US affiliate, CSI, was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. We will not burden the Panel with a repetition of the facts establishing KSC's failure to use its full authority, as a fifty-per cent owner of CSI, to attempt to obtain that information. Instead, we take this opportunity to show how the arguments that Japan continues to assert on this issue lack any basis in the facts or under the AD Agreement.

18. First, we draw the Panel's attention to Japan's response to the Panel's fifth question, regarding KSC's alleged requests to the Department for assistance concerning this issue.[19] While claiming that there "are many examples of KSC's request for assistance,"[20] Japan cites only three record documents, none of which support its claim. The first letter which Japan cites[21] nowhere requests the Department's assistance. Instead, it repeatedly requests that Commerce excuse KSC from answering Section E of the questionnaire, with respect to the sales through its affiliated further manufacturer, CSI. Japan cites two other letters by KSC to the Department[22] which likewise reiterate KSC's request to be excused from reporting the CSI information.[23] Moreover, these are not the only documents in which KSC requested to be excused from reporting the CSI information: on 21 December 1998, KSC informed Commerce that KSC would not be reporting the CSI information;[24] on 19 January 1999, KSC again informed Commerce that it would not provide the

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[18] *See* First Submission of the United States at Part B, paras. 152 and 161.

[19] Japan's Answer to Panel Question 5 at para. 19.

[20] *Id*.

[21] KSC's letter to Commerce of November 10, 1998 (**Exh. JP-42(i)**).

[22] KSC letter of December 3, 1998, (**Exh. JP-78**), and KSC letter of December 18, 1998, (**Exh. JP-42(n)**).

[23] Japan claims that the phrase "[w]e have received no information, guidance, or response from the Department," in KSC's letter of 18 December 1998, constitutes a "specific" request for assistance. Japan's Answer to Panel Question 5 at. para. 20. However, a more reasonable interpretation of that phrase is that KSC wanted confirmation from the Department that it would excuse KSC from providing the CSI information. The meaning is evident from the fact that, in the preceding (and first) paragraph of that letter, KSC informed the Department that, at its recent meeting with Commerce officials, "we asked that KSC be excused from reporting CSI's sales of subject merchandise and of further manufactured subject merchandise because of ... its conflict of interest as a petitioner." (**Exh. JP-42(n)**) (business confidential information omitted). Furthermore, on each of the following two pages of that letter, KSC renewed its request that it be excused from reporting the CSI information. *Id*.

[24] KSC response to section C of the Department's questionnaire, (**Exh. JP-42(p)**).

information;[25] and, on 25 January 1999, KSC reiterated the same position.[26] In none of these letters did KSC request assistance regarding this issue. Thus, the Department's establishment of the facts on this matter is fully supported by record evidence, whereas Japan's factual claim is supported by none.

19. In addition, the Department's interpretation of Articles 2.3, 6.8, and Annex II with regard to the selection of facts available for KSC's sales through CSI is a permissible one. Once Commerce established that it would apply facts available to KSC with regard to the CSI sales, and that it would take an adverse inference with respect to KSC for its failure to act to the best of its ability, it reasonably turned to KSC's calculated dumping margins for actual, verified sales to the United States as a source of facts otherwise available. The reasonableness of this choice is shown by one of Japan' s own affidavits.[27] At paragraph 32 of this affidavit, KSC calculated the dumping margin for the non-CSI portion of its US sales. This calculation, representing the non-adverse facts available rate applicable to Kawasaki, shows dumping.[28] The increase resulting from the Department's choice of facts available represents the logical inference that the information not provided was probably adverse to KSC.-- *i.e.*, that the dumping margins on the unreported sales were generally greater than the margins on the reported sales. Commerce chose a margin from those sales that were reported, and thus based on KSC's own selling practices, and applied it only in proportion to the unreported sales. This was a measured approach and reflected an appropriate adverse inference. Japan, however, would interpret the Agreement to reward respondents with a "neutral" choice of facts available, thereby giving them license to play a shell game by hiding dumped sales through their affiliates and directing non-dumped sales, or sales with lower dumping margins, to their non-affiliated importers.[29] Neither Article 2.3 of the Agreement, nor the facts available provisions of Article 6.8 and Annex II, should be interpreted to require such a result.

20. Finally, we draw the Panel's attention to Japan's persistent claim that it supplied the Department with reliable transfer price data between KSC and CSI that Commerce should have used.[30] Japan has ignored, or chosen not to rebut, the fact that KSC did not supply these data, as we have pointed out.[31] More important, however, is the fact that, if Commerce accepted such data as facts otherwise available, it would give respondents *carte blanche* to set those prices to their affiliates at whatever level they deemed convenient to shelter dumping. Thus, the Department's choice of facts available with respect to the affected sales represented a permissible interpretation of the Agreement.

III. THE DEPARTMENT'S APPLICATION OF FACTS AVAILABLE TO NSC AND NKK WAS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

21. The Department's application of the facts available to NSC and NKK's theoretical weight sales for which they did not timely provide a theoretical-to-actual weight conversion factor was fully in accordance with the Agreement. Japan's position, that the Department should be compelled either to ignore altogether the sales affected by the missing factors or to accept the factors which NSC and NKK could have timely provided, but did not provide until well after the reasonable deadlines

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[25] KSC response to the first section A supplemental questionnaire, (**Exh. JP-42(u)**).

[26] KSC response to sections B and C of the Department's supplemental request for information (**Exh. JP-42(v)**).

[27] Affidavit of Robert H. Huey, Counsel to KSC, (**Exh. JP-44**). The United States has asked the Panel to disregard Japan's affidavits because they are extra-record evidence. Thus, we cite to this affidavit only in the event that the Panel does examine it.

[28] The exact level is business confidential information. *See id*., paragraphs 32 and 33.

[29] Japan's Answer to Panel Question 42 at para. 93. Japan also expresses the startling view that anti-dumping investigations are usually a "surprise." *Id*. That certainly was not the case in this instance, as the Department's critical circumstances determination shows.

[30] *Id*. at paras. 93 and 18.

[31] *See* First Submission of United States at Part B, para. 123.

established for this purpose in the questionnaires, would write out of the Agreement an administering authority's ability to establish and enforce reasonable deadlines for the submission of information. This right is guaranteed by Articles 6.1, 6.8, and Annex II at paragraphs 1 and 6. Likewise, for the reasons discussed above, the Department's use of an adverse inference in selecting from the facts available with respect to the affected sales, was authorized under Article 6.8 and Annex II, paragraph 7.

22. We will not burden the Panel with a repetition of all of the facts regarding the conversion factor issue. The following pertinent points have been demonstrated in our First Submission and in our responses to the questions posed by the Panel and Japan: (1) The conversion factors were presented well after questionnaire deadlines that were twice extended and provided more than ample opportunity to respond. (2) Despite the fact that NSC and NKK both argued that such factors were unnecessary and impossible to provide, they proved to be necessary and possible to provide for both companies. (3) Despite claiming that a factor was impossible to provide, NKK's counsel received KSC's submission demonstrating how they calculated the factor when KSC filed and served its questionnaire response on December 21, 1998. (4) When finally provided by NSC and NKK, the factors were not timely because the so-called "seven day rule" (19 CFR § 351.301(b)((1)), upon which Japan relies, expressly does not apply to deadlines for responses to questionnaires, which are governed by 19 CFR § 351.301(c)(2). (5) The Department's practice of accepting minor corrections to timely presented data also does not constitute a blanket loophole covering data respondents have declined to submit (at all) in response to questionnaires. (6) The facts available the Department selected with respect to this issue were based on NSC and NKK's own data and were reasonably related to the affected sales. In sum, NSC's and NKK's theoretical weight factor submissions were rejected because they were untimely, and Article 6.8 and Annex II expressly permit the Department to enforce reasonable deadlines by use of facts available. Accordingly, the Department's application of facts available to NSC and NKK was consistent with the Agreement.

23. Finally, because this question is so clearly one of deadline enforcement, rather than of bias, the Department objects to Japan's characterization of the Department's treatment of the conversion factor issue as the result of an "effort to apply adverse facts available."[32] Had the Department been making an "effort" to apply adverse facts available, rather than conducting this investigation strictly on the merits of the case, a much better target existed. The most hotly contested substantive issue at the administrative level of this case before the Department of Commerce was the question of whether invoice/shipment date or date of order confirmation should be used as the date of sale for reporting US and home market databases.[33] Despite being asked by the Department to report separate US and home market sales databases using the date of order confirmation, as well as the date of invoice/shipment it had originally used to report its sales, NKK declined to report its sales databases using order confirmation date.[34] Had the Department been acting in a biased manner, motivated only by an "effort to apply adverse facts available," it could have determined that the order confirmation date was the proper date of sale, and could have applied facts available much more extensively to NKK. Instead, the Department made the date of sale determination, as it made all of its determinations, on the merits, and used the invoice/shipment date as the date of sale.

