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

AB-2001-2

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan

United States, *Appellant/Appellee*
Japan, *Appellant/Appellee*

Brazil, *Third Participant*
Canada, *Third Participant*
Chile, *Third Participant*
European Communities, *Third Participant*
Korea, *Third Participant*

AB-2001-2

Present:

Taniguchi, Presiding Member
Feliciano, Member
Lacarte-Muró, Member

I. Introduction

1. The United States and Japan appeal certain issues of law and legal interpretations in the Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (the "Panel Report").[1] The Panel was established to consider a complaint by Japan with respect to anti-dumping measures imposed by the United States on imports of certain hot-rolled flat-rolled carbon-quality steel products ("hot-rolled steel") from Japan.

2. On 15 October 1998, the United States Department of Commerce ("USDOC") initiated an anti-dumping investigation into imports of hot-rolled steel from, among others, Japan.[2] USDOC determined that it was not practicable to examine all known Japanese producers and exporters and, therefore, conducted its investigation on the basis of a sample of Japanese producers. USDOC selected Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") for individual investigation.[3] USDOC calculated an individual dumping margin for each of these companies. USDOC also established a single rate of anti-dumping duty applicable to all those Japanese producers and exporters not individually investigated (the "all others" rate). The "all others" rate was calculated as the weighted average of the individual dumping margins

[1]WT/DS184/R, 28 February 2001.

[2]Panel Report, para. 2.3. The United States International Trade Commission had already instituted an injury investigation. (Panel Report, para. 2.2)

[3]These three companies accounted for more than 90 per cent of all known exports of hot-rolled steel from Japan during the period of investigation. (Panel Report, para. 2.3)

calculated for KSC, NSC and NKK.[4] On 6 May 1999, USDOC published its final affirmative dumping determination.[5] On 23 June 1999, the United States International Trade Commission (the "USITC") published its final affirmative determination of injury to the United States' hot-rolled steel industry.[6] On 29 June 1999, USDOC published an anti-dumping duty order imposing anti-dumping duties on imports of hot-rolled steel from Japan.[7] The factual aspects of this dispute are set out in greater detail in paragraphs 2.1 to 2.9 of the Panel Report.

3. The Panel considered claims by Japan that, in imposing the specific anti-dumping measures on hot-rolled steel, the United States acted inconsistently with Articles 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 6.1, 6.6, 6.8, 6.13, 9.3, 9.4, 10.1, 10.6, and 10.7 and Annex II of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"); and with Article X:3 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); and claims that certain provisions of United States' anti-dumping laws, regulations, and administrative procedures are inconsistent with Articles 2.1, 2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 6.8, 9.4, 10.1, 10.6, 10.7 and Annex II of the *Anti-Dumping Agreement*. Japan asked the Panel to recommend that the Dispute Settlement Body request the United States to ensure, in accordance with Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and Article 18.4 of the *Anti-Dumping Agreement*, the conformity of the specified provisions of its anti-dumping laws, regulations, and administrative procedures with its obligations under the *Anti-Dumping Agreement*.[8]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 28 February 2001, the Panel concluded:

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

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[4]Panel Report, para. 2.6.

[5]USDOC established the following margins of dumping: 67.14% for KSC; 19.65% for NSC; and 17.86% for NKK. The "all others" rate was 29.30%. (Panel Report, para. 2.7; Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan ("USDOC Final Determination"), United States Federal Register, 6 May 1999 (Volume 64, Number 87), Exhibit JP-12 submitted by Japan to the Panel, p. 24329 at 24370)

[6]Panel Report, para. 2.8.

[7]*Ibid*., para. 2.9.

[8]*Ibid*., para. 3.1. Japan also asked the Panel to recommend that: (i) if the Panel determined that the imported products were not dumped or did not injure the domestic industry, that the DSB further request that the United States revoke its anti-dumping duty order and reimburse any anti-dumping duties collected; and (ii) if the Panel determined that the imported products were dumped to a lesser extent than the duties actually imposed, that the DSB further request that the United States reimburse the duties collected to the extent of the difference.

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

(c) that the United States acted inconsistently with Article 2.1 of the AD Agreement in excluding certain home-market sales to affiliated parties from the calculation of normal value on the basis of the "arm's length" test. In addition, in light of the findings above, we conclude that the replacement of those sales with sales to unaffiliated downstream purchasers was inconsistent with Article 2.1 of the AD Agreement.[9]

5. The Panel further concluded:

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

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

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

[9]Panel Report, para. 8.1.

(d) that United States did not act inconsistently with Article X:3 of GATT 1994 in conducting its investigation and making its determinations in the anti-dumping investigation underlying this dispute.[10]

6. The Panel concluded that, to the extent the United States had acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it had nullified or impaired benefits accruing to Japan under that Agreement.[11] The Panel recommended that the Dispute Settlement Body ("DSB") request the United States to bring its measure into conformity with the *Anti-Dumping Agreement*.[12]

7. On 25 April 2001, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 7 May 2001, the United States filed its appellant's submission.[13] On 10 May 2001, Japan filed an other appellant's submission.[14] On 21 May 2001, Japan and the United States each filed an appellee's submission.[15] On the same day, Brazil, Canada, Chile, the European Communities and Korea each filed a third participant's submission.[16]

8. The oral hearing in the appeal was held on 1 and 2 June 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

[10]Panel Report, para. 8.2. At para. 8.3 of its Report, the Panel explained that it did not consider the remaining claims made by Japan, either because it had found that those claims fell outside the Panel's terms of reference, or for reasons of judicial economy.

[11]*Ibid*., para. 8.4.

[12]*Ibid*., para. 8.8. At paras. 8.5-8.14 of its Report, the Panel declined to make more specific suggestions regarding implementation.

[13]Pursuant to Rule 21 of the *Working Procedures*.

[14]Pursuant to Rule 23(1) of the *Working Procedures*.

[15]Pursuant to Rules 22 and 23(3) of the *Working Procedures*.

[16]Pursuant to Rule 24 of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

9. The United States claims the Panel erred in finding that the use of facts available in determining the dumping margins for NSC and NKK was not consistent with the requirements of Article 6.8 of the *Anti-Dumping Agreement*.[17] The United States interprets Article 6.8 as allowing an investigating authority to enforce reasonable, pre-established deadlines for data submission. Since, in the view of the United States, this is a permissible interpretation of the relevant provision, and since NSC and NKK failed to provide the relevant weight conversion factors within USDOC's reasonable deadlines, the rejection of this data was consistent with the *Anti-Dumping Agreement.*

10. The United States underlines that the enforcement of reasonable, pre-established deadlines for the submission of requested information is consistent with the terms of Article 6.8 and Annex II and with the object and purpose of the *Anti-Dumping Agreement*, and ensures a rules-based, transparent, and predictable administration of anti-dumping law. The Panel's interpretation, however, precludes enforcement of reasonable deadlines, wrongly reads the requirement of "timeliness" out of paragraph 3 of Annex II of the *Anti-Dumping Agreement*, and ignores Article 6.1.1 of the *Anti-Dumping Agreement*, which specifically provides for the use of deadlines for questionnaire responses. The United States adds that, since NSC and NKK were given 87 days to submit weight conversion factors, the deadlines established by USDOC in this case were reasonable.

11. The United States asserts that the Panel further erred in finding that an unbiased and objective investigating authority evaluating the evidence before USDOC could not reasonably have concluded that KSC failed to "cooperate" in providing requested information.[18] According to the United States, the Panel engaged in "sheer speculation"[19] when it concluded that any action by KSC to obtain the requested information from its United States affiliate, California Steel Industries Inc. ("CSI"), "would have inevitably disrupted the on-going business relationships" of the companies.[20] The Panel also drew unreasonable inferences from the facts that were on the record in concluding that, because CSI was a petitioner, it had interests opposed to those of KSC.[21] As USDOC found, it was not clear that CSI's interests were opposed to those of KSC. Furthermore, there is *no* evidence on the record that

[17]Panel Report, paras. 7.57 and 7.59.

[18]*Ibid*., para. 7.73.

[19]United States' appellant's submission, para. 72.

[20]Panel Report, para. 7.73.

[21]*Ibid*.

KSC ever sought any assistance from Companhia Vale de Rio Doce ("CVRD"), its joint venture partner in CSI, or that CVRD would have been uncooperative. Thus, the United States reasons, even if the Panel might itself have reached a different conclusion in the first instance, the evidence on the record does not support its conclusion on review that an objective and unbiased authority could not have found KSC to be uncooperative. Accordingly, the United States requests the Appellate Body to reverse the Panel's finding on this issue and to find that USDOC's application of facts available to KSC was not inconsistent with Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

2. Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

12. The United States contends that the Panel erred in finding that the United States' statute providing for the calculation of the "all others" anti-dumping rate does not constitute a permissible interpretation of Article 9.4 of the *Anti-Dumping Agreement.* In the view of the United States, the Panel adopted an interpretation that is not supported by the text, context, or object and purpose of Article 9.4, in requiring the exclusion from the "all others" rate of *any* margin containing even the *smallest* amount of facts available. In particular, the Panel wrongly interpreted the phrase "margins established under the circumstances referred to in paragraph 8 of Article 6". In the view of the United States, margins "established" on the basis of facts available are margins that are "founded" upon facts available, but *not* margins that include only *minimal amounts* of facts available.

13. In support of its argument that only margins based "entirely" on facts available must be excluded, the United States points out that Article 9.4 also excludes *overall* zero and *de minimis* margins – not "portions" of margins, from the "all others" rate. The United States also observes that the use of some amount of facts available is a common necessity in the establishment of a dumping margin, and that such facts available will not necessarily be adverse to the exporter concerned. Therefore, the United States insists, the Panel's interpretation, which requires the exclusion from the "all others" rate of *all* margins containing *any trace* of facts available (even when those margins are based predominantly on data submitted by respondents and duly verified), would render it impossible to calculate an "all others" rate in most cases, and, for that reason, frustrates the purpose of Article 9.4.

3. Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

14. The United States argues that the Panel erred in finding that USDOC's "arm's length" or 99.5 percent test, which is used to determine whether home market sales to affiliated customers were made "in the ordinary course of trade", was not a permissible interpretation of Article 2.1 of the *Anti-*

Dumping Agreement.[22] It is generally recognized that sales to affiliated customers may be outside "the ordinary course of trade". The Panel found that USDOC's test was impermissible because it excluded only sales to affiliates paying, on average, *below* arm's length prices. However, the *Anti-Dumping Agreement* does not compel investigating authorities to use the *same* test to determine whether different categories of sales, such as those above and those below arm's length prices, are outside "the ordinary course of trade." As regards sales to affiliates at artificially *high* prices, USDOC does not address them unless a respondent makes an allegation that they are outside "the ordinary course of trade." The United States points out that, in this case, the Japanese respondents never sought to have USDOC exclude any such high-priced sales.

15. According to the United States, the 99.5 percent test does not "skew" normal value upward; to the contrary, the test simply removes the distortion that would otherwise be caused if artificially low-priced sales to affiliates were included in the calculation of normal value. The United States argues that the Panel, in its reasoning, failed adequately to take into account the argument of the United States that sales which might be outside the ordinary course of trade for *other* reasons could be addressed by *other* tests, just as, for example, sales *below cost* are addressed by a different test to determine whether they are outside the "ordinary course of trade".

16. The United States also submits that the Panel erred in finding that the replacement of excluded sales to affiliates with the sales by those affiliates to downstream purchasers in this case was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*.[23] Article 2.1 of the *Anti-Dumping Agreement* requires that normal value be based on "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Since downstream resales by affiliates meet these criteria, nothing in Article 2.1 prevents use of these sales. Furthermore, the United States' practice is consistent with the preference, expressed in Article 2.2 of the *Anti-Dumping Agreement*, that normal value be calculated using actual sales in the home market, rather than third country sales or constructed normal value. The Panel, however, erred in construing Article 2.1 in light of the unrelated provisions of Articles 2.3 and 6.10 of the *Anti-Dumping Agreement*. The Panel also ignored that many other WTO members also calculate normal value using sales by companies other than the producer or exporter for which the margin is calculated. Lastly, the United States contends that the Panel erred in finding that USDOC made "no attempt to make allowances for costs, including duties and taxes, incurred between the original sale to the affiliated purchaser and the first resale to an independent buyer".[24] The United States asserts that the Panel record contradicts the Panel on this point, and makes clear that: there were no "duties" incurred

[22]Panel Report, para. 7.112.

[23]*Ibid*., para. 7.118.

[24]*Ibid*., para. 7.117.

because the merchandise did not leave Japan; home market taxes were removed; and, although USDOC received no request for a level of trade adjustment, it nevertheless conducted the necessary analysis and concluded that this was not an appropriate case for a level of trade adjustment.

B. *Arguments of Japan – Appellee*

1. Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

17. Japan requests the Appellate Body to uphold the Panel's findings that, in using the facts available, the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement*. Japan notes that the United States' appeal of the Panel's findings regarding USDOC's application of facts available involves issues of both law and fact. In seeking to justify its use of facts available for NSC and NKK, the United States improperly asserts that mechanical deadlines eliminate any need to consider the facts and circumstances of a case. The Panel, however, properly interpreted Article 6.8 and Annex II of the *Anti-Dumping Agreement*, and recognized that the treaty text balances the interests of authorities and respondents, with the goal of ensuring that authorities calculate margins that are accurate and fair, and are based, whenever possible, on actual data. According to Japan, the interpretation of these provisions suggested by the United States is not permissible because it is not supported by their text, context or object and purpose, and would upset this balance.

18. Japan underlines that the *sole* basis for the United States' appeal on this issue is that NSC and NKK had 87 days in which to respond to USDOC's requests for information. Japan recalls a number of other relevant facts which, in its view, demonstrate the weakness of the United States' position. Japan notes, for instance, that the weight conversion factors were minor in relation to the information submitted by NSC and NKK within established timeframes, that the weight conversion factors were submitted well before verification, that USDOC in fact verified NKK's weight conversion factor, and that USDOC rejected the weight conversion factors submitted by NSC and NKK but accepted all other corrections submitted by NSC and NKK before or at verification. Japan adds that Article 6.1.1 of the *Anti-Dumping Agreement* imposes obligations on investigating authorities regarding the *minimum* time that must be given to respondents to provide requested information, but does not authorize authorities to ignore data actually provided without any regard to the overall circumstances.

19. Japan urges the Appellate Body to uphold the Panel's finding that KSC cooperated with USDOC. Japan submits that the United States' interpretation of the word "cooperate" in paragraph 7 of Annex II of the *Anti-Dumping Agreement* is unreasonable because, as the Panel correctly found, "USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for

information in this case went far beyond any reasonable understanding of any obligation to cooperate".[25] The question of whether an objective and unbiased investigating authority could reasonably have concluded that KSC did not cooperate does not depend on whether KSC took every conceivable step to obtain the data from CSI. Instead, this question turns on whether an objective and unbiased investigating authority could reasonably have concluded that KSC was not *in fact* working together – "cooperating" – with USDOC to obtain the data from CSI. Japan submits that the Panel's finding that an objective and unbiased investigating authority *could not* have reached such a conclusion was a *factual* determination not subject to review by the Appellate Body. In any event, KSC went to great lengths to cooperate with USDOC, while USDOC, in stark contrast, failed to cooperate with KSC. In Japan's view, USDOC also failed to take account of Article 6.13 of the *Anti-Dumping Agreement*, which requires investigating authorities to provide assistance to an interested party experiencing difficulties in providing requested information.

2. Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

20. Japan urges the Appellate Body to uphold the Panel's findings as regards the "all others" rate. The United States' suggested interpretation of Article 9.4 of the *Anti-Dumping Agreement* is not permissible because it ignores the text, context, and object and purpose of that provision. Article 9.4 requires authorities to disregard margins that incorporate the use of facts available in the calculation of the "all others" rate. Although Article 6.8 makes no distinction between "entire" or "partial" facts available, the United States' statute requires USDOC to disregard only those margins based "entirely" on facts available. The Panel, therefore, correctly found the United States' statute, on its face, and as applied in this case, to be inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. Japan highlights the effects of USDOC's actions in this case, where the inclusion of KSC's dumping margin in the calculation of the "all others" rate dramatically inflated that rate. Finally, Japan dismisses the United States' contention that the Panel's approach makes it "impossible" to calculate an "all others" rate. Before the Panel, Japan suggested a possible alternative method to calculate the "all others" rate without violating Article 9.4, namely to use a composite, consisting of those portions of the investigated companies' margins that were *not* based on facts available.

3. Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

21. Japan urges the Appellate Body to uphold the Panel's finding that the 99.5 percent test applied by USDOC to respondents' sales to affiliated customers, is inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. As the Panel found, USDOC's test is skewed to make more likely a finding of dumping or a higher margin of dumping. This bias is further revealed through the "test" USDOC uses

[25]Panel Report, para. 7.73.

to discern whether high-priced sales are outside the ordinary course of trade. The "aberrationally high" test for high-priced sales is flexible and lax, whereas the 99.5 percent test excludes nearly all low-priced sales in a mechanical and strict fashion. The combined effect of the two tests is to inflate the dumping margin in a manner that is contrary to Article 2.1. Japan adds that, if the Appellate Body disagrees with the Panel that the 99.5 percent test contravenes Article 2.1, then it should find the test to be inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, since the test used by USDOC operates systematically to exclude sales that tend to reduce the dumping margin and to include sales that tend to inflate the margin, thus resulting in an unfair comparison.