[32] Japan's Answer to Panel Question 1 at para. 4.
[33] *See Final Determination*, 64 Fed. Reg. at 243331-24335 (Comment 1)(**Exh. JP-12**).
[34] *See Preliminary Determination*, 64 Fed. Reg. at 8294 (**Exh. JP-11**).

IV. THE DEPARTMENT'S APPLICATION OF ITS "99.5 PER CENT" ARM'S LENGTH TEST, TO DETERMINE THAT SOME EXPORTERS' HOME MARKET SALES TO AFFILIATES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE, AND ITS SUBSEQUENT USE OF HOME MARKET DOWNSTREAM SALES TO CALCULATE THE NORMAL VALUE FOR SUCH SALES, WERE CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

24. The Department's application of its 99.5 per cent test to determine which home market sales to affiliates could be used in the normal value calculation embodies a permissible interpretation of the Agreement, as does its use of downstream sales. Although Japan has criticized the specifics of the 99.5 per cent test, it is clear from Japan's response to Panel Question 17 that Japan's primary goal with respect to the arm's length test is not to require the Department to improve it. Instead, Japan urges upon the Panel an interpretation that would write out of the Agreement any interpretation of "ordinary course of trade" that would permit any scrutiny of prices to affiliates. Because Japan has not demonstrated that the Agreement compels such an interpretation, the standard of review requires that the Panel find that the Department permissibly interprets the Agreement to allow it to assume that sales to affiliates are *not* made in the ordinary course of trade absent a showing that sales to the affiliate are made at not less than average market prices despite the affiliation. Furthermore, because Japan has not demonstrated that the Department's 99.5 per cent test is biased against respondents or otherwise fails to achieve this reasonable goal, it should likewise uphold the Department's use of this test.

25. As the Panel has recognized, Japan seems to accept, in principle, that sales to affiliated purchasers may not be in the ordinary course of trade.[35] What Japan does not appear to accept is that a Member may permissibly consider that sales to an affiliated customer may be outside the ordinary course of trade precisely *because* the affiliation may cause the pricing relationship to be "unreliable because of association." In its response to Panel Question 17, Japan appears to argue that the Agreement requires the Department to use "all these ordinary course sales – including sales to companies that did not survive the 99.5 per cent test." Although this states Japan's preferred outcome, it also begs the question of whether all of its sales to affiliates <u>are</u> sales in the ordinary course of trade. Japan seeks to compel an interpretation that they are, absent some reason not necessarily related to affiliation, such as having been made at below-cost prices. Because the Department's interpretation that sales to affiliates are inherently "unreliable because of association," and may be deemed outside the ordinary course of trade *unless* it is demonstrated that the affiliation has not resulted in favourable pricing, is a permissible one, it must be upheld. To do otherwise would compel authorities to base normal value on sales to affiliates, regardless of whether these are real market prices or not, and despite the considerable potential for a manufacturer to manipulate the results of an anti-dumping proceeding by selling to affiliates at low-margin-generating prices before re-selling the merchandise into the open marketplace. Such an interpretation would seriously interfere with the administration of the Agreement.

26. The 99.5 per cent test is a perfectly reasonable methodology by which to determine whether affiliated party sales can be considered equivalent to arm's-length sales, as demonstrated by the fact that it is virtually the same as the margin calculation – itself prescribed by the Agreement. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is nearly identical to the margin calculation. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and target-country export sales; the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated home market customer sales.

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[35] *See* Panel Question 17 to Japan.

27. Japan claims that the 99.5 per cent test is a "results-oriented approach" because it excludes only lower-priced sales as outside the ordinary course of trade.[36] But this simply is not the case. When an affiliated customer passes the 99.5 per cent test, all of the sales to that customer are retained, including those for products sold at prices below the average price to the unaffiliated customers. Conversely, when an affiliated customer fails the 99.5 per cent test, all of the sales to that customer are rejected, including those for products sold at above average prices that would otherwise have been used to calculate normal value. Thus, application of the 99.5 per cent test may increase or decrease normal value.

28. Furthermore, as Japan readily acknowledges, "[p]rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit."[37] In most situations, therefore, the fact that the test does not "fail" affiliates based on high-priced sales and results in the use of those sales in lieu of the downstream sales may have the effect of reducing margins, compared to the margins that would have resulted from normal values based on even higher priced downstream sales.

29. Although Japan attacks the 99.5 per cent test on the basis that it imposes a floor, but not a ceiling, on prices treated as being in the ordinary course of trade, the Agreement does not require such symmetry. One of the reasons that prices involved in affiliated party transactions are inherently suspect is that they may be manipulated so as to reduce normal value (and hence reduce dumping margins). This concern is simply not implicated where such prices are higher than average prices to unaffiliated customers. There is, therefore, no basis for Japan's contention that the 99.5 per cent test is "biased."[38]

30. Nor is there any merit to Japan's contention that the Agreement precludes the use of downstream home market sales where an affiliated reseller fails the 99.5 per cent test.[39] Japan' s argument hinges solely on the fact that Article 2.3 expressly permits the use of downstream sales from affiliated importers in the export market, while Article 2.2 is silent with respect to the use of such sales in the home market.[40] Japan fails to realize, however, that Article 2.1 already authorizes the use of downstream home market sales. That provision defines normal value simply as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product for consumption in Japan were made in the ordinary course of trade and clearly come within this definition.

31. Article 2.2 plainly states that normal value may be based on third-country sales price or on constructed value only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country." Moreover, in response to Panel Question 17, Japan concurs that the Article 2.2 alternatives to a normal value based on home market prices become relevant only if the administering agency "concludes there are no sales in the home market in the ordinary course of trade." In other words, Japan does not propose to substitute either constructed value or third country sales for sales to affiliates that are outside the ordinary course of trade when other valid home market sales (which would include downstream sales made by affiliates) remain. Instead, Japan claims, in essence, that the Agreement requires that an authority must simply ignore any sales to customers failing the arm's length test, and base the margin solely on "the respondent's home market sales to other customers."[41] The result of such a general policy, however, would be that a producer could shield a large percentage of its home market sales from scrutiny simply by passing

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[36] Japan's Opening Statement at para. 38.
[37] Japan's First Submission at para. 170.
[38] Japan's Opening Statement at para 36.
[39] Japan's Opening Statement at para. 41-43.
[40] *Id*.
[41] *See* Japan's Answer to Panel Question 17 at para. 59.

them through an affiliate at below-average prices before selling them to unaffiliated customers in the home country. Indeed, under Japan's preferred approach, producers could make all of their home market sales through affiliated resellers, forcing investigating authorities to use third-country sales or constructed value – a result plainly not intended by the Agreement.

32. Finally, we note that the treatment of sales to and through affiliated parties is an area in which different Member States have evolved different interpretations and practices to deal with this general concern. The approaches of the three third party interveners who provided responses to Panel Question 48 on this topic are at once diverse (demonstrating that the Agreement lends itself to multiple permissible interpretations in this respect) and much less concrete than the Department's arm's-length test. The EC, for example, apparently uses the remaining sales unless it determines that they are not "sufficiently representative" and Brazil has used sales to non-affiliated parties when they were "representative." If Korea determines that the affiliated party sales are "inappropriate" it considers "constructed export price or third country sales price." The United States is of the belief that its own practice, which is more transparent and concrete, not only embodies a permissible interpretation, but is better suited for its own administration of the dumping law. Even should the Panel find the approach of another Member State to be more in harmony with its own views on this issue, however, the Panel may not impose that approach upon the United States unless Japan has demonstrated that the Department's practice in this respect is contrary to the Agreement. Japan has not done so.

V. THE DEPARTMENT'S INTERPRETATION WITH RESPECT TO THE CALCULATION OF THE ALL OTHERS RATE, AS EMBODIED IN SECTION 735(C)(5)(A) OF THE TARIFF ACT OF 1930, IS CONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

33. The Department's calculation of the all others rate using a methodology which excluded from the calculation all margins which were, overall, zero, *de minimis* or based on the facts available, embodies a permissible interpretation of the Agreement. Article 9.4 of the Agreement makes *no* provision for eliminating the "portions of margins," affected by facts available while retaining all other "portions" of the margins, as Japan suggests in its response to Panel Question 10. Indeed, Japan has argued in its response to that question only that "its suggested approach *better reflects* Article 9.4."[42] Under Article 17.6(ii) of the Agreement, the question is not whether Japan's suggested approach "better reflects" Article 9.4 than the US interpretation, but whether the US interpretation is a permissible one.