22. Japan also requests the Appellate Body to uphold the Panel's finding that USDOC's replacement of low-priced sales to affiliates with downstream sales by those affiliates was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. It is clear from Article 2, read as a whole, that investigating authorities are to focus on sales made by the individual exporters under investigation. As the Panel found, Article 6.10 of the *Anti-Dumping Agreement* clarifies that dumping margins for an individual company are to be calculated based on *that company's* sales. Japan also underlines that, while Article 2.3 explicitly provides for the use of downstream sales to calculate *export price*, there is no such provision for the calculation of *normal value*. Application of the maxim *expressio unius est exclusio alterius* therefore compels a conclusion that downstream sales may *not* be used to calculate normal value. Japan further disputes the United States' assertion that USDOC made all necessary adjustments to home market downstream sales, in order to ensure a fair comparison. USDOC's level of trade adjustments do not normally address all differences in price comparability due to reseller's costs, and never account for the resellers' profits. In addition, in this case, USDOC received a specific request for a level of trade adjustment from NKK, which USDOC refused. Thus, Japan submits that the use of downstream sales was in any event inconsistent with United States' obligations under Article 2.4 of the *Anti-Dumping Agreement*.

C. *Claims of Error by Japan – Appellant*

1. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

23. Japan appeals the Panel's finding that section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended – the "captive production provision" – is not inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the *Anti-Dumping Agreement*.[26] The Panel misunderstood the meaning of the words "focus primarily". In Japan's view, the captive production provision requires the USITC to concentrate chiefly on a narrow segment of the industry, and this primary focus on the merchant market overrides the more general language of the statute concerning the industry "as a whole". Thus,

[26]Panel Report, para. 8.2(b).

the captive production provision effectively *prevents* the USITC from recognizing the shielding effect that results from captive production, and precludes the USITC from undertaking a balanced analysis.

24. Japan underlines that Articles 3 and 4 of the *Anti-Dumping Agreement* require investigating authorities to base a finding of injury on the domestic industry "as a whole". In contrast, when certain conditions are met, the captive production provision requires the USITC to focus on a part of the domestic industry that is *less than* the entire industry. Such a skewed analysis cannot constitute the "objective examination" required by Article 3.1 of the *Anti-Dumping Agreement*. The Panel failed to recognize that a mandatory emphasis on the merchant market necessarily means that the captive market will be de-emphasized and that the industry as a whole will not be objectively examined. While it may be permissible to consider segments of an industry, such an approach will not amount to an "objective examination" unless it relates the segments back to the industry as a whole, and does not elevate the importance of one segment over another. Japan concludes that the Panel's failure to recognize that the captive production provision does not allow the USITC to conduct an "objective examination" amounts to legal error.

2. Article 3.5 of the *Anti-Dumping Agreement*: Causation and Non-Attribution

25. Japan challenges the Panel's finding, with respect to causation, that the USITC did not act inconsistently with the requirement in Article 3.5 of the *Anti-Dumping Agreement* that the effects of other causes must not be attributed to imports. The Panel ignored crucial aspects of the interpretation set forth by the Appellate Body in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten Safeguard*")[27] and *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia* ("*United States – Lamb Safeguard*")[28], applied the wrong legal standard, and failed to recognize that the USITC's analysis fell far short of the requirements of Article 3.5. The Panel improperly applied the standard set out in *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*United States – Atlantic Salmon Anti-Dumping Duties*")[29], which is inconsistent with, and sets a lower standard than, the recent Appellate Body Reports. The USITC did not undertake the rigorous analysis which the Appellate Body has explained is needed. The USITC failed to "separate" and "distinguish" the other factors and to assess properly their bearing, influence or effect on the domestic industry. Given the USITC's failure to provide any meaningful explanation of the nature and extent of the injurious effects of the relevant

[27]Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001.

[28]Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.

[29]Panel Report, adopted 27 April 1994, BISD 41S/Vol. I/229.

"other" factors, Japan requests the Appellate Body to find that the United States did not comply with the non-attribution requirement set forth in Article 3.5 of the *Anti-Dumping Agreement*.

3. Conditional Appeals

26. In the event that the Appellate Body should reverse certain relevant Panel findings, then Japan requests a ruling on the following claims which, for reasons of judicial economy, the Panel did not examine:

(a) Japan's claim that the United States' practice of resorting to adverse facts available in an effort to punish respondents, as applied in the calculation of margins in this specific case, is inconsistent with Article 6.8 and Annex II of the *Anti-Dumping Agreement*;

(b) Japan's claims, under Articles 2.3 and 9.3 of the *Anti-Dumping Agreement*, regarding the application of adverse facts available in the margin calculation for KSC;

(c) Japan's claims, under Articles 2.4, 6.1, 6.6, 6.13, and 9.3 and Annex II of the *Anti-Dumping Agreement*, regarding the application of adverse facts available in the margin calculations for NKK and NSC; and

(d) Japan's claims, under Articles 2.2 and 2.4 of the *Anti-Dumping Agreement*, regarding: (i) the application of the 99.5 percent test; and (ii) the replacement of excluded sales to affiliates with downstream sales by the affiliated parties to independent purchasers.

D. *Arguments of the United States – Appellee*

1. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

27. The United States asks the Appellate Body to uphold the Panel's findings regarding the captive production provision. The United States notes, first, that since Japan is challenging this statutory provision on its face, Japan must show that the provision itself *mandates* WTO-inconsistent action. Japan has not, and cannot, make such a showing. Rather, according to the United States, the captive production provision of United States law is fully consistent with the requirements, under Articles 3 and 4 of the *Anti-Dumping Agreement*, that a determination of injury be based on an objective examination and on an analysis of injury to the industry "as a whole". These requirements do not preclude the kind of detailed sectoral analysis of the industry that is envisioned by the captive production provision. To the contrary, as recognized by the panel in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – High Fructose*

Corn Syrup")[30], such analyses can yield a better understanding of the effects of imports. Thus, the United States argues, as long as investigating authorities examine and address the factors set forth in Article 3 of the *Anti-Dumping Agreement* in a reasoned and objective manner, they may also perform any additional analyses necessary to ensure a complete understanding of the market.

28. The United States explains the captive production provision as an analytical tool that enhances the USITC's ability to consider all relevant economic factors bearing on the state of the domestic industry, and ensures that the USITC will "concentrate" its attention "in the first instance", or "chiefly", on the very part of the market in which import competition is occurring, as a means of assessing its impact on the industry as a whole. Nothing in the captive production provision detracts from the United States' statutory requirement that the USITC assess injury with respect to the industry as a whole, or requires the USITC to accord less weight to the industry's overall performance. This is confirmed by the wording of the relevant provisions of the United States Tariff Act of 1930, as amended, by the USITC's determinations, and by the explanation of the captive production provision explicitly approved by the United States Congress in the Statement of Administrative Action ("SAA").[31] The United States therefore concludes that there is no support for Japan's argument that the captive production provision "biases", "distorts", or "skews" the USITC determinations, or leads the USITC to ignore the shielding effects that result from captive production in its analysis of injury.

2. Article 3.5 of the *Anti-Dumping Agreement*: Causation and Non-Attribution

29. The United States submits that the Panel correctly found that the USITC ensured that injury caused by factors other than dumped imports was not attributed to dumped imports, as required by Article 3.5 of the *Anti-Dumping Agreement*. The Panel correctly construed the relevant obligations in the *Anti-Dumping Agreement*, consistently with the approach of the panel in *United States – Atlantic Salmon Anti-Dumping Duties*.[32] Under this approach, the USITC is not required to "isolate" and "exclude", or to "quantify", the effects of other causes from the effects of imports, but must examine other causes to ascertain that injury caused by those other factors is not attributed to dumped imports. Japan, in its appeal of this issue, seeks to have the Appellate Body indiscriminately apply in anti-dumping proceedings the "non-attribution" standard that applies to injury determinations in safeguards proceedings. However, the safeguard non-attribution provision appears in a different context, and is in an agreement that has a different object and purpose from that of the *Anti-Dumping Agreement*. In contrast, the provision interpreted in *United States – Atlantic Salmon Anti-Dumping Duties*, from the Tokyo Round Anti-Dumping Code, closely tracks the wording of Article 3.5 of the

[30]Panel Report, WT/DS132/R, adopted 24 February 2000, para. 7.154.

[31]19 U.S.C. § 1677(7)(E)(ii). (Exhibit JP-4(e) submitted by Japan to the Panel)

[32]Panel Report, *supra*, footnote 29.

Anti-Dumping Agreement. The Appellate Body's interpretation in *United States – Wheat Gluten Safeguard* and *United States – Lamb Safeguard* does not, and cannot, govern the interpretation of non-attribution in the *Anti-Dumping Agreement*. In the dumping context, the proper approach was set out in *United States – Atlantic Salmon Anti-Dumping Duties*, which forms part of the GATT *acquis*. In any case, the United States asserts, in this particular investigation the USITC *did* examine each of the known factors that might be causing injury to the domestic industry, and ensured that any injuries that might be caused by those factors were not attributed to dumped imports.

3. Conditional Appeals

30. In the event that the Appellate Body should reach the conditional appeals of Japan, the United States requests the Appellate Body to reject the claims made by Japan and find that USDOC's actions in this investigation were fully consistent with the *Anti-Dumping Agreement*. The application of *adverse* inferences to uncooperative parties is consistent with the terms of Article 6.8 and Annex II of the *Anti-Dumping Agreement* and is essential to a practical application of the *Anti-Dumping Agreement*. An interpretation of the *Anti-Dumping Agreement* which did not permit the use of adverse inferences as a substitute for information not provided by uncooperative parties would encourage exporters to be uncooperative in anti-dumping investigations, and allow them to benefit by doing so. The United States submits that such an interpretation would seriously undermine the object and purpose of the entire *Anti-Dumping Agreement*.

E. *Arguments of the Third Participants*

1. Brazil

(a) Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

31. Brazil requests the Appellate Body to uphold the Panel's findings regarding USDOC's use of the facts available. Brazil highlights the punitive nature of USDOC's approach, particularly in the light of the overall cooperative approach of NSC, NKK and KSC throughout the investigation, and the extensive information that these companies did submit. The United States' rigid reliance on its submission deadline ignores that Article 6.8 of the *Anti-Dumping Agreement* uses the phrase "reasonable period" rather than the word "deadline". Furthermore, the word "timely", used in paragraph 3 of Annex II, must refer to the "reasonable period" mentioned in Article 6.8. In Brazil's view, the approach taken by the United States belies the duties of good faith and flexibility imposed on investigating authorities by the *Anti-Dumping Agreement*.

(b) Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

32. Brazil urges the Appellate Body to uphold the Panel's findings on this issue. Article 9.4 of the *Anti-Dumping Agreement* prohibits the use of margins based predominantly or even partially on facts available. As the United States' statute does not contain a similar prohibition, but instead prohibits only the use of margins based "entirely" on facts available for calculation of the "all others" rate, Brazil concludes that the statute is clearly inconsistent with the *Anti-Dumping Agreement*.

(c) Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

33. Brazil requests the Appellate Body to uphold the Panel's finding that USDOC's treatment of affiliated home market customers is inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. Although in some circumstances affiliated party sales may be deemed to fall outside the ordinary course of trade, the United States' practice goes far beyond the concept of a "fair comparison" under Article 2.4 of the *Anti-Dumping Agreement* because: (i) the standard for affiliation is too low; (ii) under the 99.5 percent test, prices that are clearly "comparable" under any reasonable standard are nevertheless disregarded as outside the ordinary course of trade; and (iii) the averaging methodology used by USDOC not only removes prices that might be higher than most sales to unaffiliated customers, but also removes products that might be a more appropriate match to export sales. There is no textual basis in the *Anti-Dumping Agreement* for replacing certain affiliated party sales with the resale prices of downstream sales. Furthermore, Brazil contends, USDOC's replacement of certain home market sales with downstream resales is inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.

(d) Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

34. Brazil requests the Appellate Body to reverse the Panel's finding that the United States' captive production provision is not inconsistent with the *Anti-Dumping Agreement*. Consideration of only one segment of an industry is not permitted under the *Anti-Dumping Agreement*. If there is one like product, then there is one industry. The competitive conditions prevailing in that industry, including the existence of captive production, can be considered on a case-by-case basis. The United States legislation, however, ties the hands of the investigating authority, and requires it to ignore the captive portion of the market when certain statutory conditions are met. In addition, Brazil submits, such an approach heightens the risk that the USITC may attribute to imports the effects of other causes, since an industry may itself have chosen to decrease its merchant market shipments in favour of captive shipments to downstream production that reap higher profits.

(e) Article 3.5 of the *Anti-Dumping Agreement*: Causation and Non-Attribution

35. Brazil urges the Appellate Body to reverse the Panel's findings regarding causation. The Panel's findings are inconsistent with two recent Appellate Body rulings on the causation standard in the *Agreement on Safeguards*, namely: *United States – Wheat Gluten Safeguard*, and *United States – Lamb Safeguard*. Those cases establish that authorities must apply a more rigorous analysis of alternative causes of injury than the approach currently taken by the USITC. Brazil contends that the USITC did not adequately analyze these other causes to ensure, as required by Article 3.5 of the *Anti-Dumping Agreement*, that their effects were not attributed to imports.

2. Canada

(a) Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

36. Canada maintains that the Panel correctly found that the United States' captive production provision does not result in a distorted analysis which is incompatible with the "objective examination" requirement in Article 3.1 of the *Anti-Dumping Agreement*. The captive production provision in no way eliminates the general obligation of the USITC to make a determination regarding material injury to the domestic industry as a whole, nor diminishes the obligation to examine all relevant economic factors having a bearing on the state of that industry. The arguments made by Japan on this issue blur the distinction between the concepts of "domestic industry" and "domestic market(s)". Article 3.1 of the *Anti-Dumping Agreement* directs investigating authorities to examine the impact of dumped imports on sales of like products "in the *domestic market* for like products". Canada submits that, in cases like this one, the relevant domestic market *is* the merchant market.

(b) Conditional Appeals

37. In the event that the Appellate Body should reach Japan's conditional appeal regarding the use of "adverse" facts available, Canada urges the Appellate Body to reject Japan's interpretation of Article 6.8 of the *Anti-Dumping Agreement*. Under Article 6.8, the use of "facts available" is predicated on actions by interested parties that are intended to hamper, or have the effect of hampering, an investigation. Canada contends that if, in applying "facts available", investigating authorities are precluded from drawing adverse inferences in the face of non-cooperation, the result would be to frustrate the object and purpose of the *Anti-Dumping Agreement*, and to allow interested parties to benefit from conduct that the *Anti-Dumping Agreement* condemns.

3. Chile

(a) Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

38. Chile requests the Appellate Body to uphold the Panel's conclusion that the application to KSC of "facts available" violates Article 6.8 and Annex II of the *Anti-Dumping Agreement*. Chile underlines the particular circumstances of this case, where there were two related enterprises with conflicting interests and objectives in the investigation. Irrespective of the percentage shareholding or the level of control, if one is the petitioner and the other the respondent, there is a clear conflict of interest. As a matter of principle, companies with conflicting interests cannot be expected to cooperate. In such circumstances, it is therefore not possible to attribute to the respondent a lack of cooperation. Even if an investigating authority decides to use facts available, it may not simply apply the most adverse known facts. Thus, Chile argues that United States' legislation and practice in this regard are contrary to Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

(b) Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

39. Chile believes the Appellate Body should uphold the Panel's finding that the United States' legislation is incompatible with Article 9.4 of the *Anti-Dumping Agreement*. Article 9.4 is unambiguous as to how to calculate the margins of dumping for exporters not included in the investigation. *De minimis* and zero margins and margins based on facts available must be disregarded when determining the "all others" rate. Investigating authorities must arrive at the "all others" rate on the basis of real information and *not* the facts available. Since USDOC included, in its calculation of the "all others" rate, dumping margins based on facts available, Chile concludes that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement*.

(c) Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

40. Chile asserts that the Panel correctly found that USDOC violated Article 2.1 of the *Anti-Dumping Agreement* by excluding certain home market sales between related enterprises from the determination of normal value. Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* do not authorize the 99.5 percent test used by the United States, as this test only treats low prices as abnormal, but ignores that high prices can also be abnormal. In addition, a half percentage point differential is too insignificant to determine whether or not a sale was made in the ordinary course of trade. The Panel correctly held that it was inconsistent with Article 2 of the *Anti-Dumping Agreement* for USDOC to replace the excluded sales with downstream sales. Although Article 2.3 makes it possible to construct an export price using downstream sales, Articles 2.1 and 2.2 authorize no similar method for sales in the domestic market. Chile points out that, if an investigating authority

concludes that sales in the domestic market are not in the ordinary course of trade, Article 2.2 instructs that authority to use either sales to third parties or constructed normal value.