34. Apart from the obvious fact that Article 9.4 says nothing about and therefore cannot compel such a reading[43], Japan's approach is seriously flawed in other ways. First, were the presumption underlying the approach described in Japan's reply to Panel Question 10 to be adopted as a general rule, the all-others rate would have to be calculated based solely on whatever more favourable data respondents chose to report – whether or not such data are representative of the overall extent to which the respondents are dumping, and thus whether or not they are representative of the overall level of dumping in the industry. This means, for example, that the same high-margin-generating data Japan seeks to remove from scrutiny through the stratagems described above would also not be reflected in the margins for the non-examined members of the industry.

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[42] Japan's Answer to Panel Question 10 at para 36 (emphasis added).

[43] For the same reason, the EC's suggestion that they might use one interpretation of Article 9.4 when portions of margins were "significant" and "adverse" (but presumably a different one when the facts available portions were less significant and non-adverse), is not compelled by the plain language of that Article, which does not distinguish between "significant" and non-significant or adverse and non-adverse use of facts available.

35. Second, Japan's *ad hoc* approach to this case is not workable as a general rule. As the EC, another frequent user of the dumping law, has observed in its response to Panel Question 50, most dumping calculations include small elements of facts available. Furthermore, these are not always sale-specific. Even small elements of facts available can affect large numbers of sales, especially when facts available affects cost databases that are used in calculating constructed value, which may be used for comparison to a wide range of export sales. Thus, even if it were desirable to do so, it is in many cases simply not possible to remove all "affected" sales from the margin calculation to create the "expunged" margins Japan would have authorities use to calculate all others rates.

36. Third, Japan's preferred solution can seriously underestimate the average dumping level of the mandatory respondents when, as in this case, the percentage of export sales affected by facts available varies greatly among such respondents. This is not merely a function of the fact that it disregards the high level of dumping that may have been masked by data withheld from the Department. It is true even if it is accepted, as Japan argues it should be, that the margins used in the weighted average calculation should be margins purged of any facts available and should reflect the level of dumping only on those sales for which the respondent was willing to provide full data. Japan argues that, in weight-averaging the purged margins, authorities should assume that the mandatory respondents exported only the volume of product associated with sales that were not affected by facts available. This means that the sales volume of the least-cooperative respondents (those most likely to be willing to dump at the highest rates) will be under-represented in the numerator of all others weighted average. It also means that the total amount of sales forming the denominator of the weighted-average calculation will be reduced to the same degree, thus over-representing the sales volume associated with the margin levels of the more cooperative mandatory respondents.[44] In addition, Japan's preferred solution underestimates the average dumping level of the mandatory respondents by purging their margins of individual sales affected by facts available, but not of individual sales that are not dumped. However a Member may interpret the reference to margins established based on the facts available, Article 9.4 clearly accords the same treatment to "zero and *de minimis* margins." The solution Japan proposes, in short, does not even come close to being the sole permissible interpretation of Article 9.4.

37. Finally, the United States notes that the document contained at **Exh. JP-79** and discussed in Japan's response to Panel Question 9, in no way suggests that the interpretation of the United States is an impermissible one. It merely shows that the United States was unsuccessful in seeking to add the word "solely" to the text and that Japan was similarly unsuccessful in seeking to add the word "primarily." This suggests only that the intent of the Members was that the language remain sufficiently ambiguous to allow for multiple interpretations. Indeed, the most important statement in that document is the final sentence: "No conclusion was reached owing to the conflict of opinions." If no conclusion was reached, the drafters clearly did not conclude that the interpretation suggested by the United States was impermissible.[45] Moreover, the fact that other parties did not agree to the insertion of the word "solely" before the word "established" could also simply mean that those parties believed that the word was unnecessary because the existing language in the provision already sufficiently established that point.

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[44] Should the Panel determine to use the attorney affidavits (the United States maintains the Panel should not do so), it may wish to compare the "non-CSI portion" of KSC's margin in **Exh. JP-44**, at para. 32 *with* the average margins for NSC and NKK given in the *Final Determination*, 64 Fed. Reg. at 34780, **Exh. JP-12**.

[45] This is similar to the drafters' decision not to adopt an illustrative list of the types of sales that could be considered outside the ordinary course of trade. *See* First Submission of the United States at para. 216 and fn. 297.

VI. JAPAN IS ATTEMPTING TO WRITE ARTICLE 10.7 OUT OF THE AD AGREEMENT

38. Japan suggests that, "as a practical matter," a critical circumstances finding (as referenced in Article 10.7) cannot be made prior to the preliminary determination of dumping. This position ignores the existence of, and writes out of the Agreement, Article 10.7. Article 10.7 is distinct from other provisions in the Agreement in two fundamental respects. *First*, it does not require administering authorities to await the preliminary determination of dumping prior to making a determination to withhold appraisement or assessment. In every other instance, the Agreement expressly provides that provisional measures may not be taken until after the preliminary determination of dumping. *Second*, Article 10.7 is unique in its directive that there be "sufficient evidence" to support the finding. The requirement for " sufficient evidence" arises in two places in the Agreement: Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). The presence of this standard in these provisions suggests a threshold - a quantum and quality of evidence that must be present despite the fact that the record is incomplete.

A. ARTICLE 10.7 EXPRESSLY AUTHORIZES CRITICAL CIRCUMSTANCES FINDINGS *PRIOR* TO THE PRELIMINARY DETERMINATION OF DUMPING

39. Japan argues that, "as a practical matter," the "sufficient evidence" standard cannot be met prior to the preliminary determination of dumping (as set forth in Article 7.1). This argument ignores the plain language and intent of Article 10.7. Although Article 10.1 of the Agreement generally requires, with respect to the application of provisional measures, that there first be a preliminary determination of dumping, injury, and causation.[46] Article 10.7 provides the express exception to this rule. Specifically, Article 10.7 provides that investigative authorities may make critical circumstances findings and withhold appraisement or assessment at any time "after initiating and investigation." Thus, Japan's claim that the "sufficient evidence" requirement in Article 10.7 mandates a delay until the preliminary finding of dumping is untenable.[47]

B. "SUFFICIENT" EVIDENCE DOES NOT MEAN ALL POTENTIAL EVIDENCE

40. The drafters of the Agreement expressly provided that certain decisions may be made on the basis of "sufficient evidence." These express statements are found in Article 5 (relating to initiations) and Article 10.7 (early determinations to withhold appraisement or assessment under critical circumstances). Thus, the members of the Agreement have specifically denoted two instances in which there must be a certain quantum and quality of evidence - *despite the fact that the record may be incomplete*.

41. Japan contends that the evidentiary standard applied in preliminary dumping determinations (as provided for in Article 7.1) is the same as that to be applied in determinations made under Article 10.7. This argument is incorrect. Normally, provisional measures may not be applied until

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[46] *See* Article 10.1 ("Provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 {preliminary determination of dumping and injury} ... enters into force, *subject to the exceptions set out in this Article*.") (emphasis added); and Article 7.2 ("Withholding of appraisement is an appropriate provisional measure, ... as long as the withholding of appraisement is subject to the same conditions as other provisional measures.").

[47] Japan implies, with the use of the word "generally" that it is not taking an absolute position (which would be clearly contrary to the Agreement). *See* Japan's Answer to Panel Question 11 at para. 37. However, Japan does not provide any example of a situation in which an administering authority would have *more* evidence prior to the preliminary determination of dumping than was on the record for this case. In fact, the Department in this case not only relied on the overwhelming evidence in the petition, but conducted external research, corroborated the data in the petition, and relied upon the USITC preliminary finding of threat of injury.

parties have had the opportunity to submit evidence and comments, and the administering authority has made a preliminary determination of dumping and injury.[48] An exception to this rule, however, is found in Article 10.7, which provides simply that withholding of appraisement or other necessary measures may be taken "after initiating an investigation" as soon as there is "sufficient evidence." It does *not* state that the measures must await a preliminary determination of dumping, nor does it require that the decision occur after the receipt of information from respondents. Rather, in order to preserve the ultimate remedy, it simply states that the measures may be taken "after initiation" if there is sufficient evidence.