(d) Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

41. Chile submits that the Appellate Body should reverse the Panel's findings on this issue and find that the captive production provision of the United States' statute, and the administrative practices of the USITC, are inconsistent with Articles 3 and 4 of the *Anti-Dumping Agreement.* The captive production provision allows the USITC to ignore captive production when determining injury, which in turn affects the assessment of the impact of imports. However, Articles 3 and 4 of the *Anti-Dumping Agreement* clearly call for an examination of the domestic producers of the like products as a whole, irrespective of whether or not their production is sold or used for their own consumption. Chile submits that a failure to consider captive production is tantamount to ignoring the effects of factors other than imports on the state of the domestic industry, and constitutes a distorted approach – *not* an objective examination.

4. European Communities

(a) Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

42. The European Communities considers that the Panel correctly found that section 735(c)(5) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. Nevertheless, the European Communities is of the view that, when read in light of its object and purpose, Article 9.4 does not prevent the inclusion, in the "all others" rate, of margins based *partially* on facts available, provided that such facts are used simply to fill gaps in the information supplied by a cooperative exporter and the investigating authority has drawn no adverse inferences. Even when exporters are fully cooperative, facts available are often used simply because some information requested is beyond the exporters' reach. The use of such facts available often does not have an adverse impact on the dumping margin. Since, in practice, almost every dumping calculation includes at least some small elements of facts available, the Panel's rigid interpretation of Article 9.4 of the *Anti-Dumping Agreement* would render that provision virtually inapplicable in practice. Furthermore, whenever Article 9.4 cannot be applied, investigating authorities "recover" their discretion to calculate the "all others" rate by applying other methods.[33] Since such other methods may be less favourable to the non-investigated exporters, the European Communities cautions that the Panel's interpretation, which renders Article 9.4 inapplicable in most cases, could in fact be detrimental to those non-investigated exporters, contrary to the purpose of that provision.

[33]European Communities' third participant's submission, para. 15.

(b) Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

43. The European Communities agrees with the United States that investigating authorities may, consistently with Article 2.1, use the downstream domestic sales made by affiliated companies in the determination of an exporter's normal value. The Panel erred in giving the term "exporter" an unduly narrow interpretation. The term "exporter", as used in the *Anti-Dumping Agreement*, encompasses not only the company which formally makes the exports, but also other persons which, although legally distinct, form a single economic unit with the exporting company, provided that: (i) the related company and the exporting company are subject to common control; and (ii) the related company performs at least some of the tasks that would normally fall within the responsibility of a producer's internal sales department. The Panel's narrow interpretation of the term "exporter" promotes form over substance and would allow exporters to manipulate normal value by making purely formal changes to their corporate legal structure. The Panel also erred in concluding, from the fact that the *Anti-Dumping Agreement* contains no provision explicitly allowing for the use of downstream sales by affiliates in calculating normal value that, *a contrario*, such a method is precluded. However, to the extent that the use of downstream sales may result in normal value and export price being determined at different levels of trade, and that such differences affect price comparability, investigating authorities are required to make adjustments under Article 2.4 of the *Anti-Dumping Agreement.*

5. Korea

(a) Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

44. Korea agrees with the Panel's analysis of the legal obligations in Article 6.8 and Annex II, as well as with the Panel's application of that analysis to the facts of this investigation. With respect to the application of available facts to NSC and NKK, Korea notes that the difference between the approach of the United States and that of the Panel is that, for the United States, regulatory deadlines *per se* define the "reasonable period." The Panel, on the other hand, correctly views the definition of "reasonable" as requiring an objective assessment of the totality of the facts and circumstances. With respect to the application of available facts to KSC, the Panel, unlike USDOC, correctly analyzed the relevant actions that were taken, and accepted that the actions taken by CSI as a petitioner, in refusing KSC access to vital data, were highly relevant to this issue.

(b) Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

45. Korea agrees with the Panel that the 99.5 percent test employed by USDOC does not constitute a permissible interpretation of the term "sales in the ordinary course of trade" in Article 2.1 of the *Anti-Dumping Agreement*. While the *Anti-Dumping Agreement* does not explicitly address sales to affiliated parties in the home market, Korea believes that Article 2.2.1 of the *Anti-Dumping Agreement* informs the analysis of this issue. Pursuant to Article 2.2.1, even below-cost sales cannot be excluded from the calculation of normal value unless certain requirements are met. Equal care should also be applied when the issue is whether above-cost sales to affiliated customers can be excluded as outside the ordinary course of trade. Korea does not object to a test for affiliated parties *per se*, but rather to the test applied by the United States. The United States' test fails to ensure that other factors affecting comparability are taken into account before the test is applied, is biased in its treatment of low-priced as opposed to high-priced affiliated party sales, and does not allow for the possibility that other, normal, commercial factors may explain the price difference between affiliated parties. Korea adds that these problems are exacerbated by United States' laws and regulations that allow USDOC to find affiliation between two companies when one company owns as little as five percent of the other.

46. Korea maintains that USDOC did not make the adjustments required by Article 2.4 to the resale prices to unaffiliated buyers for costs incurred by the affiliates. Should the Appellate Body agree with the United States that the use of downstream sales by affiliated customers is a permissible interpretation of Article 2.1 of the *Anti-Dumping Agreement*, Korea urges the Appellate Body to find that USDOC violated the "fair comparison" requirement in Article 2.4 because USDOC did not make all relevant adjustments for differences affecting price comparability.

(c) Article 3.5 of the *Anti-Dumping Agreement*: Causation and Non-Attribution

47. Korea submits that the Panel employed the wrong standard in its evaluation of causation and improperly found that the USITC analysis was consistent with Article 3.5 of the *Anti-Dumping Agreement*. In *United States – Wheat Gluten Safeguard* and *United States – Lamb Safeguard*, the Appellate Body interpreted Article 4.2(b) of the *Agreement on Safeguards* – which is substantially similar to Article 3.5 of the *Anti-Dumping Agreement* – to mean that authorities must separate and distinguish the effects of other factors and assess the "bearing", "influence", or "effect" that each factor has on the overall situation of the domestic industry.[34] In this case, the USITC did not apply the proper standard of causation in its evaluation of the relevant "other" causal factors. Therefore,

[34]Appellate Body Report, *United States – Wheat Gluten Safeguard, supra*, footnote 27, paras. 90 and 91; Appellate Body Report, *United States – Lamb Safeguard*, *supra*, footnote 28, para. 180.

Korea joins Japan in requesting the Appellate Body to reverse the Panel's findings on this issue, and to find that the USITC's causation analysis was inconsistent with United States' obligations under Article 3.5 of the *Anti-Dumping Agreement*.

(d) Conditional Appeals

48. Korea disagrees with the Panel's finding that it was neither necessary nor appropriate to consider whether the 99.5 percent test is also inconsistent with the obligation of fair comparison set out in Article 2.4 of the *Anti-Dumping Agreement*.[35] Such a finding is a necessary first step in any analysis of the determination of normal value because the requirement for a fair comparison informs all aspects of the comparison, including the determination of normal value. Korea, therefore, believes that the Appellate Body should complete the Panel's analysis and find that the United States' 99.5 percent test, as well as USDOC's application of facts available, also violate Article 2.4 of the *Anti-Dumping Agreement*.

III. Issues Raised in this Appeal

49. The following issues are raised in this appeal:

(a) whether the Panel erred in finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Nippon Steel Corporation, NKK Corporation and Kawasaki Steel Corporation;

(b) whether the Panel erred in finding, in paragraph 8.1(b) of the Panel Report, that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement*; that, consequently, the United States acted inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* by failing to bring section 735(c)(5)(A) into conformity with its obligations under the *Anti-Dumping Agreement*; and that the United States' *application* of section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, to determine the "all others" rate in this case was also inconsistent with United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*;

[35]Panel Report, para. 7.119.

(c) whether the Panel erred in finding, in paragraph 8.1(c) of the Panel Report, that:

(i) the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by excluding from the calculation of normal value, as outside "the ordinary course of trade", certain home market sales to parties affiliated with an investigated exporter, on the basis of the "99.5 percent" or "arm's length" test; and that

(ii) the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by replacing, in its calculation of normal value, these excluded sales with downstream sales made by the affiliated parties to independent purchasers;

(d) whether the Panel erred in finding, in paragraph 8.2(b) of the Panel Report, that:

(i) section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, the "captive production" provision, is not, *on its face*, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the *Anti-Dumping Agreement*; and that

(ii) the United States did not act inconsistently with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the *Anti-Dumping Agreement* in its *application* of section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, in its determination of injury sustained by the United States' domestic hot-rolled steel industry;

(e) whether the Panel erred in finding, in paragraph 8.2(c) of the Panel Report, that the USITC had demonstrated the existence of a causal relationship between dumped imports and material injury to the United States' hot-rolled steel industry consistently with the requirements of Article 3.5 of the *Anti-Dumping Agreement*, and, in particular, in finding that the USITC did not attribute to dumped imports injury actually caused by other factors; and

(f) if the Appellate Body were to reverse relevant Panel findings that the United States acted inconsistently with its obligations under the *Anti-Dumping Agreement*, whether the Appellate Body can or should itself rule on Japan's claims that:

(i) the United States' practice of deliberately selecting "adverse" facts from among the facts otherwise available, as applied in the calculation of dumping margins in this case, is inconsistent with Article 6.8 and Annex II of the *Anti-Dumping Agreement*;

(ii) the United States' application of adverse facts available in the dumping margin calculations for NKK and NSC was inconsistent with United States' obligations under Articles 2.4, 6.1, 6.6, 6.13, and 9.3 and Annex II of the *Anti-Dumping Agreement*;

(iii) the United States' application of adverse facts available in the dumping margin calculation for KSC was inconsistent with United States' obligations under Articles 2.3 and 9.3 of the *Anti-Dumping Agreement*;

(iv) the United States' exclusion from the calculation of normal value, as outside "the ordinary course of trade", of certain home market sales to parties affiliated with an investigated exporter, on the basis of the "99.5 percent" or "arm's length" test, was inconsistent with United States' obligations under Article 2.4 of the *Anti-Dumping Agreement*; and that

(v) the United States' replacement, in the calculation of normal value, of these excluded sales with downstream sales made by the affiliated parties to independent purchasers was inconsistent with United States' obligations under Articles 2.2 and 2.4 of the *Anti-Dumping Agreement*.

IV. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU: Standard of Review

50. Before turning to the issues raised on appeal, it appears to us useful to address certain general aspects of the standard of review established by Article 17.6 of the *Anti-Dumping Agreement*, as this standard bears upon each issue arising in this appeal.[36] Article 17.6 of the *Anti-Dumping Agreement* reads:

[36]We have referred to Article 17.6 of the *Anti-Dumping Agreement* in previous Reports: Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India* ("*European Communities – Bed Linen*"), WT/DS141/AB/R, adopted 12 March 2001, paras. 63-65; Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland* ("*Thailand – Steel*"), WT/DS122/AB/R, adopted 5 April 2001, paras. 137 and 138; and Appellate Body Report, *United States – Lamb Safeguard*, *supra*, footnote 28, para. 105 and footnote 63 thereto.

> In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

51. Two threshold aspects of Article 17.6 need to be noted. The first is that Article 17.6 is identified in Article 1.2 and Appendix 2 of the DSU as one of the "special or additional rules and procedures" which prevail over the DSU "[t]o the extent that there is a difference" between those provisions and the provisions of the DSU. In *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, a dispute which involved claims under the *Anti-Dumping Agreement*, we stated:

> In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.[37]

52. Thus, we must consider the extent to which Article 17.6 of the *Anti-Dumping Agreement* can properly be read as "complementing" the rules and procedures of the DSU or, conversely, the extent to which Article 17.6 "conflicts" with the DSU.

53. The second threshold aspect follows from the first and concerns the relationship between Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. Article 17.6 lays down rules relating to a panel's examination of "matters" arising under one, and only one, covered agreement, the *Anti-Dumping Agreement*. In contrast, Article 11 of the DSU provides rules which apply to a panel's examination of "matters" arising under any of the covered agreements. Article 11 reads, in part:

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[37]Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998, para. 65.

> … a panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements … (emphasis added)

54. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal. Thus, panels make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measure at stake with those covered agreements. Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter. The first sub-paragraph covers the *panel's* "*assessment* of the *facts* of the matter", whereas the second covers its "*interpret[ation* of] the *relevant provisions*". (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*.

55. In considering Article 17.6(i) of the *Anti-Dumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Anti-Dumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6(i) requires panels to make an "*assessment* of the *facts*". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter". In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.

56. Article 17.6(i) of the *Anti-Dumping Agreement* also states that the panel is to determine, first, whether the investigating authorities' "*establishment* of the facts was *proper*" and, second, whether the authorities' "*evaluation* of those facts was *unbiased and objective*" (emphasis added) Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the

investigating authorities' establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*.

57. We turn now to Article 17.6(ii) of the *Anti-Dumping Agreement*. The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law." Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*").[38] Clearly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*.

58. The *second* sentence of Article 17.6(ii) bears repeating in full:

> Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

59. This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."

60. It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*.[39] In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*. We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to

[38]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679. See, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3 at 15; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 at 104-106.

[39]Appellate Body Report, *European Communities – Bed Linen*, *supra*, footnote 36, paras. 63-65; and Appellate Body Report, *Thailand – Steel*, *supra*, footnote 36, para. 127.

any treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.[40]

61. We cannot, of course, examine here which provisions of the *Anti-Dumping Agreement* do admit of more than one "permissible interpretation". Those interpretive questions can only be addressed within the context of particular disputes, involving particular provisions of the *Anti-Dumping Agreement* invoked in particular claims, and after application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*.

62. Finally, although the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an "objective assessment of the matter" as a whole. Thus, under the DSU, in examining claims, panels must make an "objective assessment" of the legal provisions at issue, their "applicability" to the dispute, and the "conformity" of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an "objective assessment" of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement.

V. Article 6.8 of the *Anti-Dumping Agreement*: the Use of "Facts Available"

A. *Application of "Facts Available" to NSC and NKK*

63. Before the Panel, Japan claimed that USDOC's application of "facts available" in the calculation of the dumping margins for Nippon Steel Corporation ("NSC") and NKK Corporation ("NKK") was inconsistent with the United States' obligations under Article 6.8 of the *Anti-Dumping Agreement*. Japan argued that, under that provision, USDOC was not entitled to reject certain information – namely "weight conversion factors", supplied by NSC and NKK to USDOC – for the

[40]It might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in Articles 31 and 32 of the *Vienna Convention*. But this is not the case here.

sole reason that this information was provided after the deadlines for responses to USDOC's questionnaires, and to use instead facts available in respect of the transactions concerned.

64. USDOC individually investigated three Japanese exporters of hot-rolled steel: NSC, NKK and Kawasaki Steel Corporation ("KSC"). USDOC requested, in its original questionnaire, that the investigated Japanese exporters provide a weight conversion factor for sales made on a so-called theoretical weight basis, so that USDOC could arrive at a single unit of measurement for all transactions.[41] This would allow USDOC to calculate an overall dumping margin for each company.

65. Although both NSC and NKK made a small number of sales on a theoretical weight basis during the period of investigation[42], neither company provided a weight conversion factor in its questionnaire responses. NSC explained that it had no way of calculating a weight conversion factor, because it did not know the actual weight of the steel products sold on a theoretical weight basis. NKK stated that it was "impracticable or impossible" to calculate the requested weight conversion factor.[43] However, before the Panel, the United States argued that, before stating that it was "impossible" to provide a weight conversion factor, NSC and NKK both attempted, in their responses to the initial questionnaires, to avoid providing the factor by stating that it was "unnecessary" to provide this information.[44]

66. NSC and NKK both submitted their questionnaire responses, without the weight conversion factors, by the applicable deadlines of 21 December 1998 (original questionnaire) and 25 January 1999 (supplemental questionnaire). In all, the two companies were given 87 days to respond to the questionnaires.

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[41]Steel mills sell steel in coils in prices per ton that are based on one of two possible weights: (1) the *actual* weight of the steel product, which is determined by physically weighing the steel; or (2) a *theoretical* weight, which is calculated using a formula based on the dimensions of the steel product. (Panel Report, para. 7.32)

[42]In its final determination of dumping, USDOC stated that "NSC reported most of its U.S. and home market sales on an actual weight basis, with the exception of a small percentage of U.S. and home market sales"; and that "NKK reported all its U.S. and home market sales on an actual weight basis, with the exception of less than one percent of home market sales". (USDOC Final Determination, *supra*, footnote 5 at 24360 and 24363)

[43]Panel Report, paras. 7.33 and 7.34.