42. The US agrees that the evidence necessary to sustain a preliminary critical circumstances finding may be, and indeed often will be, different than that required for initiation of an investigation, even though the standards are the same. The inquiries involved are different, and as such, the evidence that is sufficient for each determination will depend on the factors being considered and the context of the inquiry.[49] As explained above, it is especially notable that the Agreement provides that the evidence simply be "sufficient" in two instances which occur early in the investigative proceedings.

43. Japan suggests that a petition, along with the Department's independent research and analysis, can never serve as a basis for a preliminary determination of critical circumstances, regardless of the strength and quality of the evidence on the record. Japan bases this conclusion on three arguments. First, Japan argues that the reference to "dumped imports" in Article 10.6 requires a preliminary dumping finding as described in Article 7.1. Second, Japan argues that an administering authority cannot possibly make a critical circumstances finding prior to the Article 7.1 finding, because it has not conducted any investigation whatsoever. Finally, Japan argues that the evidence cannot be sufficient prior to an Article 7.1 finding, because the margins are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities." These arguments are without merit.

44. As explained above, Japan's first argument, that a preliminary finding of dumping is required, is contrary to the Agreement because it ignores the existence of Article 10.7, which expressly contemplates that measures may be taken at any time after initiation. Japan's second claim, that the Department has conducted no investigation when making its early critical circumstances finding, is flatly incorrect. The Department indeed investigated the allegations, reviewed the evidence contained in the petition for adequacy and accuracy, supplemented that information with additional relevant data and analyzed and relied upon the USITC's preliminary determination of threat to the domestic industry. Furthermore, Japan implies that the evidence necessary for a preliminary dumping determination is the same evidence that is necessary for an early critical circumstances determination. This position, however, confuses the findings being made. Each determination is based upon distinct factors, and thus, at least in part, involves collection and analysis of different evidence. Finally, Japan's argument that the margins utilized are based solely on "self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities," is disingenuous. *Japan does not contest that the margins are based upon comparisons of actual sales*

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[48] *See* Article 7.1 (provisional measures may only be taken after "parties have been given adequate opportunities to submit information and make comments" and "a preliminary affirmative determination has been made of dumping....") and 10.1 (provisional measures are to be applied in accordance with Article 7.1 *subject to the exceptions set forth in Article 10*).

[49] This distinction was recognized by the Panel in *HFCS*. In that case, the panel explained that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation." Panel Report on *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From (HFCS) the United States*, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.94.

offers by NKK and NSC to US customers and actual transactions in the home market.[50] Indeed, Japan has not rebutted the legitimacy of any of the specific evidence contained in the petition. Rather, Japan simply argues that, because it is contained in the petition, it is meaningless. This absolute argument should be rejected by the Panel.

45. In fact, the evidence supporting each element of the preliminary critical circumstances determination in this case was sufficient, and indeed, substantial. Japan repeatedly claims that, "the only evidence USDOC had was the petition."[51] However, while much of the evidence was taken from the petition (after being corroborated and reviewed for accuracy), the determination did not rest entirely on the petition data. Japan cannot contest that the Department not only corroborated the petition evidence with external research sources (Internet trade publications and general news articles, US Customs Service data, and American Iron and Steel Institute data),[52] but also relied significantly on the USITC preliminary determination of threat to the US industry. Furthermore, Japan does not suggest that the plethora of newspaper articles, consultant reports, and industry publications attached to the petition are unreliable or otherwise unrepresentative. Again, Japan simply states that, because they were contained in the petition, they are "mere allegations."

46. Although Japan repeatedly argues that the findings made were not based upon "sufficient evidence," Japan has never addressed the specific information that was on the record to support the critical circumstances finding. For example, with respect to importer knowledge of dumping and consequent injury, as discussed above, the record contained *actual* evidence of significantly high margins, and widespread, publicly distributed, media, consultant, and industry reports detailing the massive dumping and the negative impacts on the domestic industry.[53] Japan cannot possibly claim

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[50] *See* Initiation Checklist, at 7 (**US/B-18)**. Furthermore, the calculation of the dumping margins that were based upon constructed value were calculated using *NSC's and NKK's own financial statements. Id.*

[51] *See, e.g.*, Japan's Answer to Panel Question 13 at para. 37 (emphasis added).

[52] *See* Initiation Checklist at 70-71 **(Exh. US/B-18)**.

[53] *See* **Exh. US/B-40(b) and (c)**. The Wall Street Journal, *"Steel Imports to US Set Record in July; Japan Claims Its Shipments Are Slowing,"* ("In the latest month, imports took 34 per cent of the domestic market for steel .... That lost market share has hit US steelmakers hard, particularly in the last three months as the US industry pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their earning estimates for the third and fourth quarters. .... 'Japanese steel is just murdering' the US steelmakers."); Metal Bulletin (24 Sept. 1998) (" The July figure fully supports our industry's contention that massive levels of steel are being dumped."); Metal Bulletin (7 Sept. 1998) ("Nucor has cut production ... in response to low market prices ... because of market turmoil in the wake of a flood of cheap imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.... The collapse in steel prices on the world steel market this year has been almost unprecedented."); Japan Economic Newswire (19 Sept. 1998) ("officials of major US steelmakers ... made an appeal for the US government to take measures against what they view as unfair steel shipments from Japan ...."); Morgan Stanley, Dean Witter - Industry Report (21 July 1998) ("hot-rolled imports are coming in at ... 15-20 per cent below the domestic price, and we believe that domestic pricing on these products will break down in late September or early October."); The Wall Street Journal, *"Rising Imports Distress US Steelmakers,"* (8 Sept. 1998) ("And while it took months for major effects of inflows from overseas to show up in the US, industry analysts and executives now say they definitely have. 'The pricing has just collapsed....'"); American Metal Market (11 Sept. 1998) ("For the second time in less than two months, Nucor Corp., ... is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports."); PaineWebber: Metal Stock Strategies (16 Sept. 1998) ("We expect the US flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998."); Wall Street Transcript Corporation - Industry Report (20 July 1998) ("Imports were simply so large, and prices at which the entered markets so low, that steel pricing was compromised"); CRU Steel Monitor (April 1998) ("This decline in corporate profitability is being exacerbated by the Asian financial crisis.").

that the importers (many of which are sophisticated, large corporations) were not aware, or should not have been aware of the information reported in the Wall Street Journal, the PaineWebber reports and the other steel industry publications.[54] What is more, with respect to knowledge of injury, the Department also looked to the injury information in the petition (charts and industry data demonstrating drastic decreases in prices and resulting declines in profitability), the 101 per cent increase in imports during the surge period, and the USITC's preliminary determination of threat. As such, Japan's claims that the determination was based solely upon allegations from the petition are unfounded.

47. In sum, an administering authority is not merely capable of making an early critical circumstances determination based upon "sufficient evidence," like that presented here, but such an action is expressly authorized under the Agreement. The Panel should uphold the Department's preliminary critical circumstances determination in this case and the US statute upon which it is based.

PART 2: INJURY

I. THE CAPTIVE PRODUCTION PROVISION, ON ITS FACE AND AS APPLIED IN THIS CASE, IS CONSISTENT WITH THE OBLIGATIONS IN THE ANTI-DUMPING AGREEMENT

A. THE DIRECTION IN THE CAPTIVE PRODUCTION PROVISION TO "FOCUS PRIMARILY" ON THE MERCHANT MARKET PERMITS AN OBJECTIVE ANALYSIS OF RELEVANT ECONOMIC FACTORS CONSISTENT WITH ARTICLES 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

48. In arguing that the captive production provision of the United States' anti-dumping and countervailing duty statute on its face violates the Anti-dumping Agreement, Japan faces a high burden which its submissions fail entirely to meet. As GATT and WTO panels have repeatedly stated, only legislation that requires WTO-inconsistent action can itself be WTO-inconsistent.[55]

Japan also argues in its answer to Panel question 15, para. 9, that many of the newspaper articles do not establish knowledge of dumping and injury because they were published just weeks before the petition was filed. According to Japan, this was long after the date that USDOC concluded that importers knew or should have known of the dumping and consequent injury. If, however, the importers had knowledge at an earlier date, this only supports Commerce's finding of knowledge of dumping and injury for purposes of the critical circumstances determination. The Agreement does not specify *when* the importers had to be aware of dumping practices. Rather, it merely inquires as to whether dumping practices "exist," and whether importers should be aware that such dumping would cause injury. The newspaper articles and press releases demonstrate that dumping had been widespread for months and that the effects on the industry were widely apparent. This type of evidence (including both the early and later articles) certainly satisfies the question under Article 10.6(i). (Note, It also appears that Japan's reference the US First Submission Paragraph B-273, footnote 288, is incorrect. This cite should reference Paragraph B-476, footnote 388).

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

[55] Panel Report on Canada - Measures Affecting the Export of Civilian Aircraft, adopted on 14 April 1999, WT/DS70/R, para. 9.124 ("Canada – Aircraft"), citing the Panel Report on United States -

Panels have found that even legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action.[56] Indeed, these principles apply even where a Member has in fact used the provision to take action inconsistent with its obligations.[57]

49. Here, Japan seeks to have this Panel declare the United States' captive production provision unlawful on its face, even if the Panel should find that the determination by those Commissioners who applied the provision in this case is permissible. However, Japan's challenge must fail if the United States establishes, as it believes it has, that those three Commissioners who invoked the provision in the underlying investigation applied the provision in a way consistent with the Anti-dumping Agreement. If their findings here are consistent with the Agreement, the Panel should find that the provision that they applied is consistent as well.

50. Indeed, Japan's arguments in this proceeding appear to rest on the premise that the Panel should impose its own interpretation of US law in order to find the captive production provision contrary to the United States' obligations. This, however, is not the Panel's task. When examination of a law is solely for the purpose of determining whether a member meets its WTO obligations, the panel does not interpret the party's law "as such", the way it would, for instance, interpret provisions of the covered agreements.[58] Rather, a panel is called upon to establish the meaning of the provision as a factual element and to determine whether the factual element constitutes conduct contrary to WTO obligations.[59] When an interpretation of municipal law is at issue, a panel cannot assume that municipal authorities will choose an interpretation which is inconsistent with their international obligations.[60] This principle should apply all the more forcefully in the interpretation of an agreement, like the Anti-dumping Agreement, which specifically requires that independent judicial review of administrative decisions be available [61], an avenue that Japanese producers have declined to take in this case, and explicitly recognizes that Members may interpret the Agreement differently. [62] Thus, even if the application of the provision in this case were not consistent with the Anti-dumping Agreement, Japan must establish that a United States court could not interpret the provision in a manner consistent with the Agreement.

51. The captive production provision of United States law is entirely consistent with the Anti-dumping Agreement. The provision provides that, when certain prerequisites are met, the Commission shall "focus primarily" on the merchant market in its consideration of market share and financial indicators.[63] Japan ascribes two meanings to the "focus primarily" language that conflict

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Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted on 4 October 1994, BISD 41S/131, para 118 ("United States – Tobacco").

[56] Panel Report on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 138 ("US – Superfund").

[57] Panel Report on EEC - Regulation on Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132 ("EEC – Parts and Components"), at paras. 5.9, 5.21, 5.25-5.26.

[58] Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents"), WT/DS50/AB/R (19 December 1997) at para. 65, quoting Certain German Interests in Polish Upper Silesia, 1926, PCIJ Rep., Series A, No. 7, p. 19.

[59] *India-Patents* at para. 65.

[60] Under the municipal law of the United States, if a statute that an authority is charged with administering permits multiple interpretations, a court will uphold an authority's construction of the statute if that construction is reasonable; the interpretation's conformity with international obligations is a basis for finding the authority's action to be reasonable. *See, e.g., Chaparral Steel Corp. v. United States*, 901 F.2d 1097, 1101, 1103 n.5 (Fed. Cir. 1990) (**Exh. US/C 24**).

[61] Anti-dumping Agreement, Article 13.

[62] Anti-dumping Agreement, Article 17.6.

[63] Sec. 771(7)(C)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(C)(iv). (**Exh. Jp-4(e)**).

with the plain reading of the statute and that are not meanings the USITC has ascribed in applying the provision. In so doing, Japan is attempting to mischaracterize and reshape United States law in order to make it fit Japan's idea of a violation of the Anti-dumping Agreement. Japan cannot make out its case in this manner.

1. "Focus primarily" on the merchant market speaks to a segmented market analysis, but not to one where the USITC focuses exclusively on a particular market segment

52. The statutory provision at issue requires the USITC to focus *primarily* on the merchant market in evaluating certain factors. By definition, therefore, there is some *other* focus that the USITC should have as well. That is, under the statute's plain meaning, the inquiry does not end with examination of the merchant market. The statutory mandate that the impact upon the industry as a whole be assessed continues to be the overarching concern in the analysis.

53. Perhaps recognizing the flaw in its early reading of the statute, Japan retreats from its initial position that the statute mandates a focus exclusively on the merchant market. It now argues, instead, that, when the USITC focuses upon the merchant market, it improperly uses the entire industry as the other point of focus. According to Japan, an appropriate segmented analysis would look at the merchant market and the captive market separately.[64] Whether or not Japan's proposed alternative analysis would be consistent with the Agreement is not at issue here. "Conformity [with WTO obligations] can be assured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved."[65]

54. By advancing its alternative, Japan implicitly acknowledges that there are various ways to consider the fact that the performance of each segment of an industry may influence the performance of the whole industry differently. Japan has not articulated any basis for concluding that looking at the merchant market as a step in considering the market as a whole is less in accord with the Anti-dumping Agreement than the separate merchant/captive market analysis Japan suggests as an alternative. Indeed, Japan seems to concede that the US statute's initial focus on the segment in which imports primarily compete with domestic product is, as the *High Fructose Corn Syrup* panel suggested, calculated to allow the authority "to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry."[66] Japan's approach might also serve the same end; this would not mean, however, that its approach would be required.

55. Moreover, Japan does not show that the alternative approach it would prefer would be precluded by the United States statute, a burden that it must carry if it is to establish that the law is impermissible on its face. As the United States has previously indicated, a requirement to "focus primarily" on a certain segment does not prohibit other focuses, including on other segments. Moreover, under the United States statute, in evaluating the impact of dumped imports, the USITC is required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States".[67] In short, the form of segmented analysis preferred by Japan is neither required by the Agreement nor precluded by the United States statute.

56. As the United States has previously discussed, what the United States statute does require is a focus on the entire domestic industry after the merchant market is examined. This approach is clearly

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[64] Japan's Answer to Panel Question 19 at para. 70.

[65] Panel Report on *United States–Sections 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, at para. 7.24.

[66] See Panel Report on Mexico – Anti-dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States, adopted on 24 Feb. 2000, WT/DS132/R, at para. 7.154.

[67] 19 U.S.C. § 1677(7)(C)(iii).

consistent with the principle that the "determination of injury" under Article 3 concerns effects of dumped imports on the industry as a whole. In any event, consideration of the captive market data is inherent in such an analysis. Because the data for the entire industry incorporated data for the captive market, the side-by-side discussion of the merchant market and the entire industry inescapably reflected any similarities or differences between the merchant market and the captive market.

57. Contrary to Japan's claim that the USITC does not "relate its merchant market findings to producers as a whole"[68], the determination here shows how a primary focus on the merchant market for certain factors is consistent with such an analysis of the industry as a whole. In examining the volume of imports, the USITC set forth data and made parallel findings regarding the merchant market and the entire industry, finding on the basis of both that the volume of and increase in dumped imports was significant.[69] The USITC's findings as to the impact of dumped imports begin with an analysis that does not focus on the merchant market *per se*. Rather, the USITC found that the increased volume and market share of dumped imports led to the US industry's increased capacity becoming excess capacity almost immediately.[70] By these findings, the USITC's impact analysis tied its findings on market share, to which the captive production provision applies, to a key indicator of the performance of the industry as a whole -- capacity utilization -- to which the provision does not apply.

58. In analyzing financial performance, the USITC again made parallel findings, which showed that declines in the industry's performance on merchant market sales were mirrored by overall declines. Japan's claim[71], that the USITC discussed the data for the entire market only in its staff report, not in its determination, thus is belied by the face of the determination itself. The USITC found these trends not to be consistent with the industry's improvement in productivity and the rise in apparent consumption in the United States, both of which are overall measures not particular to the merchant market.[72] The USITC amply tied its findings concerning the merchant market segment to the industry as a whole.