[44]United States' first submission to the Panel, paras. 147 and 148. (Panel Report, pp. A-154 and A-155) In its response to the initial questionnaire NSC did not contend that it *could not* provide a weight conversion factor, but instead explained that "NSC *did not need to* arrive at a 'uniform quantity of measure'". (emphasis added) Only in its response to the supplemental questionnaire did NSC state that it was "unable" to provide the weight conversion factor, adding that "[w]e do not believe that this information would be helpful to [USDOC]". (Exhibit JP-29(a) and (b) submitted by Japan to the Panel) Similarly, in its response to the initial questionnaire, NKK submitted that "it *does not make sense* to convert the majority of the reported home market sales to a theoretical basis", as well as that it "is not possible to convert a theoretical weight into an actual weight." (Exhibit JP-45(b) submitted by Japan to the Panel; emphasis added)

67. In its preliminary dumping determination, issued on 19 February 1999, USDOC applied "facts available" to the small number of NSC and NKK transactions made on a theoretical weight basis because the actual weight conversion factor had not been submitted. As USDOC chose "adverse" facts available, this led to larger dumping margins for NSC and NKK than would have been the case if the weight conversion factors subsequently submitted by those companies had been used.[45]

68. NSC submitted a weight conversion factor on 23 February 1999, 14 days before verification. While preparing for verification, NSC had discovered that information regarding the actual weight of products sold on a theoretical weight basis did, in fact, exist and was kept in a database at a production facility in the south-west of Japan, which is separate from the main sales database, maintained at its Tokyo headquarters.[46] On the same day, and nine days before verification, NKK also submitted a weight conversion factor. According to the Panel, in reviewing USDOC's preliminary determination, NKK discovered that USDOC had accepted KSC's "best estimate" as a surrogate for an actual weight conversion factor. NKK, thereupon, submitted its own "best estimate" weight conversion factor, based on the same method used by KSC.[47]

69. Shortly after the weight conversion factors had been provided, the petitioners submitted letters requesting USDOC to reject the weight conversion factors submitted by NSC and NKK.[48] USDOC conducted verifications during the week of 8 March 1999 at NSC's and NKK's respective Tokyo headquarters. USDOC did not verify the weight conversion factor submitted by NSC. According to the Panel, USDOC verified NKK's weight conversion factor.[49] On 12 April and 15 April 1999, respectively, USDOC wrote to NSC and NKK informing them that the weight conversion factors submitted had been rejected as untimely. USDOC returned one copy of their respective weight conversion factor submissions to each of NSC and NKK, informed NSC and NKK

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[45]The term "adverse" does not appear in the *Anti-Dumping Agreement* in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available. Pursuant to 19 U.S.C. § 1677e(b), if the investigating authorities find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information", then they may, in reaching their determination, "use an inference that is *adverse* to the interests of that party in selecting from among the facts otherwise available". (emphasis added) The United States explained to us at the oral hearing that, in practice, an "adverse inference" is used because it is assumed that the information that a non-cooperative party did not provide would have been adverse to its interests. In this appeal, we do *not* address the issue of whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities *consciously* to choose facts available that are *adverse* to the interests of the party concerned. Rather, we use the term "adverse" facts available simply to denote that the facts available used by USDOC, in this case, with respect to NSC and NKK's sales on a theoretical weight basis, and KSC's sales to CSI, increased the respective dumping margins of these companies, that is, they had an "adverse" impact on those margins from the point of view of the companies concerned.

[46]Panel Report, para. 7.33; Exhibit JP-29 submitted by Japan to the Panel.

[47]Panel Report, para. 7.34.

[48]Letters of 24 February 1999 and 5 March 1999, referred to in NSC's case brief before USDOC and the USITC, 13 April 1999. (Exhibit JP-29(h) submitted by Japan to the Panel, p. 15)

[49]Panel Report, footnote 56 to para. 7.55.

that all other copies of that information would be expunged from the record, and requested NSC and NKK to revise and resubmit all submissions that referred to the weight conversion factors that had been submitted.[50]

70. The Panel examined Article 6.8 and Annex II of the *Anti-Dumping Agreement* and, on the basis of that examination, found that, with respect to the weight conversion factors submitted by both NSC and NKK, and given the evidence before USDOC, "an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that [NSC and NKK] had failed to provide necessary information within a reasonable period."[51] The Panel, therefore, found that the application of facts available by USDOC in determining NSC's and NKK's dumping margins was inconsistent with United States' obligations under Article 6.8 of the *Anti-Dumping Agreement*.[52]

71. The United States appeals these findings and argues that USDOC was entitled to reject NSC's and NKK's weight conversion factors because they were submitted after the deadlines for questionnaire responses. The United States interprets Article 6.8 as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data. In addition, in the view of the United States, Annex II of the *Anti-Dumping Agreement* makes clear that investigating authorities must use information supplied by responding exporters provided that three separate requirements are met: the information must be submitted in a timely manner, that is, within applicable deadlines; it must be verifiable; and it must be usable by the authorities without undue difficulty. The United States considers that the Panel, in effect, wrongly read the first requirement of timeliness out of Article 6.8, thereby preventing investigating authorities, in practice, from establishing and enforcing reasonable deadlines for the submission of information. The United States adds that the Panel's interpretation of Article 6.8 ignores Article 6.1.1 of the *Anti-Dumping Agreement* which specifically provides for the use of pre-established deadlines for questionnaire responses. For the United States, it is decisive that the weight conversion factors were submitted *after the relevant deadlines for questionnaire responses*, as the deadlines established by USDOC were in themselves reasonable.

72. We begin with Article 6.1.1, which provides:

> Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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[50]Exhibits JP-29(f) and JP-45(i) submitted by Japan to the Panel.

[51]Panel Report, paras. 7.57 and 7.59.

[52]*Ibid*.

73. We observe that Article 6.1.1 does not explicitly use the word "deadlines". However, the *first* sentence of Article 6.1.1 clearly contemplates that investigating authorities may impose appropriate time-limits on interested parties for responses to questionnaires. That first sentence also prescribes an absolute minimum of 30 days for the initial response to a questionnaire. Article 6.1.1, therefore, recognizes that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses. Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*. We note, in that respect, that Article 5.10 of the *Anti-Dumping Agreement* stipulates that anti-dumping investigations shall normally be completed within one year, and in any event in no longer than 18 months, after initiation. Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 "are not intended to prevent the authorities of a Member from proceeding *expeditiously*". (emphasis added) We, therefore, agree with the Panel that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines."[53]

74. While the United States stresses the significance of the *first* sentence of Article 6.1.1, we believe that importance must also be attached to the *second* sentence of that provision. According to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires "upon *cause shown*", where granting such an extension is "*practicable*". (emphasis added) This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable.

75. In sum, Article 6.1.1 establishes that investigating authorities may impose time-limits for questionnaire responses, and that in appropriate circumstances these time-limits must be extended. However, Article 6.1.1 does not, on its own, resolve the issue of when investigating authorities are entitled to *reject* information submitted, and instead resort to facts available, as USDOC did in this case. We consider that this issue is to be resolved by reading Article 6.1.1 together with Article 6.8 of the *Anti-Dumping Agreement*, and Annex II of that Agreement, which is incorporated by reference into Article 6.8.

76. Article 6.8 of the *Anti-Dumping Agreement* provides:

[53]Panel Report, para. 7.54.

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

77. Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using "facts" which are otherwise "available" to the investigating authorities. According to Article 6.8, where the interested parties do not "significantly impede" the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information "within a reasonable period". Thus, if information is, in fact, supplied "within a reasonable period", the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party.

78. Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available. Paragraph 1 of Annex II provides, in relevant part, that:

> The authorities should also ensure that the party is aware that if information is *not* supplied *within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available … (emphasis added)

79. Although this paragraph is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only "if information is not supplied within a reasonable time". Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a "reasonable time" but should, instead, be based on the information submitted.

80. Neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to *reject* information submitted by interested parties, as USDOC did in this case. In our view, paragraph 3 of Annex II of the *Anti-Dumping Agreement* bears on this issue. Paragraph 3 of Annex II states, in relevant part:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation *without undue difficulties*, *which is supplied in a timely fashion*, 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)

81. Thus, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted "in a *timely* fashion".

82. The text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of "timeliness" under that provision. In our view, "timeliness" under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, "upon cause shown", and if "practicable", these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.

83. That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, "in a timely fashion", in paragraph 3 of Annex II as a reference to a "reasonable period" or a "reasonable time". This reading of "timely" contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines "upon cause shown", if "practicable". In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information.

84. Our interpretation of these provisions raises a further interpretive question, namely the meaning of a "reasonable period" under Article 6.8 of the *Anti-Dumping Agreement* and a "reasonable time" under paragraph 1 of Annex II. The word "reasonable" implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under

Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.

85. In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.

86. In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities.[54] Instead, Articles 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.

87. In this case, the Panel found that USDOC had rejected the weight conversion factors submitted by NSC and NKK *for the sole reason* that they were submitted after the deadline for submission of the questionnaire responses. According to the Panel, USDOC made no effort to determine whether, notwithstanding the fact that the weight conversion factors were received after the applicable deadlines, they were nevertheless submitted "within a reasonable period".[55] Instead, USDOC relied *exclusively* on the fact that the deadline had expired, even though NSC and NKK had requested that USDOC accept the information as a *correction* to the information submitted in the

[54]Indeed, as we have already noted, *supra*, para. 73, Article 6.14 of the *Anti-Dumping Agreement* provides that:

> The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

[55]Panel Report, para. 7.55.

questionnaire. USDOC did not consider any other facts and circumstances – even though several were raised[56] – which indicated that the information might have been submitted within a reasonable period of time. Moreover, in the case of NKK, USDOC in fact verified the information, before subsequently rejecting it as out of time.

88. The approach taken by the United States in this case excludes the very *possibility*, recognized by Articles 6.1.1 and 6.8 and Annex II of the *Anti-Dumping Agreement*, that USDOC might be required, by these provisions, to extend the time-limits and accept the information submitted, as requested by NSC and NKK.

89. We are, therefore, of the view that USDOC acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by NSC and NKK were submitted within a reasonable period of time. In reaching this conclusion, we are *not* finding that USDOC *could not*, consistently with the *Anti-Dumping Agreement*, have rejected the weight conversion factors submitted by NSC and NKK. Rather, we conclude simply that, under Article 6.8, USDOC was not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires. Accordingly, we find that USDOC's action does not rest upon a permissible interpretation of Article 6.8 of the *Anti-Dumping Agreement*.

90. For all of the above reasons, we, therefore, uphold, albeit for different reasons, the Panel's findings that the United States acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* in applying facts available to the theoretical weight transactions made by NSC and NKK. [57]

B. *Application of "Adverse" Facts Available to KSC*

91. During the period of investigation, KSC made a significant proportion of its export sales to the United States to California Steel Industries Inc. ("CSI"), a joint venture company which is owned 50 percent by KSC and 50 percent by a Brazilian company, Companhia Vale de Rio Doce ("CVRD"). In the proceedings before USDOC, CSI participated as one of the group of petitioners for the United States' hot-rolled steel industry.

92. In order to construct an export price for KSC's United States export sales, USDOC requested KSC to provide information concerning the prices at which CSI resold products it had purchased from KSC, as well as information concerning CSI's further manufacturing costs. KSC, or its lawyers, met

[56]NSC and NKK argued, for example, that they were unable to provide the information at an earlier date, and that the weight conversion factors were verifiable (and, in the case of NKK, actually verified) and usable. See, *supra*, paras. 68 and 69.

[57]Panel Report, paras. 7.57 and 7.59.

with a CSI representative, and sent five separate letters to CSI, over a period of thirteen weeks, requesting cooperation and information. Notwithstanding initial indications that it would assist KSC, CSI eventually refused to supply the relevant information or to allow KSC's lawyers to visit CSI for purposes of gathering that information. Prior to submitting its response to the questionnaire, KSC reported to USDOC its difficulties in obtaining information from CSI, met with USDOC to discuss the issue, and requested several times to be excused from responding to the relevant section of the questionnaire. USDOC did not take any steps to assist KSC in overcoming the difficulties it was experiencing in obtaining the information, nor did USDOC request CSI to supply the information to it directly. Rather, USDOC continued to require KSC to provide the requested information.[58]

93. Japan does not contest that KSC did not request the assistance of CVRD, the other parent company of CSI, in obtaining the information; nor did KSC seek to exercise certain rights available to it under its joint venture agreement with CVRD that might have enabled KSC to compel CSI to produce the necessary information.

94. In its final determination, USDOC concluded that "KSC did not act to the best of its ability with respect to the requested CSI data", and that "it cannot be said that KSC was fully cooperative and made every effort to obtain and provide the information".[59] USDOC, therefore, decided to apply "adverse" facts available in determining that portion of KSC's dumping margin attributable to its sales to CSI.[60] The facts available applied by USDOC significantly increased KSC's overall dumping margin.[61]

95. Before the Panel, Japan did not contest the use of *facts available* for KSC's sales to CSI, but objected to USDOC's finding that KSC did not "cooperate" with USDOC, and to USDOC's consequent use of "*adverse*" facts available for such transactions. The Panel found that a "'less favourable' result under paragraph 7 of Annex II may only be appropriate in the case of an interested party who does not cooperate" in the investigation.[62] In addition, the Panel found that:

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[58]These facts are set forth in paras. 7.61 to 7.73 of the Panel Report, as well as in Exhibit JP-42 submitted by Japan to the Panel.

[59]USDOC Final Determination, *supra*, footnote 5 at 24368.

[60]As explained above, the term "adverse" facts available is taken from the relevant United States legislation, and indicates that USDOC drew an inference that was *adverse* to the interests of the non-cooperating party "in selecting from among the facts otherwise available". (19 U.S.C. §1677e(b)) In this appeal, we do *not* address the issue of whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities *consciously* to choose facts available that are adverse. See, further, *supra*, footnote 45.

[61]Exhibit JP-44 submitted by Japan to the Panel.

[62]Panel Report, para. 7.71.

> We do not consider that USDOC's conclusion that KSC's not having taken such measures justified the conclusion that it had failed to cooperate was a decision that could properly be made by an unbiased and objective investigating authority on the basis of the evidence before USDOC. In the absence of a justified conclusion that there was a lack of cooperation, there is no basis under paragraph 7 of Annex II for a result which is less favourable than would have been the case had the party cooperated.[63]
>
> We therefore conclude that USDOC acted inconsistently with Article 6.8 and Annex II paragraph 7 of the AD Agreement in applying adverse facts available in making its determination of KSC's dumping margin.[64]

96. In its appeal, the United States asserts that the factual record supports USDOC's finding that KSC failed to cooperate. The Unites States emphasizes the Panel's recognition that KSC had certain contractual rights available to it to secure the cooperation of CSI, and that KSC did not exercise those rights. KSC also failed to seek assistance from CVRD, the other shareholder in CSI, in obtaining the necessary information from CSI.

97. We note, first, that although the United States describes the issue it raises on appeal as one of fact, we see the issue as one of legal interpretation. The facts were not in dispute before the Panel, and they are not in dispute before us. The issue, in reality, turns on the appropriate meaning of the word "cooperate" in paragraph 7 of Annex II of the *Anti-Dumping Agreement* and the proper *legal* characterization of the uncontested facts in terms of that meaning.

98. We begin our examination of this issue with the last sentence of paragraph 7 of Annex II of that Agreement, which provides:

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

99. Paragraph 7 of Annex II indicates that a lack of "cooperation" by an interested party may, by virtue of the use made of facts available, lead to a result that is "less favourable" to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of "cooperate": to "work together for the same purpose or in the same task."[65] This meaning suggests that cooperation is a *process*, involving joint effort, whereby

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[63]Panel Report, para. 7.73.

[64]*Ibid*., para. 7.74.

[65]*The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 506; Panel Report, para. 7.73.

parties work together towards a common goal. In that respect, we note that parties may very well "cooperate" to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of "cooperating" is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a "less favourable" outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has "cooperated" with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*.

100. Paragraph 7 of Annex II does not indicate what *degree* of "cooperation" investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a "less favourable" outcome. To resolve this question we scrutinize the context found in Annex II. In this regard, we consider it relevant that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is "not ideal in all respects" if the interested party that supplied the information has, nevertheless, acted "to the *best* of its ability". (emphasis added) This provision suggests to us that the level of cooperation required of interested parties is a high one – interested parties must act to the "best" of their abilities.

101. We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be "maintained" if complying with that request would impose an "*unreasonable extra burden*" on the interested party, that is, would "entail *unreasonable additional cost and trouble*". (emphasis added) This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements.[66] This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable.[67]

102. We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant

[66]Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[67]See, *infra*, para. 193 and footnotes 141 and 142 thereto.

degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.

103. We also observe that Article 6.13 of the *Anti-Dumping Agreement* provides:

> The authorities shall take *due account of any difficulties experienced by interested parties*, in particular small companies, in supplying information requested, *and shall provide any assistance practicable*. (emphasis added)

104. Article 6.13 thus underscores that "cooperation" is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to "take due account" of genuine "difficulties" experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation.