59. The USITC's analysis, moreover, assured that the causal relationship that it saw between developments in the merchant market and the condition of the industry as a whole were not in fact due to developments in the captive sector of the industry. It compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition. It found their operating income to be falling both for merchant market sales and overall.[73] The USITC then compared the operating results of integrated producers to those of minimills. The USITC recognized that the minimills had "greater dependence on the merchant market, where imports are concentrated."[74] If this comparison had shown that minimills were performing as well or better overall as integrated producers, or that minimills were not similarly declining in performance, it might have indicated that the decline in the industry operating figures was not due in particular to the effects of imports. However, the USITC found minimills to be experiencing a "worse financial performance", evidently due to their greater exposure to import competition.[75] In short, contrary to Japan's contention, the USITC explicitly took into account that captive production is relatively shielded from the effects of imports. It nevertheless found that the record evidence supported the conclusion that the effects of imports in the merchant market adversely affected the industry as a whole.

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[68] Japan's Answer to Panel Question 19 at para. 66.
[69] USITC Views at 12-13 (**Exh. US/C-1**).
[70] USITC Views at 17.
[71] Japan's Opening Statement at para. 21.
[72] USITC Views at 18.
[73] USITC Views at 19.
[74] USITC Views at 19.
[75] USITC Views at 19.

60. As the USITC's determination shows, the captive production provision is entirely consistent with the Agreement. As the USITC's determination further shows, it examined the relevant economic factors and, on an objective basis, found a causal relationship between developments in the merchant market segment and the injury suffered by the industry as a whole.

2. "Focus primarily" does not dictate that any particular weight be given to the merchant market in the USITC 's evaluation of the relevant factors

61. Japan now states that it takes issue only with the particular analysis that it views as required by the captive production provision, not that an analysis of the merchant market violates the Agreement. In this regard, Japan acknowledges that it is permissible to consider "as a condition of competition, the merchant versus captive portions of the [market]."[76] It frames its challenge, therefore, in terms of the "weights" it believes the statute requires to be given to "factors."

62. It is unclear, however, whether Japan is arguing that the captive production provision requires the USITC to give weight to one factor over another or to give inappropriate weight to the merchant market segment. In either case, Japan misreads the captive production provision and misunderstands the USITC's application of the provision in this investigation.

63. To the extent that Japan claims the captive production provision requires greater weight to be given to some delineated factors over others, there is no basis for the claim. The "focus primarily" language does not require that emphasis be placed on any factor. The captive production provision gives direction to the USITC "*in determining* market share and the factors affecting financial performance"[77] (emphasis added). It therefore only implicates the evaluation *of those factors* and not the evaluation of *how those factors* relate to any of the other factors that the USITC must consider. The provisions of the Anti-dumping Agreement[78] and the US statute[79] that permit the USITC to give the weight it deems appropriate to any relevant factor is not affected by the terms of the captive production provision. As has been seen, in this case, the USITC gave emphasis to the effect of dumped imports on capacity utilization, a factor not implicated by the provision, in establishing the impact of dumped imports on the domestic industry. Japan's allegation that the captive production provision impermissibly constrains the USITC's ability to objectively assess all the relevant economic factors is belied both by the face of the statute and the determination at issue here.

64. To the extent that Japan is arguing that, in evaluating certain factors, the captive production provision requires that undue weight be given to the merchant market, this argument too should not hold sway. The USITC has not given any indication that the captive production provision requires it to place more weight on the merchant market data for any factor than on the data for the industry as a whole. As is reflected in the USITC's determination here, the requirement to "focus primarily" on the merchant market in establishing certain factors does not necessarily mean more than to collect and make specific findings based on merchant market data that, which always possible, might not otherwise be required. It does not mean that, having examined that data, the USITC is required to give weight to that data over what other evidence might show. And, indeed, on each relevant factor concerning market share and financial indicators, the USITC assured that it examined and gave weight to data for the industry as a whole.

65. Such a requirement is neither, as Japan asserts, meaningless, nor a violation of the Anti-dumping Agreement. The captive production provision requires the gathering and analysis of

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[76] Japan's Opening Statement at para. 23.
[77] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).
[78] Article 3.4 of the Anti-dumping Agreement.
[79] § 771(7)(E)(ii) of the Act, 19 U.S.C. § 1677(7)(E)(ii) (**Exh. Jpn-4(e)**).

evidence that the statute might not otherwise require of the USITC. The provision may be said to require, as a matter of municipal law, a form of segmented analysis such as that which the *HFCS* panel indicated was permitted under the Anti-dumping Agreement. This does not mean that, even as to the factors to which the provision applies, the USITC must give the merchant market segment data weight over contrary evidence on which it otherwise may also focus. The provision does not prevent an objective examination of all the information collected.

66. Japan's distrust of special examination of merchant market trends is based on the false premise that such an examination will necessarily skew data concerning the domestic industry's performance unfavourably to foreign producers.[80] This is not the case. First, as has been seen, the USITC nevertheless collects and assesses the data concerning the entire industry. Second, an examination of data particular to the segment where competition primarily occurs may disclose that trends concerning the industry as a whole, which might otherwise appear to disclose a connection between imports and injury, are misleading. Japan's allegation assumes that the domestic industry will always fare worse in the merchant market than it does in the captive market. The industry, however, could be performing worse in the captive market than in the merchant market. In that scenario, a failure to look at the merchant market may exaggerate the effects of dumped imports.

67. The captive production provision in no way mandates action in conflict with the Agreement. It does not preclude an objective evaluation consistent with the requirement of the Agreement, as well as US law, that the assessment be made, to the extent possible, in relation to the dumped imports' impact on domestic producers of the like product "as a whole". The law on its face does not constitute conduct by the United States contrary to its WTO obligations.

II. THE USITC'S ANALYSIS IN THIS CASE WAS IN ACCORDANCE WITH THE ANTI-DUMPING AGREEMENT

A. THE USITC PERFORMED AN OBJECTIVE EVALUATION OF ALL THE RELEVANT ECONOMIC FACTORS OVER THE ENTIRE PERIOD OF INVESTIGATION

68. Despite the fact that the USITC's determination clearly contains an analysis of data over the three year period of investigation, Japan continues to claim that the USITC did not evaluate data about the impact factors over the entire period.[81] By simply reading the USITC's determination, this panel can see that Japan's claim is patently false. With respect to the impact factors in particular, despite Japan's allegations to the contrary, the USITC explicitly evaluated capacity, capacity utilization, productivity, unit costs of goods sold, unit values, employment, wages, and capital expenditures from 1996 to 1998.[82] The USITC plainly examined trends over the full period investigated.

69. Japan then narrows its objection even further. From focusing on the impact factors, it turns to arguing that the USITC did not discuss the fact that the financial performance of the industry as a whole purportedly improved over the three year period of investigation.[83] Once again, this claim is specious. The USITC discussed three year trends of financial indicators, expressly noting that the cost of goods sold declined by more than the unit values over the entire period of investigation.[84] The USITC also found that the domestic industry "maintained an operating profit."[85] As the USITC explained, however, other evidence made this profitability less important to its determination.

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[80] Japan's Opening Statement at para. 21.
[81] Japan's Answer to Panel Question 18 at para. 60.
[82] USITC Views at 17-18 nn.100-101.
[83] Japan's Answer to Panel Question 18 at para. 65.
[84] USITC Views at 18 n.100.
[85] USITC Views at 18.

70. The fact that the USITC *also* examined the data from 1997 to 1998 does not detract from this full-period analysis. Japan attempts to characterize the decision of the USITC to consider the 1997 to 1998 data as a decision to reject an analysis of trends over the entire period. Japan's account does not comport, however, with what the USITC did. Consistent with Article 12.2 of the Agreement, the USITC provided its "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." In particular, importers and exporters before the USITC, like Japan here, contended that the USITC should rely on 1996-98 performance data to find the domestic industry not to be injured, rather than on the 1997-98 trends.[86]

71. The USITC's explanation of why it chose to rely on 1997-98 data rather than on the 1996-1998 data evidences the USITC's consideration of the 1996-98 data. Article 3.4 does not require that an authority's determination restate every index having a bearing on the state of the industry. Rather, Article 3.4 states that the examination of the impact of dumped imports shall include an "evaluation" of all relevant indices. The USITC's statement of its reasons for rejecting respondents' arguments concerning the 1996-98 data demonstrates its evaluation of that index.

72. Japan's argument confuses the USITC's justification for comparing the data from1997 to 1998 with an expression of its intention not to examine data over the 1996 to 1998 period. To the contrary, the USITC's justification for making a comparison between the 1997 and 1998 data reflected its evaluation of the probative value of the 1996-98 data in view of the changes in demand in the market that had occurred since 1996. Indeed, the USITC based the decision to rely on 1997 to 1998 data on the fact that "US apparent consumption increased throughout the period of investigation, both *from 1996 to 1997* and from 1997 to 1998, reaching record levels."[87] The USITC's determination shows that it evaluated "trends between the first and third years of a period that conflict with trends between the second and third years of a period," which Japan claims are "especially relevant."[88] What Japan couches as an argument that the USITC did not examine 1996-98 data is no more than a challenge to the weight that the USITC gave to 1997-98 data;[89] the weight of evidence, however, is for the authority to decide.

73. Japan cites *Argentina - Footwear*[90] as support for its position that the USITC improperly evaluated the data from 1997 to 1998 instead of comparing 1996 to 1998.[91] In fact, this decision shows the flaws in the Japanese position. *Argentina - Footwear* expressly rejects the notion that an authority should simply make a comparison of the data between the beginning and endpoints of the period of investigation. It states that trends within the period are an important part of any decision.[92] Thus, *Argentina - Footwear* in fact supports the USITC's determination.

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[86] USITC Views at 18.

[87] USITC Views at 18.

[88] Japan's Answers to Panel Question 18 at para. 60.

[89] Cf. United States -- Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87) ("Atlantic Salmon"), at ¶ 539.("Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 3:3 [now Article 3.4] that the positive developments reflected in the indicators referred to by Norway could not per se have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury.") (emphasis in original).

[90] Report of the Appellate Body, *Argentina -Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), adopted on 12 January 2000, WT/DS121/AB/R.

[91] Japan's Answer to Panel Question 18 at paras. 62-63

[92] *Argentina - Footwear* at para. 129.

74. Further, this panel should note that Japan makes inconsistent arguments about the appropriate time frame in an analysis of injury. With regard to the financial indicators, it is claiming that the USITC erred because it considered intervening trends, but when it discusses alternative causes of injury, it is alleging that the USITC erred because it did *not* consider trends within the period.[93] In the latter context, it argues that the USITC improperly did not compare data for the first half of 1998 with data from the second half of 1998 in order to fully appreciate the effect of the General Motors strike on the domestic industry.[94] Not only is Japan incorrect in stating that the USITC did not consider this time frame, but, in making this argument, it is conceding that an evaluation of trends within the period may, under certain circumstances, be more probative.

B. THE USITC PROPERLY DETERMINED THAT DUMPED IMPORTS WERE CAUSING MATERIAL INJURY TO THE DOMESTIC INDUSTRY

1. The USITC demonstrated a causal relationship between dumped imports and material injury

75. Contrary to Japan's argument, which it raised for the first time in its opening statement at the first panel meeting, the USITC amply established the causal relationship between dumped imports and the injury to the domestic industry. As has been seen, the USITC found that the increased dumped imports led the domestic industry to have excess capacity. Further, for example, it found that "at the same time as subject import volumes and market share increased dramatically, the domestic industry's market share declined;"[95] "domestic producers were prevented from participating in the increasing demand as subject imports increased their market share",[96] "declines [in prices] were most precipitous in the third and fourth quarters of 1998, at a time when the volume of subject imports was peaking;"[97] and "unit values fell significantly in 1998 as subject imports increased in volume and market share."[98] Such findings demonstrate "a causal relationship between the dumped imports and the injury to the domestic industry" as required by Article 3.5.

(a) The USITC properly found a correlation between the dumped imports and the price declines

76. Japan points to a three-month lag time between orders for Japanese product and its importation.[99] The existence of this lag time does not, however, defeat the USITC's conclusion that the increase in imports when price underselling increased supported the causal relationship between dumped imports and injury. First, this nexus was not established solely on the basis of a relationship between imports and prices in a particular quarter. Rather, the USITC found the instances of underselling to have increased in 1997 and 1998 as opposed to 1996, concurrently with a rise in import volume and market share and a decline in industry annual performance indicators.[100] As the USITC concluded, full year data was sufficient to support its affirmative determination.[101]

77. Moreover, evidence concerning the nature of pricing in the market supported the USITC's reliance on the fact that price declines were most precipitous in the third and fourth quarters of 1998, when import volumes peaked. The fact that some imports in those quarters were made pursuant to earlier contracts does not mean that the prices of those imports were not set when the importations

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[93] First Submission of Japan at para. 275.
[94] First Submission of Japan at para. 277.
[95] USITC Views at 12.
[96] USITC Views at 12.
[97] USITC Views at 14.
[98] USITC Views at 18.
[99] Japan's Answer to Panel Question 47 at para. 107.
[100] USITC Views at 14-15.
[101] USITC Views at 20.

were made. To the contrary, during the hearing, respondents' witnesses testified that, in many cases, purchasers demanded lower prices after a contract had been negotiated, threatening to cancel the order if the prices did not come down.[102] In fact, Japanese respondents testified that, if prices in the market fell between the time of an order and the time scheduled for delivery, the prices were renegotiated.[103] This evidence shows that the lag time for orders does not translate into a lag time for price effects of imports. Therefore, consistent with the Japanese parties' own witnesses, the correlations that the USITC drew between the time of entry of the imports and the declining prices for hot rolled steel in the United States are not affected by the lag time between date of order and date of delivery.

(b) The USITC determined that the dumped imports were causing material injury in accordance with Article 3.5 of the Anti-dumping Agreement.

78. As the United States has discussed in its answer to the Panel's questions[104], the phrase "imports are causing material injury" had been interpreted under the Tokyo Round Anti-dumping Code not to require that an authority isolate the particular quantum of injury due to imports from the injuries due to other causes and determine that quantum of injury to be "material". In adopting that phrase in Article 3.5, the negotiators of the Anti-dumping Agreement reflected that they would not change that conclusion. Rather, adopting also the phrase "a causal relationship", they indicated that a demonstration of causation must show a connection between the effects of imports and material injury, not that dumped imports are the only factor so connected. Such a demonstration, consistent with the requirement not to attribute to dumped imports the effects of other causes, must not mistakenly rely on indicators of such a relationship that are in fact due to other causes of injury.

79. Japan nevertheless argues that the USITC violated the Agreement by stating that "the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance."[105] The USITC's legal conclusion was that the domestic industry "is materially injured by reason of LTFV [*i.e.*, dumped] imports of hot rolled steel from Japan."[106] Japan does not contend that this conclusion differs from the conclusion that dumped imports are causing material injury.

80. The USITC's use of the phrase "materially contributed" in effect recognizes that, although in using the phrase "a causal relationship" Article 3.4 does not establish a precise degree of relationship that must be demonstrated between the effects of imports and injury, that relationship must not be trivial. Use of the phrase "materially contributed" is entirely in accord with the ordinary meaning of the term "cause." *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." *Webster' s* makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> CAUSE indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[107]

In short, the phrasing of which Japan complains is simply one way of restating the term "cause."

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[102] Transcript of 4 May 1999, Hearing at 242 (testimony of Mr. Curtis) (**Exh. US/C 25**).
[103] Transcript at 246-47 (testimony of Mr. Stapp).
[104] US Answer to Panel Question 46.
[105] USITC Views at 20-21.
[106] USITC Views at 23.
[107] Webster's Third New International Dictionary (Unabridged) at 356 (1981) (**Exh. US/C 26**).

81. In considering the adequacy of the USITC's demonstration of this causal relationship, it is instructive to compare the findings that it made here to those upheld by the panel in *Atlantic Salmon*, whose analysis was before the negotiators of the Anti-dumping Agreement. In *Atlantic Salmon*, the panel found that the "USITC had not failed to consider whether there had been a significant increase in the volume of subject imports."[108] The USITC's decision that the panel upheld discussed the existence of a surge in imports from Norway, but also found that market penetration of these dumped imports declined.[109] In the current case, not only did dumped imports double in volume; they doubled their market shares as well.[110]

82. As to price effects, the *Atlantic Salmon* panel found that, "on its face, the text of the USITC determination demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway."[111] As part of its analysis in that case, the USITC concluded that, "[a]lthough other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a role in the price decline."[112] The *Atlantic Salmon* panel reached this conclusion notwithstanding the fact that in that case the dumped imports persistently oversold the domestic product.[113] In the current case, the USITC found that imports that increased by 10 million tons over 1997 and 1998, including 7 million tons in 1998, and increasingly undersold the US product in that period, had significant price effects. Japan's argument that a strike at General Motors that affected no more than 685,000 tons of product over a period of five weeks had significant price effects only reinforces the USITC's conclusions about the price effects of the massively increased imports.