105. Bearing in mind our interpretation of the requirements of "cooperation", we recall the approach taken by USDOC and made of record in this case. It is uncontested that the information requested by USDOC: was not known to, nor in the possession of, KSC; related to the prices and costs of CSI; resulted from CSI's own operations and not KSC's; and was known only to, and in the possession only of, CSI. We observe, also, that, as set forth above, KSC made several attempts to obtain the requested information from CSI.[68] Indeed, USDOC itself acknowledged that KSC "has provided a great deal of information and has substantially cooperated with respect to other issues" and that, with respect to the missing information, KSC "[has made] some effort to obtain the data and […] CSI's management rebuffed these efforts".[69]

106. KSC also repeatedly reported to USDOC its difficulties in obtaining information from CSI.[70] However, USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied. USDOC declined to allow KSC to attend a meeting with petitioners' counsel to discuss the issue. Although USDOC met with KSC to discuss the issue, it appears that USDOC did not provide any specific guidance or assistance to KSC – USDOC simply repeated that KSC should obtain the requested information from CSI.[71] USDOC did not take

[68]See, *supra*, para. 92.

[69]USDOC Final Determination, *supra*, footnote 5 at 24368.

[70]Exhibit JP-42 submitted by Japan to the Panel details all of the efforts made by KSC to obtain the data and to inform USDOC of the problems it encountered, as well as the reactions from CSI and from USDOC.

[71]Letter of 18 December 1998 from KSC to USDOC. (Exhibit JP-42 submitted by Japan to the Panel)

any steps to secure the necessary information by requesting it directly from CSI.[72] We find nothing in the *Anti-Dumping Agreement* which would have prevented USDOC from asking CSI directly for the information. To the contrary, Articles 6.1 and 6.11 of the Agreement contemplate precisely such an approach.[73]

107. We also note that, in its initial responses to KSC, CSI indicated that it *would* provide KSC with certain assistance, and that it was only as the deadline for questionnaire responses approached that CSI unequivocally refused to provide the requested information. Furthermore, following KSC's letter to USDOC explaining the difficulties it was experiencing, the petitioners, *of which CSI was one*, submitted comments to USDOC urging USDOC *not* to excuse KSC from providing any information relating to CSI.[74]

108. According to USDOC's final determination, "it cannot be said that KSC was *fully* cooperative and made *every effort* to obtain and provide the information requested".[75] (emphasis added) USDOC criticized KSC, in particular, because "KSC did not instruct its members of the CSI board to address the issue, did not invoke the Shareholder's Agreement, and did not discuss this issue with its joint venture partner."[76] The United States highlights these alleged deficiencies and points, in particular, to KSC's failure to exercise certain rights under its Shareholder's Agreement with CVRD that might have influenced CSI. The United States, and USDOC, seem, therefore, to have expected KSC to have gone to very considerable lengths in pursuit of the necessary information. In particular, in contrast to USDOC's reluctance to take any available step, pursuant to Article 6.13 of the *Anti-*

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[72]Exhibit JP-42(n) submitted by Japan to the Panel.

[73]We recall that, in their investigation, investigating authorities deal with *all* interested parties, which are defined under Article 6.11 of the *Anti-Dumping Agreement*, to include, *inter alia*, exporters, domestic producers of the like product, and trade associations representing such domestic producers. Moreover, we observe that Article 6.1 requires investigating authorities to give notice to "[a]ll interested parties" of the information required from them.

[74]The petitioners argued that:

> With respect to the claim of conflict of interest, KSC's argument is at best premature. CSI, which is 50 percent owned … by KSC, should be expected to provide complete and accurate information to the best of its ability. Contrary to KSC's suggestion, it is not in CSI's interest to obstruct this investigation. In the unlikely event that CSI does not or cannot provide the necessary cost information, KSC can alert [USDOC] and renew its request at such time.

Letter of 27 November 1998 from counsel for the petitioners to USDOC, responding to KSC's 10 November 1998 letter asking, *inter alia*, to be excused from answering Section E of the questionnaire with respect to sales by CSI. (Exhibits JP-42(z) and JP-42(i) submitted by Japan to the Panel)

Following submission of this letter, but before the deadline for responding to the questionnaire, KSC again requested the information in writing from CSI; CSI refused, in writing, to provide the information; and KSC again wrote to USDOC explaining these developments and renewing its request to be excused from providing the information. (Exhibit JP-42 submitted by Japan to the Panel)

[75]USDOC Final Determination, *supra*, footnote 5 at 24368.

Dumping Agreement, to assist KSC in obtaining the information from CSI, USDOC seems to have expected KSC to have exhausted *all legal means* at its disposal to compel CSI to divulge the requested information, within the short time-limits of the investigation.

109. Against this background, the Panel found that the interpretation of "cooperate" applied by USDOC "went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II."[77] The Panel stated that, in "the absence of a justified conclusion that there was a lack of cooperation", there was no basis, pursuant to that provision, for a result "less favourable" than would have been the case had KSC cooperated.[78] In effect, the Panel held that USDOC's conclusion that KSC failed to "cooperate" in the investigation did not rest on a permissible interpretation of that word. In the light of our own interpretation of the word "cooperate", and taking account of the circumstances of this case, we agree with the Panel's finding on this issue.

110. We, therefore, uphold the Panel's finding, in paragraph 8.1(a) of its Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in applying "adverse" facts available to KSC's sales to CSI.

VI. Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

111. Before the Panel, Japan claimed that the United States' statutory method for calculating a rate of anti-dumping duty for those exporters and producers who were *not* individually investigated, as well as USDOC's application of that method in this case, were inconsistent with Article 9.4 of the *Anti-Dumping Agreement*.

112. The Panel concluded that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement* "insofar as it requires the consideration of margins based in part on facts available in the calculation of the all others rate"; and that, in maintaining section 735(c)(5)(A) following the entry into force of the *Anti-Dumping Agreement*, the United States acted inconsistently with Article 18.4 of that Agreement as

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[76] *Ibid*.

[77] Panel Report, para. 7.73.

[78] *Ibid*.

well as with Article XVI:4 of the *WTO Agreement*.[79] The Panel also concluded that the *application* by the United States of section 735(c)(5)(A) of the Tariff Act of 1930, as amended, in this case was inconsistent with United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*.[80]

113. The United States appeals these findings and argues that the Panel erred in its interpretation of Article 9.4 of the *Anti-Dumping Agreement*. The United States contends that the Panel's interpretation is inconsistent with the text, context, and object and purpose of Article 9.4, and leads to the "absurd" result that all margins which are based, even in very small part, on facts available, must be excluded from the calculation of the "all others" rate.

114. Article 9.4 of the *Anti-Dumping Agreement* provides, in pertinent part:

> When the authorities have limited their examination [to a sample of exporters or producers], any anti-dumping duty applied to imports from exporters or producers not included in the examination *shall not exceed*:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers
>
> …
>
> *provided that the authorities shall disregard for the purpose of this paragraph* any zero and *de minimis* margins and *margins established under the circumstances referred to in paragraph 8 of Article 6*. (emphasis added)

115. We observe, first, that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have, in accordance with Article 6.10 of the *Anti-Dumping Agreement*, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping duty rate to be applied to those exporters and producers who were *not* included in the investigated sample. The rate so established is referred to as the "all others" rate.

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[79]Panel Report, para. 7.90. Article 18.4 of the *Anti-Dumping Agreement* provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Article XVI:4 of the *WTO Agreement* provides:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

[80]Panel Report, para. 7.90.

116. Article 9.4 does not prescribe any method that WTO Members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "*shall not exceed*" in establishing an "all others" rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a "weighted average margin of dumping established" with respect to those exporters or producers who *were* investigated. However, the clause beginning with "provided that", which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, "for the purpose of this paragraph", investigating authorities "*shall disregard*", first, zero and *de minimis* margins and, second, "margins established under the circumstances referred to in paragraph 8 of Article 6." Thus, in determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the "all others" ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using "margins established under the circumstances referred to" in Article 6.8.

117. The United States' appeal on this point concerns only the second type of "margins" that are to be disregarded in the calculation of the maximum "all others" rate, namely "margins established under the circumstances referred to in paragraph 8 of Article 6." The United States' appeal is founded on the contention that this phrase should be interpreted to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin – normal value and export price – are determined *exclusively* using facts available. By contrast, the Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the "all others" rate, any margins which are calculated, *even in part*, using facts available.

118. Before focusing on the qualifying language in Article 9.4 of the *Anti-Dumping Agreement*, we recall that the word "margins", which appears in Article 2.4.2 of that Agreement, has been interpreted in *European Communities – Bed Linen*. The Panel found, in that dispute, and we agreed, that "margins" means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[81] This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions. We see no reason, in Article 9.4, to interpret the word "margins" differently from the meaning it has in Article 2.4.2, and the parties have not suggested one.

[81]Panel Report, *European Communities – Bed Linen*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.118; Appellate Body Report, *European Communities – Bed Linen*, *supra*, footnote 36, para. 53.

119. We proceed to examine the phrase "margins established under the circumstances referred to in paragragh 8 of Article 6." This provision permits investigating authorities, in certain situations, to reach "preliminary or final determinations … on the basis of the facts available". There is, however, no requirement in Article 6.8 that resort to facts available be limited to situations where there is *no* information whatsoever which can be used to calculate a margin. Thus, the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available. Rather, under Article 6.8, investigating authorities are entitled to have recourse to facts available *whenever* an interested party does not provide some necessary information within a reasonable period, or significantly impedes the investigation. Whenever such a situation exists, investigating authorities may remedy the lack of *any* necessary information by drawing appropriately from the "facts available". As the United States acknowledges, Article 6.8 may apply in situations where recourse to facts available is needed to cure the lack of even a very small amount of information.[82]

120. In consequence, we are of the view that the "*circumstances* referred to" in Article 6.8 are the circumstances in which the investigating authorities properly have recourse to "facts available" to overcome a lack of necessary information in the record, and that these "circumstances" may, in fact, involve only a small amount of information to be used in the calculation of the individual margin of dumping for an exporter or producer.

121. We turn to the word "established" in the phrase "margins established under the circumstances" referred to in Article 6.8. The essence of the United States' argument is that this word should be read as if it were qualified by the word "entirely", or "exclusively", or "wholly": only where a margin is established "entirely" under the "circumstances" of Article 6.8 must that margin be disregarded.

122. We have noted that Article 9.4 establishes a prohibition, in calculating the ceiling for the all others rate, on using "margins established under the circumstances referred to" in Article 6.8. Nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established "entirely" on the basis of facts available. As noted earlier, Article 6.8 applies even in situations where only limited use is made of facts available. To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet, the text of Article 9.4 simply refers, in an open-ended fashion, to "margins established under the circumstances" in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word "entirely" as suggested by the United States. In our view, a

[82]United States' appellant's submission, para. 9.

margin does not cease to be "established under the circumstances referred to" in Article 6.8 simply because not every aspect of the calculation involved the use of "facts available".

123. Our reading of Article 9.4 is consistent with the purpose of the provision. Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of, information supplied by the investigated exporters. Indeed, in some circumstances, as set forth in paragraph 7 of Annex II of the *Anti-Dumping Agreement*, "if an interested party *does not cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is *less favourable* to the party than if the party did cooperate." (emphasis added) Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins "established" even in part on the basis of the facts available.

124. The United States expresses concern that this interpretation of Article 9.4 of the *Anti-Dumping Agreement* would make it impracticable to calculate an "all others" rate. The United States points out that many and, in some investigations, all, individual margins are calculated using some element of facts available. According to the United States, if all such margins must be "disregarded" in calculating the "all others" rate, there will be cases in which there are no margins, at all, that can be used to calculate the ceiling of the "all others" rate.

125. We observe that the United States' concern overlooks that, even on the United States' reading of Article 9.4 of the *Anti-Dumping Agreement*, there may be situations where there are *no* margins to calculate an "all others" rate. Under the United States' reading, it is possible that the margins for all of the investigated exporters could be based entirely on facts available. In that case, there would also be no margin that could be used to calculate a ceiling for an "all others" rate. Thus, the interpretation proposed by the United States does *not* overcome what we see as a *lacuna* in Article 9.4 of the *Anti-Dumping Agreement*.

126. This *lacuna* arises because, while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the "all others" rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation, under the prohibitions. This appeal does not raise the issue of how that *lacuna* might be overcome

on the basis of the present text of the *Anti-Dumping Agreement*. Accordingly, it is not necessary for us to address that question. [83]

127. The method used by the United States to calculate an "all others" rate is set forth in section 735(c)(5) of the United States Tariff Act of 1930, as amended, which provides:

> (A) General rule
>
> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate *shall be* an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 1677e of this title. (emphasis added)
>
> (B) Exception
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined *entirely* under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. [84] (emphasis added)

128. Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, sets forth a mandatory method for calculating the *actual* "all others" rate. This provision requires that the "all others" rate be equal to a weighted average of margins, unless those margins are zero, *de minimis*, or are determined "*entirely*" on the basis of the facts available. Thus, this provision requires the *inclusion* of *all* margins calculated using facts available, unless the margin is calculated *entirely* on the basis of the facts available. Accordingly, in calculating the "all others" rate, section 735(c)(5)(A) requires the *inclusion* of margins calculated *in part* using facts available. However, as we have

[83]We note that each of the parties in this dispute has a different method for overcoming the *lacuna*. The United States statute provides that if there are no margins remaining after the exclusion of *de minimis* and zero margins, and margins calculated entirely using facts available, USDOC "may use *any reasonable method* to establish the estimated all-others rate". (section 735(c)(5)(B) of the United States Tariff Act of 1930, as amended; emphasis added) We observe that the United States statute refers to the calculation of the "all others" rate itself, and not the ceiling for this rate. We assume here that the United States would use the same method to calculate the ceiling for the "all others" rate. In its appellee's submission, Japan suggests that "one permissible approach" would be to "use a composite of *those portions of the investigated companies' margins not based on facts available*." (Japan's appellee's submission, footnote 27 to para. 26; emphasis added)

[84]Section 735(c)(5)(B) of the United States Tariff Act of 1930, as amended, is contained in Title 19 of the United States Code at 19 U.S.C. § 1673d(c)(5). We note that section 1673b(d) refers to the establishment of an "all others" rate in preliminary determinations, while section 1677e refers to determinations on the basis of facts available.

said, Article 9.4 of the *Anti-Dumping Agreement* requires the *exclusion* of all such margins from the calculation of the maximum "all others" rate. In consequence, in cases where margins established *in part* on the basis of facts available are used to calculate the "all others" rate, the "all others" rate calculated pursuant to section 735(c)(5)(A) may well exceed the maximum allowable "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*.

129. As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. We also uphold the Panel's consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the *WTO Agreement*.[85] We further uphold the Panel's finding that the United States' *application* of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the *Anti-Dumping Agreement* because it was based on a method that included, in the calculation of the "all others" rate, margins established, in part, using facts available.[86]

130. Finally, the United States also argues that, in interpreting Article 9.4, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*. We note, however, that the Panel correctly identified its task as determining "whether Article 9.4 'admits of ' the interpretation put forward by the United States".[87] Having interpreted Article 9.4 of the *Anti-Dumping Agreement* in accordance with the customary rules of treaty interpretation of public international law, the Panel found that this provision "*can not*" be interpreted in the manner suggested by the United States. (emphasis added)[88] For the reasons we have given, we agree with the Panel's interpretation of Article 9.4. We do not believe that Article 9.4 is susceptible, under the customary law rules of treaty interpretation, of the interpretation on which the United States' measure rests. We, therefore, believe that the Panel did not err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement.*

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[85]Panel Report, para. 7.90.

[86]We recall that the United States calculated the "all others" rate in this case based on a weighted average of the individual margins it determined for NSC, NKK, and KSC, even though all of those margins were calculated, in part, based on facts available. Since, for each company, the use of facts available increased, in one case significantly, the respective dumping margins, the use of those dumping margins to calculate the "all others" rate inevitably increased that rate.

[87]Panel Report, para. 7.86.

[88]*Ibid*.

VII. Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

A. *99.5 Percent Test*

131. Before addressing the Panel's findings on Japan's claims regarding the so-called "99.5 percent" or "arm's length" test, it is useful to describe how this test has been applied by the United States. Article 2.1 of the *Anti-Dumping Agreement* provides that a determination of "dumping" must be based on transactions made "in the *ordinary course of trade*" (emphasis added). According to the United States:

> [USDOC] policy is to treat home market sales by an exporter to an affiliated customer as having been made at arm's length *if prices to that affiliated customer are, on average, at least 99.5 per cent of the prices charged to unaffiliated customers*. The purpose of the arm's length test (also referred to as the 99.5 per cent test) is to determine *whether the affiliation between the seller and the customer has, in general, affected the pricing of the goods sold to the affiliated customer*.[89] (emphasis added)

132. USDOC applies the 99.5 percent test by determining, for sales by an exporter to *each affiliated* party, the weighted average selling price for the product.[90] For the *group of non-affiliated* parties, USDOC also calculates the weighted average selling price for the product but, in this case, the average is for the group as a whole. If the weighted average price for sales to an *individual affiliated party* is 99.5 percent, or more, of the weighted average price of sales to *all non-affiliated parties*, all of the sales to that affiliated party are treated as being made "in the ordinary course of trade". If the weighted average sales price for sales to an *individual affiliated party* falls below the 99.5 percent threshold, all of the sales to that affiliated party are treated as being made *outside* "the ordinary course of trade" and are disregarded in calculating normal value.[91]

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[89]United States' first submission to the Panel, para. 212. (Panel Report, p. A-172) In para. 212 the United States referred to USDOC Anti-Dumping Duties; Countervailing Duties – Final rule, United States Federal Register, 19 May 1997 (Volume 62, Number 96). (Exhibit JP-39 submitted by Japan to the Panel, p. 27296 at 27355)

[90]Section 771(33)(E) of the United States Tariff Act of 1930 (19 U.S.C. § 1677(33)(E)), as amended, defines the term "affiliated persons" as including "[a]ny person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization." In our Report, we have, generally, referred to "affiliates" because that is the term used in the United States statute and it is used by USDOC in applying the 99.5 percent test. The terms "affiliate" and "affiliation" do not, however, appear in the *Anti-Dumping Agreement*. Thus, the use of these terms in this Report should not be taken as implying that we attach any special importance or approval to those terms, or to the definition of "affiliate" given in the United States statute, which has not been challenged in this case.