83. The panel in *Atlantic Salmon* also upheld the USITC's determination about the negative financial performance of the US industry[114] when the USITC found, "After posting a large operating loss in 1987, the domestic industry recorded an overall operating profit in 1988. However, the financial state of the US Atlantic salmon industry declined precipitously in 1989."[115] The USITC found a similar end-of-period trend in operating income in this case.

84. In short, the United States submits that, in order to establish that the USITC's demonstration of a causal relationship between dumped imports and material injury in this case violates the Anti-dumping Agreement, Japan must establish that the Anti-dumping Agreement requires an analysis significantly different from that upheld under the Tokyo Round Code. Japan has not attempted such a showing, and cannot make it.

III. THE USITC CONDUCTED THE PROCEEDINGS IN THIS INVESTIGATION IN AN UNBIASED AND FAIR MANNER

85. The United States has previously addressed Japan's argument that the USITC Commissioners should not have requested at the USITC's hearing that domestic producers provide information that they had not previously provided. The United States will not here reiterate its points on the matter. Japan now, however, takes issue with the USITC's acceptance of that submission because, it claims, "respondents literally had less than a week to comment on the corrected figures, and then only briefly,

[108] *Atlantic Salmon* at para. 501.
[109] *Atlantic Salmon* at para 499.
[110] USITC Views at 12.
[111] *Atlantic Salmon* at para. 514.
[112] *Atlantic Salmon* at para. 514.
[113] *Atlantic Salmon* at para. 518.
[114] *Atlantic Salmon* at para. 538.
[115] *Atlantic Salmon* at para. 535.

as final comments are strictly limited to fifteen pages in length per respondent country."[116] This contention fails to make out a claim under the Agreement.

86. As reflected in the final USITC's staff report, US producers submitted the requested data before the report issued, and that information was incorporated into the report.[117] The staff report was issued to the parties on 27 May 1999. In fact, the US producers had submitted to the USITC and served on the other parties the final piece of information on this point several weeks prior to issuance of the final report. Parties submitted their final comments on the information obtained in the investigation to the USITC on 7 June 1999. Thus, respondents had several weeks to prepare their comments on this information, not the seven days that Japan claims.

87. Further, respondents were not limited to a fifteen page submission. On 2 June 1999, respondents requested to file more than fifteen pages for their final comments. They made this request, not because of an issue with the information in the record, but because of the fact that one counsel was representing producers from several different countries.[118] In fact, respondents' final comments were 29 pages long.[119]

88. In any event, Japan's argument does not establish that the USITC in any way violated the applicable provision concerning parties' opportunity to comment on information. The relevant provision is Article 6.9, which provides that authorities, before a final determination is made, shall inform all interested parties of the essential facts under consideration. Article 6.9 further provides, "Such disclosure should take place in sufficient time for the parties to defend their interests."

89. Notably, Article 6.9 does not define what constitutes a "sufficient time" nor does it require authorities to afford parties unlimited numbers of pages in which to present their arguments. In the current case, respondent interested parties in fact commented on the US producers' data in final submissions. None complained that either the time or pages that they were afforded for comment was insufficient. None complained that, with more time or space, they would have had more to say. None requested that, as its rules allow, the USITC make an exception to the limitations set forth in its normal procedures.[120] They only requested clarification of the rule on comments, and they never made reference to the domestic industry's data in that request. In short, the Japanese respondents having failed in the administrative proceedings to object to the time and space they were given, Japan's argument at best consists of the contention that a week for response and a limitation of the number of pages in which to make that response is *per se* insufficient. Nothing in the Agreement supports such a contention.

90. Indeed, Japan should be barred from making such a contention. In arguing the USITC failed to afford parties sufficient time to defend their interests, that contention is beyond this Panel's terms of reference. Japan's panel request does not state any claim arising under Article 6.9 or mention that Article at all. Thus, unable to make a substantive claim under Article 6.9, Japan should not be permitted to substantiate this claim through vague and unsupported allegations of bias.

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[116] Japan's Answer to Question 44 at para. 98.
[117] USITC Views at VI-1.
[118] 2 June 1999 letter to Chairman Bragg (**Exh. US/C-27**).
[119] Selected pages from Respondents' Comments (**Exh. US/C-28**).
[120] *See* 19 C.F.R. §§ 201.4(b) & 201.14(b)(2) (**Exh. US/C-29**).

CONCLUSION

91. For the foregoing reasons, the United States requests that the Panel reject Japan's claims in their entirety.

ANNEX C-3

Letter from the United States to the Chairman of the Panel

(21 September 2000)

The United States has raised a preliminary objection to Japan's submission to the Panel of factual information not made available to the US authorities during the antidumping duty investigation, i.e., extra-record evidence. In its questions to the United States, the Panel asked the United States to list the exhibits that should not be considered by the Panel because they are extra-record evidence. The United States responded on 6 September. Since the time of that response, the United States notes that Japan has put before this Panel, in its second submission of 13 September, two additional pieces of extra-record evidence that should not be considered by the Panel.

First, at note 353, Japan cites profit figures from an annual report of a US producer. Japan apparently admits that the annual report was not submitted to the US International Trade Commission ("USITC"), but states that purportedly similar information was given to the USITC. As the United States has previously made clear, we have no objection to Japan's use of any information presented to the USITC, with respect to "injury" issues, but ask that the Panel disregard this new, extra-record evidence.

Second, Japan's exhibit JP-105 contains information from two web sites, described at note 372 of Japan's second submission. Neither these web sites nor their content were presented to the USITC during the course of the antidumping investigation. In addition, Japan retrieved these web sites on 5 September 2000, as the date on the pages demonstrates. Therefore, the information contained in those documents may not even be relevant to the time period under investigation, and may not even have existed at the time of the investigation.

We ask that the panel disregard the above extra-record evidence contained in Japan's second submission.

The United States is providing a copy of this submission directly to the Government of Japan.

ANNEX C-4

Letter from Japan to Chairman of the Panel

(25 September 2000)

On 21 September 2000, the United States filed a letter with your office registering its objection to certain evidence referenced in Japan's Second Submission. Japan believes that the items to which the United States now objects are properly before the Panel, for the following reasons:

The information contained in footnote 353 of Japan's Second Submission is from the 1999 annual report of Steel Dynamics Inc. ("SDI"). During the course of its investigations, USITC requests the annual reports of domestic producers in their questionnaires. Specifically, Question III-4 of the domestic producer questionnaire issued in the hot-rolled steel case requested the producers to submit their annual reports if they were not available on the internet.[1] (While the staff report does not state which domestic producers submitted completed questionnaires, it can be assumed that SDI did so given that it was named as a petitioner.[2]) Therefore, although USITC's confidential record has not been made available to the Panel, it is safe to assume that the information cited in footnote 353 - SDI's operating profits for 1997 and 1998 - was contained in the annual report(s) accompanying SDI's questionnaire response. Given that this 1997 and 1998 data is the only information referenced in footnote 353, it is irrelevant whether the 1999 annual report itself was on the record (Japan did not provide the entirety of the 1999 annual report as an exhibit to its Second Submission).

The documents in Exhibit JP-105 merely show that Lone Star Steel and Newport Steel specialize in supplying hot-rolled steel sheet for pipe and tube production. Question II-23 of USITC's domestic producers' questionnaire asked each company to report the percentage of its shipments devoted to pipe and tube products.[3] Japan admits that, unless Lone Star and Newport submitted questionnaire responses, USITC might not have had record information before it to suggest that they specialized in hot-rolled steel for pipe and tube production.

Neither producer was a petitioner, and the public staff report gives no indication that either firm returned a questionnaire response to the staff. The staff report does, however, identify both companies as hot-rolled steel producers[4], and it is a matter of public record that both companies specialize in pipe and tube production, as demonstrated by their websites. Further, Japan only offers Lone Star Steel and Newport Steel as examples of companies dependant on the pipe and tube market that would have been hard hit by the pipe and tube recession. Even without these examples, Japan's logic is irrefutable: Even though overall apparent consumption reached a record high in 1998, companies dependant on the pipe and tube market would have nevertheless lost money for reasons unrelated to subject imports. Nonetheless, USITC completely ignored this alternative cause in its determination.

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[1] **Exh. JP-106** (attached).
[2] *USITC Final Injury Determination*, USITC Pub. 3202 at III-3 (**Exh. JP-14**).
[3] **Exh. JP-106** (attached).
[4] *USITC Final Injury Determination*, USITC Pub.3202 at III-2 (**Exh. JP-14**).