[91]In that event, as discussed *infra*, paras. 159-180, USDOC may calculate normal value using the first re-sale price between an affiliated party and an independent non-affiliated party.

133. At the oral hearing, the United States clarified that the 99.5 percent test is not mandated by any United States statute or by any provision of the United States Code of Federal Regulations. The 99.5 percent test constitutes a consistent practice of USDOC that is reflected in certain federal notices issued by the United States Government.[92]

134. Japan made claims regarding the *application* of the 99.5 percent test in this case and it also made claims regarding the use of downstream sales as a substitute for sales to affiliates which were disregarded following application of the 99.5 percent test.[93] Japan claimed that the application of the 99.5 percent test was inconsistent with Article 2.1 of the *Anti-Dumping Agreement* because, first, the test excluded only low-priced affiliated sales, thereby inflating normal value, and, second, the test operated on the basis of an arbitrary threshold that did not take account of usual variation of prices in the marketplace. Accordingly, the 99.5 percent test was not an appropriate means of identifying sales made "in the ordinary course of trade". Japan also claimed that the reliance on downstream sales is inconsistent with Articles 2.1, 2.2 and 2.4 of the *Anti-Dumping Agreement*.

135. The Panel began its examination of Japan's claim concerning the 99.5 percent test by observing that the *Anti-Dumping Agreement* does not define the phrase "in the ordinary course of trade".[94] The Panel also noted that the parties agreed that home market sales made to affiliates might, in some circumstances, not, in fact, have been made in the ordinary course of trade and that the investigating authorities need to verify whether such sales *are* in the ordinary course of trade.[95] Moreover, the Panel also noted the parties' agreement that a pattern of prices to affiliated customers, different from the pattern of prices to unaffiliated customers, could indicate that sales were not in the ordinary course of trade.[96] However, the Panel expressed concern that the 99.5 percent test:

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[92]United States' response to questioning at the oral hearing.

[93]Panel Report, footnote 83 to para. 7.107. The Panel stated that, although Japan "purport[ed] to make a claim concerning the 'general practice' of the United States with respect to" the 99.5 percent test, the Panel found, on its own motion, that Japan's request for the establishment of a panel did not state a claim with respect to the "general practice". Japan has not appealed this finding.

[94]*Ibid*., para. 7.108.

[95]*Ibid*.

[96]*Ibid*., para. 7.109.

> … does not, in fact, test for differences in prices of sales to affiliated customers as compared with unaffiliated customers, which might indicate that sales are not made in the ordinary course of trade. Rather, the "arm's length" test only tests whether prices to affiliated customers are **lower**, on average, than prices to unaffiliated customers. There is no reason to suppose, and the United States has not proposed any, that affiliation only results in sales that are outside the ordinary course of trade because they are *lower* priced on average than sales to unaffiliated customers. … [P]rices might, on average, be *higher* than prices to unaffiliated customers, but would not be caught by the USDOC's "arm's length" test.[97] (italics added)

136. Although the United States argued that it excludes "aberrationally high" prices to affiliated buyers, the Panel stated that this did not mean that the 99.5 percent test is "permissible".[98] The Panel pointed out that the "test was applied in this case without consideration of any particular factual circumstances."[99] Finally, the Panel indicated that its view was "reinforce[d]" by the fact that the 99.5 percent test excludes low-priced home market sales and, therefore, "skew[s] the normal value upward".[100] In conclusion, the Panel found that the application of the 99.5 percent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'."[101]

137. The United States appeals this finding, arguing that the *Anti-Dumping Agreement* does not compel a Member to use the *same* method, or test, to determine whether *different* categories of sales – such as low and high-priced sales – are made "in the ordinary course of trade". According to the United States, a WTO Member may develop different tests to deal with the different reasons for which sales might be made otherwise than in the ordinary course of trade. The United States asserts that USDOC does not "automatically" exclude sales to affiliates that are *higher* than arm's length prices "because there is no reason to suspect that such prices are artificial."[102] However, the United States adds that high-priced sales would be excluded from the calculation of normal value if the exporter demonstrates that they are "aberrationally high".[103] The United States insists that automatically excluding sales to affiliates made at prices that are *lower* than the 99.5 percent threshold prevents distortion of normal value. It, therefore, takes the view that the 99.5 percent test rests upon a "permissible interpretation" of Article 2.1 of the *Anti-Dumping Agreement*.

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[97]Panel Report, para. 7.110.

[98]*Ibid*., para. 7.111.

[99]*Ibid*.

[100]*Ibid*., para. 7.112.

[101]*Ibid*.

[102]United States' appellant's submission, para. 38.

[103]United States' response to questioning at the oral hearing.

138. In this part of the appeal, we are asked to examine the Panel's finding that the application of the 99.5 percent test was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. In our view, in making this finding, the Panel was engaged in interpretation of that provision and it is our task to rule whether the Panel erred in concluding that the application of the 99.5 percent test "does not rest upon a permissible interpretation" of Article 2.1 of that Agreement, within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. [104]

139. Article 2.1 of the *Anti-Dumping Agreement* provides that normal value – the price of the like product in the home market of the exporter or producer – must be established on the basis of sales made "in the ordinary course of trade". Thus, sales which are *not* made "in the ordinary course of trade" must be excluded, by the investigating authorities, from the calculation of normal value. The *Anti-Dumping Agreement* does not define the term "in the ordinary course of trade". Before the Panel, Japan referred with approval to the definition of this term given by USDOC in its questionnaire and, for the purposes of this appeal, we are content to work with this definition. That USDOC definition states:

> Generally, sales are in the ordinary course of trade if made *under conditions and practices* that, for a *reasonable period of time prior to the date of sale* of the subject merchandise, have been *normal* for sales of the foreign like product. [105] (emphasis added)

140. In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.

141. We can envisage many reasons for which transactions might not be "in the ordinary course of trade". For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales

[104]Panel Report, para. 7.112.

[105]Japan's first submission to the Panel, para. 157 and footnote 146 thereto. (Panel Report, p. A-44) Japan also cited approvingly to a similar definition found in *Black's Law Dictionary*, 6th ed. (1990), p. 1098.

price may be *lower* than the "ordinary course" price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the "ordinary course" price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise.

142. We note that determining whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price.

143. Clearly, the lower the degree of common ownership, implying common control, between the parties to a sales transaction, the less likely it is that the transaction will not be "in the ordinary course of trade". However, even where the parties to a sales transaction are entirely independent, a transaction might not be "in the ordinary course of trade".[106] In this appeal, we do not need to define all the circumstances in which transactions might not be "in the ordinary course of trade". It suffices to recognize that, *as between affiliates*, a sales transaction *might* not be "in the ordinary course of trade", either because the sales price is higher than the "ordinary course" price, or because it is lower than that price.

144. We observe that the *inclusion* of *lower*-priced transactions, between affiliates, in the calculation of *normal value* would result in a *lower* normal value, which would make a finding of dumping *less* likely, and would also *lower* the amount of any margin of dumping, all to the *advantage* of the exporter. Conversely, the *inclusion* of *higher*-priced transactions in the calculation of normal value would result in a *higher* normal value, which would make a finding of dumping *more* likely and would also *raise* the amount of any margin of dumping, all to the *disadvantage* of the exporter.

145. In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, *all* sales which

[106]One example of such a transaction is a liquidation sale by an enterprise to an independent buyer, which may not reflect "normal" commercial principles.

are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "*normal* value".

146. In view of the many different types of transaction not "in the ordinary course of trade" – some including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not "in the ordinary course of trade".

147. We note that Article 2.2.1 of the *Anti-Dumping Agreement* itself provides for a method for determining whether *sales below cost* are "in the ordinary course of trade". However, that provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible methods for determining whether low-priced sales are "in the ordinary course of trade". Article 2.2.1 sets forth a method for determining whether sales between *any* two parties are "in the ordinary course of trade"; it does *not* address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that *sales above cost*, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities.

148. Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade", that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation. If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be "in the ordinary course of trade".

149. In this case, the United States applied a general "bright line" test to identify *low*-priced sales between affiliates, which excluded such sales from the calculation of normal value, unless the weighted average sales price of sales to an affiliate lay within or above a very narrow, downward range of the weighted average sales price to all non-affiliates, namely a 0.5 percent range. Moreover, the 99.5 percent test operated *automatically*, that is, USDOC itself systematically tested all sales to affiliates. Further, in response to questioning at the oral hearing, the United States stated that the current practice of USDOC, applied in this case, does not involve any right for an exporter to demonstrate that sales to affiliates were, in the light of all of the circumstances, actually in the ordinary course of trade, even though they fell below the 0.5 percent downward range. The United States indicated that if an exporter requested an opportunity to rebut the presumption raised by

the 99.5 percent test, USDOC would "entertain" such a request.[107] However, the United States indicated that to accede to such a request it would have to change its current practice.[108]

150. In sum, we observe that, under the 99.5 percent test, a great range of low-priced sales to affiliates can be *excluded* from the calculation of normal value because they are deemed not to be "in the ordinary course of trade". The effect of this test is to minimize, to an extreme degree, possible downward distortion of normal value that might result from sales to affiliates.

151. As regards *high*-priced sales between affiliates, the United States argues that it *did* apply a rule to such sales, but a rule different from the one applied to low-priced sales. The rule applied by the United States to high-priced sales between affiliates was that such sales were excluded from the calculation of normal value only if they were "*aberrationally*" or "*artificially*" high (the "aberrationally high" test).[109] However, USDOC does not have any standard, nor even guidelines, for determining the threshold of aberrationally high prices or for informing exporters when USDOC might consider prices to be aberrationally high.[110] Nor does USDOC *systematically* test for aberrationally high-priced sales.[111] Instead, exporters must request the exclusion of individual, high-priced sales and the exporters bear the "burden" of demonstrating that, in the circumstances, the price is aberrationally high.[112]

152. Under the aberrationally high test, a far smaller range of high-priced sales between affiliates can be *excluded* as not "in the ordinary course of trade", than the 99.5 percent test excludes for low-priced sales. With low-priced transactions, sales which are below the *very narrow* 0.5 percent downward range are excluded, whereas only "*aberrationally*" high prices are excluded. Moreover, USDOC *systematically* tests for low-priced sales and it *assumes* that sales below the 0.5 percent downward range are *not* "in the ordinary course of trade". Under the current practice, applied by USDOC in this case, exporters have *no right* to demonstrate that such sales are, in fact, made "in the ordinary course of trade". By contrast, high-priced sales are automatically *included* unless the exporter demonstrates that the sales price is aberrationally high.

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[107]United States' response to questioning at the oral hearing.

[108]*Ibid*.

[109]Panel Report, para. 7.111. See also United States' first submission to the Panel, para. 228. (Panel Report, pp. A-177 and A-178)

[110]United States' response to questioning at the oral hearing.

[111]*Ibid*.

[112]United States' appellant's submission, para. 38.

153. Given that exporters will rarely be apprised of the threshold figure, applied by USDOC, for determining whether prices are high, it will be extremely difficult for exporters to know which of their sales are aberrationally high. The burden placed on exporters to demonstrate that prices are aberrationally high is, therefore, very difficult to satisfy. In addition, under Article 2.1, it is for the *investigating authorities*, and not exporters, to ensure that the calculation of normal value is based on sales made "in the ordinary course of trade", as they are responsible for making a determination of dumping. It, therefore, seems open to serious doubt whether USDOC, under the aberrationally high test, can place on exporters the burden of demonstrating that prices were aberrationally high.

154. In our view, there is a lack of *even-handedness* in the two tests applied by the United States, in this case, to establish whether sales made to affiliates were "in the ordinary course of trade". The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters.[113]

155. Although the United States argues that the aberrationally high test was applicable in this case, it contends that none of the investigated exporters actually requested the exclusion of sales involving high prices. We understand the United States to argue that the application of the rule for high-priced sales, in this case, did not result in any prejudice to exporters because none sought to avail itself of the rule applied. We are not persuaded by this argument. The rule applied to high-priced sales, in this case, was not contained in any guidelines, or other document conveyed to the interested parties.[114] It is, therefore, not clear to us that exporters would have known of the rule applied to high-priced sales. Moreover, even if exporters knew of the rule itself, there seems to have been no means for them to ascertain which of their sales might satisfy the particular threshold of "aberrationally" high prices applied by USDOC in this case. Viewed in this light, we cannot attach significance to the absence of formal requests in this case for the exclusion of high-priced sales from the calculation of normal value. In addition, the lack of even-handedness in the rules applied, in this case, to low-priced and high-priced sales might, in itself, have created prejudice to exporters. If the United States had applied different rules, which *were* even-handed, either more low-priced sales might have been included in the calculation of normal value, or some high-priced sales, might have been excluded from it. In that event, normal value might have been lower, to the advantage of exporters.

[113]We wish to emphasize that in finding that the application of the 99.5 percent test was not sufficiently *even-handed*, we do not suggest that the methods for verifying whether high and low-priced sales to affiliates are "in the ordinary course of trade" must necessarily be *identical*.

[114]United States' response to questioning at the oral hearing.

156. Finally, we observe that USDOC was requested, during a review of its policies, to apply a "100.5 percent" test to mirror the effects of the 99.5 percent test. USDOC refused to amend its policies in this way, stating:

> The purpose of an arm's length test is to eliminate prices that are *distorted*. We test sales between two affiliated parties to determine *if prices may have been manipulated to lower normal value*. We do not consider home market sales to affiliates at prices above the threshold to have been *depressed* due to the affiliation. …[115] (emphasis added)

157. In this passage, USDOC states that it seeks to "eliminate prices that are distorted". As we have noted, sales between affiliates may result in prices that are either higher or lower than the "ordinary course" price, and *both* may distort normal value. Yet USDOC does not take equal account of the possibility that the inclusion of "prices above the threshold" can also "distort" normal value and, instead, focuses predominantly on the "distortion" that results from "lower" or "depressed" prices. However, the language in Article 2.1 of the *Anti-Dumping Agreement* applies to *any* sales not "in the ordinary course of trade" and not simply those that *lower* normal value.

158. In conclusion, albeit for reasons which differ in part, we uphold the Panel's finding, in paragraph 7.112 of the Panel Report, that the *application* of the 99.5 percent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'", and the Panel's related finding in paragraph 8.1(c) of that Report.

B. *Replacement of Sales to Affiliates by Downstream Sales*

159. Before the Panel, Japan claimed that it was inconsistent with Articles 2.1, 2.2 and 2.4 of the *Anti-Dumping Agreement* for USDOC to replace home market sales to affiliates, that were excluded from the calculation of normal value, under the 99.5 percent test, by the first downstream home market sales between those affiliates and independent buyers.

160. The Panel observed that, under Article 6.10 of the *Anti-Dumping Agreement*, investigating authorities establish a margin of dumping for *each* investigated exporter or producer.[116] The Panel took the view that downstream sales made by affiliates of the exporter or producer, although "in the ordinary course of trade", are not relevant because they are *not* sales of the *exporter or producer for whom a margin was being calculated.*[117] The Panel found support for this view in Articles 2.2 and 2.3 of the *Anti-Dumping Agreement*, which provide alternative methods of calculating,

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[115]USDOC Anti-Dumping Duties; Countervailing Duties – Final rule, *supra*, footnote 89 at 27356.

[116]Panel Report, para. 7.114.

[117]*Ibid*.

respectively, normal value and export price. While Article 2.3 expressly allows the use of downstream sales where the "*export price* is unreliable because of association", Article 2.2 is silent as to whether the use of downstream sales is a permitted alternative method of calculating "*normal value*". (emphasis added) The Panel could "see no basis" for concluding that, because Article 2.3 allows the use of downstream sales to construct export price, it must also be possible to use a similar method to "construct" normal value.[118] Accordingly, the Panel found that the United States acted inconsistently with Article 2.1 by using the replacement downstream sales when calculating normal value.

161. The United States appeals the Panel's finding, arguing that downstream sales by affiliates fall within Article 2.1 of the *Anti-Dumping Agreement* because they are sales of the like product, in the ordinary course of trade, for consumption in the exporting country. It asserts that Article 2.1 does not impose any limitation on *who* must make the sales for consumption in the exporting country. Moreover, rejecting downstream sales by affiliates as a basis for calculating normal value would "invite producers to shield their high-priced home market sales from scrutiny simply by passing them through affiliates".[119]

162. In the present case, in calculating normal value, USDOC discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade". USDOC replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer. The United States and Japan agree that these downstream sales were made "in the ordinary course of trade"; they involved the "like product", produced by the exporter for whom a margin of dumping was being calculated; and, the product was destined for consumption in the exporting country, namely Japan.[120] However, Japan objects to the use of these sales in calculating normal value, under Article 2.1, because the *exporter*, for whom a margin of dumping was being calculated, was not the *seller* in the sales transaction. Japan asserts that it is implicit in Article 2.1 of the *Anti-Dumping Agreement* that the exporter must be the seller in order that a sales transaction may properly be used to calculate normal value.

163. We note initially that the issue here raised concerns the calculation of normal value under *Article 2.1* of the *Anti-Dumping Agreement* and *not* Article 2.2 of that Agreement. The United States contends, and Japan disputes, that Article 2.1 permits the use of downstream sales to calculate normal value, provided that the terms of that provision are respected. We are *not*, therefore, examining the *construction* of normal value under Article 2.2, which applies either when there are

[118]Panel Report, para. 7.117.

[119]United States' appellant's submission, para. 47.

[120]Japan's and the United States' responses to questioning at the oral hearing.

"*no* sales of the like product in the ordinary course of trade" or when "such sales do *not* permit a proper comparison". (emphasis added)

164. According to Article 2.1 of the *Anti-Dumping Agreement*, normal value is:

> … the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

165. The text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be "in the ordinary course of trade"; second, it must be of the "like product"; third, the product must be "destined for consumption in the exporting country"; and, fourth, the price must be "comparable".

166. The text of Article 2.1 is, however, silent as to *who* the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-Dumping Agreement* are satisfied, the *identity* of the seller of the "like product" is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.

167. We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the *Anti-Dumping Agreement*. However, to ensure that prices are "comparable", the *Anti-Dumping Agreement* provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party. Article 2.4 requires that a "fair comparison" be made between export price and normal value. This comparison "shall be made at the same level of trade, normally at the ex-factory level". In making a "fair comparison", Article 2.4 mandates that due account be taken of "differences which affect price comparability", such as differences in the "levels of trade" at which normal value and export price are calculated.

168. The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales. Other factors may also affect the comparability of prices, such as the payment of additional sales taxes on downstream sales, and the costs and profits of the reseller. Thus, we believe that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness

of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison.[121]

169. Thus, the use of downstream sales prices may necessitate the provision of appropriate "allowances", under Article 2.4, which take into account any differences demonstrated to affect price comparability. We will explore this issue further below.

170. Our reading of Article 2.1 of the *Anti-Dumping Agreement* is not altered by the fact that, under Article 6.10 of that Agreement, the investigating authorities "shall, as a rule, determine an individual margin of dumping for *each known exporter or producer concerned*". (emphasis added) The downstream sales prices which we believe may be used to calculate normal value *do* enable a margin of dumping to be calculated for the "like product" produced by a *particular exporter*. The downstream sale used involves an *affiliate* of the exporter concerned and the sale of the "like product" produced by *that exporter*.[122] By making the allowances required under Article 2.4 of the *Anti-Dumping Agreement*, the investigating authorities should, in effect, arrive at a price which corresponds to the "ex-factory" price of the "like product" for the specific exporter concerned, as required by that provision.

171. Nor is our reading of Article 2.1 altered by the fact that Article 2.3 of the *Anti-Dumping Agreement* provides expressly for the use of downstream sales in constructing export price, when "the export price is unreliable because of association". We are concerned with the text of Article 2.1 of the *Anti-Dumping Agreement* and, irrespective of the terms of Article 2.3, we are satisfied that Article 2.1 does not preclude the use of downstream sales "in the ordinary course of trade" in calculating normal value.

172. In the present case, as we said, Japan and the United States agree that the downstream sales by affiliates were made "in the ordinary course of trade". The participants also agree that these sales were of the "like product" and these products were "destined for consumption in the exporting country." In these circumstances, we find that the reliance by USDOC on downstream sales to calculate normal value rested upon an interpretation of Article 2.1 of the *Anti-Dumping Agreement* that is, in principle, "permissible" following application of the rules of treaty interpretation in the *Vienna Convention*.

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[121]The Panel noted that the United States acknowledged that "the downstream sales of the affiliated company are likely to be higher priced than the excluded sales to the affiliated company". (Panel Report, footnote 90 to para. 7.117)

[122]Clearly, a downstream sale could only be relevant if it involved the products of the exporter or producer for whom an individual margin of dumping is being calculated.

173. We, therefore, reverse the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the reliance by USDOC on downstream sales between parties affiliated with an investigated exporter and independent purchasers to calculate normal value was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*.

174. In these circumstances, Japan requests that we rule on its claim, under Article 2.4 of the *Anti-Dumping Agreement*, that, in relying on downstream sales, USDOC failed to make proper "allowances" in respect of the additional costs and profits of the downstream sellers, reflected in the price of these sales. According to Japan, the failure to make "allowances" for these additional elements, in the downstream sales price, resulted in an "apples to oranges" comparison, which is not a "fair comparison" under Article 2.4. Japan also asserts that the level of trade analysis performed by USDOC was not adequate to ensure that these additional costs and profits were removed from the downstream resale price used in the calculation of normal value.[123]

175. The Panel declined to examine Japan's claim under Article 2.4 due to its finding, under Article 2.1, that downstream sales could not be used to calculate normal value.[124] However, as we have reversed that finding, and with a view to facilitating a "prompt" resolution of the dispute under Article 3.3 of the DSU, it is appropriate for us to consider whether we can examine Japan's claims under Article 2.4.

176. As we have already said, Article 2.4 of the *Anti-Dumping Agreement* requires that appropriate "allowances" be made to any downstream sales prices which are used to calculate normal value in order to ensure a "fair comparison" between export price and normal value. If those proper "allowances" were not, in fact, made in this case, the comparison made by USDOC between export price and normal value was, by definition, not "fair", and not consistent with Article 2.4 of the *Anti-Dumping Agreement*.

177. Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made" for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "*any other differences* which are also demonstrated to affect price comparability." (emphasis added) There are, therefore, no differences

[123]See, Japan's other appellant's submission, para. 49, incorporating by reference Japan's second submission to the Panel, paras. 139-143. (Panel Report, p. C-40 and C-41)

[124]Panel Report, para. 7.120.

"affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance".

178. We would also emphasize that, under Article 2.4, the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports. Article 2.4 goes on to state:

> *The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison* and shall *not* impose an *unreasonable burden of proof* on those parties. (emphasis added)

179. The issue of which specific "allowances" should be made in any case depends very much on the facts surrounding the calculation of export price and normal value. Accordingly, an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on the downstream sales that were included in the calculation of normal value and on whether there were "differences", relevant under Article 2.4, which affected the comparability of export price and normal value.

180. Our examination of this issue must be based on the factual findings of the Panel or uncontested facts in the Panel record.[125] As the Panel did not examine this issue, and as the parties do not agree on the relevant facts, we find that there is not an adequate factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the *Anti-Dumping Agreement*.[126]

VIII. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*: the United States' "Captive Production Provision"

181. We begin with a brief description of the United States' measure at issue in this part of the dispute. Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended (the "captive

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[125]See, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("*European Communities – Asbestos*"), WT/DS135/AB/R, adopted 5 April 2001, para. 78 and footnotes 48 and 49 thereto.

[126]We note that, in para. 7.117 of its Report, the Panel observed that USDOC did not "attempt to make allowances for costs, including duties and taxes, incurred between the original sale to the affiliated purchaser and the first resale to an independent buyer". This statement was made in passing in the context of the Panel's examination of Japan's claim under Article 2.1 and the Panel's discussion, as part of that examination, of the alternative methods for the construction of normal value and export price under Articles 2.2 and 2.3 of the *Anti-Dumping Agreement*. The Panel did not examine, under Article 2.4 of that Agreement, the steps which USDOC allegedly took, in this case, to ensure a fair comparison of normal value and export price. We note, in that respect, that Japan concedes that "normally no duties would need to be removed from home market prices, and that USDOC makes some cost adjustments to downstream prices." (Japan's appellee's submission, para. 55) In these circumstances, we cannot rely on the statement made by the Panel in the context of Article 2.1 of the *Anti-Dumping Agreement*, for the purposes of our examination of Japan's claim under Article 2.4 of that Agreement.

production provision"), provides that, in certain statutorily defined circumstances, the USITC "shall *focus primarily*" on a particular segment of the "domestic industry", when "determining *market share* and the factors affecting *financial performance*", as part of an injury determination.[127] (emphasis added) The industry segment on which the USITC is directed to "focus primarily" is the segment of domestic producers that sell in the so-called "merchant market", or the open market, in the United States, for the like product. Imports of the like product are generally sold into the merchant market. The merchant market is distinguished from the "captive" market, which covers internal transfers of the like product that generally do not enter the open market, because the product is used by an integrated producer to manufacture a downstream product. Domestic producers whose production is captive do not, therefore, compete *directly* with importers, as imports are not generally used in the captive production of the downstream product.[128]

182. Japan argued that the captive production provision is, *on its face*, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the *Anti-Dumping Agreement* because it prevents a balanced assessment of the situation of the domestic industry as a whole and ignores the fact that a significant part of the domestic industry – captive production – is shielded or protected from the effects of the allegedly dumped imports. Japan also claimed that the *application* of the measure, in this investigation, was inconsistent with the same provisions of the *Anti-Dumping Agreement*.

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

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

[128]We observe that, in this case, USITC Commissioner Askey stated "that significant captive consumption *effectively protects the domestic industry* by providing integrated producers with a guaranteed market in which they do not compete with imports or with non-affiliated domestic producers". (United States International Trade Commission, Certain Hot-Rolled Steel Products From Japan, Investigation No. 731-TA-807 (Final), Publication 3202, June 1999 ("USITC Report"), Exhibit JP-14 submitted by Japan to the Panel, p. 51; emphasis added)

183. In examining the captive production provision, *on its face*, the Panel observed that the *Anti-Dumping Agreement* requires investigating authorities "to make a final determination as to 'injury' as defined in the Agreement to the industry as a whole."[129] The Panel went on:

> Specific circumstances might well call for specific attention to be given to various aspects of the industry's performance or to specific segments of the industry, as long as the end-result of this analysis is consistent with the Agreement's requirement to examine and evaluate all relevant factors having a bearing on the state of the industry and demonstrate a causal relationship between the dumped imports and the injury to the domestic industry.[130]

184. According to the Panel, the "key" to determining the consistency of the captive production provision with the *Anti-Dumping Agreement* "lies in the ordinary meaning of the words 'focus primarily'."[131] The Panel proceeded to examine that ordinary meaning, looking first to the dictionary meaning of the words "focus" and "primarily", then to the context of the provision.[132] In the course of that examination, the Panel took the view that the captive production provision:

> … requires USITC to concentrate *in chief* on the merchant market when considering market share and financial performance of the industry. Such a specific direction … does not, in our view, necessarily imply that the overall injury analysis is not performed with respect to the industry *as a whole*. The statute does *not* require a general and *exclusive* focus on the merchant market … but *only a "primary" focus*.[133] (emphasis added)

185. In reviewing the relevant context, the Panel added:

> However, we can find no basis in the text of the US law to conclude that the captive production provision eliminates the general obligation on USITC to make a determination regarding material injury to the domestic industry. Nor does it, in our view, diminish the obligation to examine all relevant economic factors having a bearing on the state of the industry as a whole in making a final determination of injury caused by dumped imports.[134]

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[129]Panel Report, para. 7.190.

[130]*Ibid*., para. 7.190.

[131]*Ibid*., para. 7.194.

[132]*Ibid*., paras. 7.195 and 7.196.

[133]*Ibid*., para. 7.195.

[134]*Ibid*., para. 7.196.

186. The Panel also observed that:

> … the [Statement of Administrative Action the "SAA"] notes that "the captive production provision does not require USITC to focus exclusively on the merchant market". The SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law … it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement".[135]

187. The Panel concluded by finding that the captive production provision is not, *on its face*, inconsistent with Articles 3 and 4 of the *Anti-Dumping Agreement*.[136] The Panel also concluded that the captive production provision was *applied* consistently with Articles 3.1, 3.4, 3.5, 3.6, and 4.1 of the *Anti-Dumping Agreement*.[137]

188. Japan appeals the Panel's findings, arguing that the captive production provision on its face, and as applied in this investigation, distorts the USITC's analysis of the domestic industry as a whole because only one part of the market is the subject of special examination. Further, by "focus[ing] primarily" on the merchant market, the USITC focused on the part of the industry which was most likely to be injured. Such an examination is not "objective" under Article 3.1 of the *Anti-Dumping Agreement*. Japan also argues that the Panel misunderstood the meaning of the words "focus primarily" in the United States statute.

189. We recall first that the *Anti-Dumping Agreement* provides that "injury" means "material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of *such an industry*".[138] (emphasis added) It emerges clearly from this definition that the focus of an injury determination is the state of the "domestic industry".

190. Article 4.1 of the *Anti-Dumping Agreement* defines the term "domestic industry" as the "domestic producers as a whole of the like products" or "[domestic producers] whose collective output of the products constitutes a major proportion of the total domestic production". It follows that an injury determination, under the *Anti-Dumping Agreement*, is a determination that the domestic

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[135]Panel Report, para. 7.198. The Panel also noted that United States law, "19 U.S.C. § 3512(d), provides that '[t]he statement of administrative action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application'". (Panel Report, footnote 131 to para. 7.198)

[136]*Ibid*., para. 7.199.

[137]*Ibid*., para. 7.215.

[138]Footnote 9 to the *Anti-Dumping Agreement*.

producers "as a whole", or a "major proportion" of them, are "injured". This is borne out by the provisions of Articles 3.1, 3.4, 3.5, 3.6, and 3.7 of the Agreement, which impose certain requirements with respect to the investigation and examination leading to an injury determination. Investigating authorities are directed to investigate and examine imports in relation to the "domestic industry", the "domestic market for like products" and "domestic producers of [like] products". The investigation and examination must focus on the totality of the "domestic industry" and not simply on one part, sector or segment of the domestic industry.

191. We also observe that Article 3.1 of the *Anti-Dumping Agreement* provides that an injury determination:

> … shall be based on *positive evidence* and involve an *objective examination* of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products. (emphasis added)

192. In our Report in *Thailand – Steel*, we said that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination.[139] We also said that this general obligation "informs the more detailed obligations" in the remainder of Article 3.[140] The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

193. The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.[141] In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of

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[139]Appellate Body Report, *Thailand – Steel*, *supra*, footnote 36, para. 106.

[140]*Ibid*.

[141]This provision is yet another expression of the general principle of good faith in the *Anti-Dumping Agreement*. See, *supra*, para. 101.

interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[142]

194. As we noted, the obligations in Article 3.1 inform the obligations imposed in the remainder of that provision. An important aspect of the "objective examination" required by Article 3.1 is further elaborated in Article 3.4 as an obligation to "examin[e] the impact of the dumped imports on the domestic industry" through "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities.[143] However, the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to "all relevant economic factors".

195. We see nothing in the *Anti-Dumping Agreement* which prevents a Member from requiring that its investigating authorities examine, in every investigation, the potential relevance of a particular "other factor", not listed in Article 3.4, as part of its overall "examination" of the state of the domestic industry. Similarly, it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry.[144] Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.

196. However, the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an "objective examination". If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

197. Instead, Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially

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[142]In this respect, we recall that panels are under a similar duty, under Article 11 of the DSU, to make an "objective assessment of the matter … including an objective assessment of the facts". In our Report in *EC Measures Concerning Meat and Meat Products (Hormones)*, we indicated that the obligation to make an "objective assessment" includes an obligation to act in "good faith", respecting "fundamental fairness". (Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 133)

[143]Appellate Body Report, *Thailand – Steel*, *supra*, footnote 36, para. 128.

[144]We note that the panel in *Mexico – High Fructose Corn Syrup*, *supra*, footnote 30, para. 7.154, took a similar view.

relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry".

198. Against this background, we turn to the measure at issue, the captive production provision. In our opinion, nothing in the *Anti-Dumping Agreement* prevents the United States from directing its investigating authorities to evaluate the potential relevance of the structure of a domestic industry, and, in particular, the importance to that industry, as a whole, of the fact that the production of certain domestic producers is captively consumed, while the production of other domestic producers competes directly with imports in the merchant market. Indeed, we believe that it may be highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market.

199. The issue which is before us is not, however, whether the United States could require the USITC to evaluate the division of the domestic industry, into captive production and merchant market production. Rather, the issue is whether the United States could require the USITC to "focus primarily" on the merchant market in its analysis of market share and of factors involving financial performance.

200. Although it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law.[145] Both before the Panel, and before us, the United States has sought to explain the meaning of the phrase "shall focus primarily". The United States notes that the captive production provision has not been applied on many occasions and that its meaning has not, therefore, been definitively determined.[146] The United States also points out that, in this investigation, the six individual Commissioners of the USITC adopted several different interpretations of the threshold criteria which must be satisfied in order that the captive production provision may apply.[147] Three of the Commissioners found that, in this case, these threshold criteria *were* satisfied, and that the captive production provision *was* applicable, while the three other Commissioners found that these criteria were *not* satisfied.[148] We accept that there is, as yet, no definitive interpretation of the captive production provision, including the words "shall focus primarily", *as a matter of United States' law*.

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[145]Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras. 66 and 67.

[146]United States' response to questioning at the oral hearing.

[147]*Ibid*.

201. We note that, during the Panel and appellate proceedings, the United States has explained the meaning of the words "shall focus primarily" in a variety of ways. The United States stated that the words "merely" require the USITC "to consider certain factors as they relate to the merchant market as well as the entire industry."[149] The United States indicated further that the captive production provision "requires the USITC to 'concentrate' its attention 'in the first instance' or 'chiefly' on the industry's merchant operations".[150] The United States also stated that the provision is simply "an analytical tool" or "an additional step" in the injury analysis, that "enhances" the ability of the USITC to evaluate the state of the domestic industry.[151] Moreover, according to the United States, in that "additional step", the words "focus primarily" dictate only an "ancillary analysis" of the merchant market, with the "primary" or "predominant analysis" being of the industry as a whole.[152]

202. The United States also explained that the captive production provision allows a "*comparative* analysis" to be conducted, or a "*juxtaposition*" to be made, of the performance of *merchant* market producers and the performance of *captive* market producers.[153] According to the United States, it is this comparative analysis, with the conclusion based on the industry as a whole, which ensures that inappropriate weight is not given to the merchant market in the USITC's determination.[154]

203. We observe, as the Panel did, that, under United States law, the required focus on the merchant market is *not per se* exclusive, and does not, by itself, exclude consideration of either the captive portion of the domestic industry or the domestic industry as a whole. We further note that the same statute which contains the captive production provision also directs the USITC to examine the domestic industry *as a whole*, and make a final determination about the industry *as a whole*.[155] We observe also that the captive production provision does not mandate that USITC attach any special weight, in the final determination, to the state of the merchant market. To the contrary, the United States argues that "the provision has no bearing on the weight that the USITC assigns to each factor."[156]

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[148]USITC Report, *supra*, footnote 128, pp. 9 and 10.

[149]United States' response to Question 24 posed by Japan during the Panel proceedings, para. 33. (Panel Report, p. E-62)

[150]United States' appellee's submission, para. 66.

[151]United States' oral statement; and United States' response to questioning at the oral hearing.

[152]United States' response to questioning at the oral hearing.

[153]*Ibid*.

[154]*Ibid*.

[155]Sections 735(b)(1) and 771(7)(B) and (C) of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1673d(b)(1) and § 1677(7)(B) and (C)); United States' appellee's submission, para. 61.

[156]United States' response to Question 23 posed by Japan during the Panel proceedings; see also the United States' response to Questions 22 and 24 posed by Japan during the Panel proceedings, paras. 29-33. (Panel Report, pp. E-61 and E-62)

204. We have already stated that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

205. Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

206. Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*.

207. As far as the captive production provision is concerned, we have observed that the United States sees this measure as an "analytical tool" which enables a proper "comparative analysis" of the merchant *and* captive markets. In an industry where a significant part of domestic production – captive production – is shielded by the structure of the domestic market from direct competition with imports, this comparison between these two parts seems particularly important. Accordingly, we agree with the United States that, in an industry with significant captive production, a "comparative"

examination of *each* part of the domestic market – which "juxtaposes" the merchant market *and* captive market – "enhances" the ability of the investigating authorities, here the USITC, to make an appropriate determination about the state of the domestic industry as a whole.[157]

208. The captive production provision does not, by itself, *require* an exclusive focus on the merchant market, nor does it *compel* a selective approach to the analysis of the merchant market that *excludes* an equivalent examination of the captive market. The provision also does not itself *mandate* that particular weight be accorded to data pertaining to the merchant market. Rather, as explained above, the provision allows the USITC to examine the merchant market *and* the captive market, with the same degree of care and attention, as part of a broader examination of the domestic industry as a whole.[158] Moreover, the provision does *not* alter the requirement in the same statute for the USITC to reach a final determination concerning the domestic industry as a whole. The captive production provision allows investigating authorities to take account of the need to ensure an "objective examination", and of the need to evaluate, and make a determination concerning, the domestic industry as a whole. Accordingly, if and to the extent that it is interpreted in a manner consistent with our reasoning, as set forth in paragraphs 203 to 208 of this Report, we see no necessary inconsistency between the captive production provision, *on its face*, and the *Anti-Dumping Agreement*.

209. For these reasons, which differ in part from those given by the Panel, we uphold the Panel's finding, in paragraph 8.2(b) of the Panel Report, that "the 'captive production' provision, is not [on its face] inconsistent with Articles [3 and 4] of the AD Agreement."

210. We turn to the *application* of the captive production provision in this investigation. In its examination of this issue, the Panel observed that the "USITC considered data for the domestic industry as a whole as well as merchant market data."[159] The Panel found that:

[157]See, *supra*, paras. 201 and 202.

[158]See, *supra*, paras. 201-203.

[159]Panel Report, para. 7.211.

> … the USITC determined that the domestic industry producing hot-rolled steel as a whole, defined in the report as the domestic producers as a whole of hot-rolled steel in the United States, was materially injured, or threatened with material injury. We further consider that the determination was one that could properly be reached by an objective and unbiased investigating authority on the basis of the information before the USITC, and in light of the explanations given in its analysis. The mere fact that the analysis also included a discussion with regard to a certain segment of the industry most affected by the subject imports, in our view, does not at all necessarily imply that the analysis was faulty.[160]

211. We have found that the requirement for investigating authorities to conduct an "objective examination" under Article 3.1 of the *Anti-Dumping Agreement* means that investigating authorities cannot examine parts of a domestic industry on a selective basis. Rather, if those authorities examine one part of a domestic industry, they must examine, in like manner, all the other parts of the industry, or, in the alternative, provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts. We have upheld the WTO-consistency of the captive production provision on the basis that it does not by itself compel a selective examination of the merchant market. According to the United States, the measure is precisely intended to allow a "comparative analysis" of the financial performance of the merchant market *and* captive market.[161]

212. Like the Panel, we observe that the USITC Report contains data for, firstly, the merchant market and, secondly, for the overall market.[162] Furthermore, the USITC's injury analysis also contains reference to data for the merchant market and for the overall market. In particular, in its examination of market share and of each of the financial performance indicators, the USITC mentioned data pertaining to the merchant market and the overall market.[163] However, while the USITC Report includes frequent reference to data for the merchant market, it does not contain, describe, or otherwise refer to, data for the captive market. At the oral hearing, the United States confirmed that the USITC did not include in its Report "a separate discussion" of the captive market.[164] According to the United States, the examination of the data for the captive market is subsumed within the examination of the domestic market as a whole, even though the merchant market is the subject of separate and express examination.

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[160]Panel Report, para. 7.213.

[161]See, *supra*, para. 202.

[162]Panel Report, paras. 7.207, 7.209, 7.211 and 7.212.

[163]USITC Report, *supra*, footnote 128, pp. 12-13 and 18-20. The USITC referred to data relating to market share, consumption, capacity utilization, production, shipments, operating income, net sales, and unit values.

[164]United States' response to questioning at the oral hearing.

213. It is true, as the United States argues, that the *aggregate* data for the industry as a whole includes data for every part of the industry. However, without further analysis to *disaggregate* this data, the data relating to the captive market remains unknown. Moreover, the mere fact that the *aggregate* data for the industry as a whole includes data for every part of the industry does not overcome the fact that the USITC Report discloses no *analysis* of the significance of the data for the captive market. Thus, there is no explanation by the USITC of the state of the part of the domestic industry that is shielded from direct competition with imports, nor any explanation of the significance of that shielding for the domestic industry as a whole. Further, the USITC Report does not exhibit any "comparative analysis" or "juxtaposition" of the merchant and the captive markets which, the United States said, is precisely contemplated by the captive production provision.[165] Yet, in the examination provided of the merchant market, there *is* an explanation of the poor state of that part of the domestic industry which is *not* shielded from the effects of imports.

214. As we have already explained, in the absence of a satisfactory explanation, Article 3.1 of the *Anti-Dumping Agreement* does not entitle investigating authorities to conduct a selective examination of one part of a domestic industry. Rather, where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. Here, we find that the USITC examined the merchant market, without also examining the captive market in like or comparable manner, and that the USITC provided no adequate explanation for its failure to do so.

215. We, therefore, reverse the Panel's findings, in paragraphs 7.215 and 8.2(b) of the Panel Report, that the United States did not act inconsistently with the *Anti-Dumping Agreement* in its *application* of the captive production provision in this investigation. We hold, instead, that the United States acted inconsistently with Articles 3.1 and 3.4 of that Agreement in the *application* of the captive production provision.

IX. Article 3.5 of the *Anti-Dumping Agreement*: Causation and Non-Attribution

216. In the Panel proceedings, Japan claimed that the USITC acted inconsistently with the causation requirements in Article 3.5 of the *Anti-Dumping Agreement*, first, because it did not adequately examine factors, other than dumped imports, which were also causing injuries to the domestic industry and, second, because, the USITC failed to ensure that injuries caused by these other factors were not attributed to the dumped imports. Japan's arguments focused on four other factors, the importance of which, it said, had been recognized by the USITC. These factors were: the

[165]See, *supra*, para. 202.

increase in production capacity of mini-mills[166]; the effects of a strike at General Motors ("GM") in 1998; declining demand for hot-rolled steel from the United States' pipe and tube industry; and the effects of prices of non-dumped imports.

217. The Panel examined each of these factors in turn and concluded that the USITC did not fail adequately to examine them.[167] The Panel went on to address Japan's claim regarding the proper attribution of injury. The Panel interpreted the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* to mean that:

> … the authority is to examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of the dumped imports under Articles 3.2 and 3.4 of the AD Agreement.[168]

218. The Panel referred with approval to the panel report in *United States – Atlantic Salmon Anti-Dumping Duties* and, in particular, adopted as an important element of its own reasoning that panel's statement that:

> [u]nder Article 3:4 the USITC was required not to attribute injuries caused by other factors to the imports from Norway. In the view of the Panel this did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports.[169]

219. The Panel took the view that our Report in *United States – Wheat Gluten Safeguard* "[bore] directly and substantially on [its] analysis" of the causation requirements in the *Anti-Dumping Agreement*, even though that dispute involved claims under the *Agreement on Safeguards*.[170] After reviewing that Report, the Panel stated that, under the *Anti-Dumping Agreement*, it is not necessary:

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[166]Mini-mills produce hot-rolled steel in an electronic arc furnace. See, further, USITC Report, *supra*, footnote 128, p. 11.

[167]Panel Report, paras. 7.241, 7.244, 7.246 and 7.247.

[168]*Ibid*., para. 7.251.

[169]Panel Report, *United States – Atlantic Salmon Anti-Dumping Duties*, *supra*, footnote 29, para. 555.

[170]Panel Report, para. 7.258.

> … to demonstrate that dumped imports alone have caused material injury by deducting the injury caused by other factors from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury.[171]

220. On appeal, Japan argues that the Panel erred because it did not correctly interpret the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*. According to Japan, that provision means that the effects of the "other" causal factors must be "separated" and "distinguished", and that their "bearing" on the domestic industry must be assessed. Japan cites as support the Appellate Body Reports in *United States – Wheat Gluten Safeguard* and *United States – Lamb Safeguard*.

221. We observe that the issue raised on appeal is confined to the Panel's interpretation and application of the *non-attribution* language in Article 3.5 of the *Anti-Dumping Agreement*, and does not relate to the Panel's finding that there is no requirement that dumped imports alone be capable of causing injury. The relevant part of Article 3.5 reads:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*. (emphasis added)

222. This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (emphasis added)

223. The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately

[171]Panel Report, para. 7.260.

separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.

224. We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.

225. In examining the meaning of the non-attribution language, the Panel considered that the panel report in *United States – Atlantic Salmon Anti-Dumping Duties* was "relevant and persuasive"[172] and, in fact, the Panel based its interpretive approach, in part, on a passage from that panel report which included the following statement:

> … [the non-attribution language] did *not* mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have *identified the extent of injury caused by these other factors* in order to *isolate* the injury caused by these factors from the injury caused by the imports from Norway.[173] (emphasis added)

226. It is clear to us that the interpretive approach adopted by the panel in *United States – Atlantic Salmon Anti-Dumping Duties* is at odds with the interpretive approach for Article 3.5 of the *Anti-Dumping Agreement* that we have just set forth.[174] As we said, in order to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports. However, the panel in *United States – Atlantic Salmon Anti-Dumping Duties*, expressly disavowed any need to "identify" the injury caused by the other factors. According to that panel, such separate identification of the injurious effects of the other causal factors is not required.

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[172]Panel Report, para. 7.253.

[173]Panel Report, *United States – Atlantic Salmon Anti-Dumping Duties*, *supra*, footnote 29, para. 555.

[174]See, in particular, *supra,* paras. 222 and 223.

227. By following the panel in *United States – Atlantic Salmon Anti-Dumping Duties*, the Panel, in effect, took the view that the USITC was not required to separate and distinguish the injurious effects of the other factors from the injurious effects of dumped imports, and that the nature and extent of the injurious effects of the other known factors need not be identified at all. However, in our view, this is precisely what the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* requires, in order to ensure that determinations regarding dumped imports are not based on mere assumptions about the effects of those imports, as distinguished from the effects of the other factors.

228. The United States contends that the panel in *United States – Atlantic Salmon Anti-Dumping Duties* correctly stated that there is no need to "isolate" the injurious effects of the other factors from the injurious effects of the dumped imports. We are not certain what the panel, in that dispute, intended to imply through the use of the word "isolation". Nevertheless, we agree with the United States that the different causal factors operating on a domestic industry may interact, and their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry. We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.

229. We are fortified in our interpretation of Article 3.5 of the *Anti-Dumping Agreement* by the interpretation we gave to Article 4.2(b) of the *Agreement on Safeguards*. In two recent Reports, *United States – Wheat Gluten Safeguard* and *United States – Lamb Safeguard*, we examined the causation requirements of the *Agreement on Safeguards* and, in particular, the non-attribution language of Article 4.2(b) of that Agreement. The relevant part of Article 4.2(b) of the *Agreement on Safeguards* reads:

> When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

230. Although the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language. Under both Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards*, any injury caused to the domestic industry, at the

same time, by factors other than imports, must not be attributed to imports. Moreover, under both Agreements, the domestic authorities seek to ensure that a determination made concerning the injurious effects of imports relates, in fact, to those imports and not to other factors. In these circumstances, we agree with the Panel that adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.[175]

231. In that respect, we observe that, in our Report in *United States – Wheat Gluten Safeguard*, we said:

> Clearly, the process of attributing "injury", envisaged by this sentence [in Article 4.2(b)], can only be made following a separation of the "injury" that must then be properly "attributed". What is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the "injury".[176]

232. In addition, in *United States – Lamb Safeguard*, we elaborated further upon this:

> As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports.[177]

233. In conclusion, in the light of our interpretation of Article 3.5 of the *Anti-Dumping Agreement*, we find that the Panel erred in its interpretation of the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* by finding that this language does not require the investigating authorities to separate and distinguish the injurious effects of the other known causal factors from the injurious effects of the dumped imports. In particular, we find that the Panel erred by

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[175]Panel Report, para. 7.258.

[176]Appellate Body Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 27, para. 68.

[177]Appellate Body Report, *United States – Lamb Safeguard*, *supra*, footnote 28, para. 179. See also para. 186 of that Report, where we indicated that competent authorities must provide a "meaningful explanation of the *nature and extent* of the injurious effects" of the other factors causing injury to the domestic industry. (emphasis added)

following the interpretive approach set forth by the panel in *United States – Atlantic Salmon Anti-Dumping Duties*.

234. The Panel's examination of Japan's claim under Article 3.5 was based on an erroneous interpretive approach. In view of the Panel's consequential failure to verify whether the USITC separated and distinguished the injurious effects of dumped imports from those of the other known factors, there was no means by which the Panel could properly satisfy itself, in examining Japan's claim, that the injurious effects of the other factors had not, in fact, been attributed by the USITC to the dumped imports, inconsistently with the *Anti-Dumping Agreement*. We must, therefore, reverse the Panel's findings in paragraphs 7.257, 7.261 and 8.2(c) of its Report as they are bereft of legal basis.

235. Having reversed the Panel's finding on Japan's claim, we must now consider whether it is appropriate for us to complete the analysis and facilitate the prompt settlement of the dispute, under Article 3.3 of the DSU, by examining Japan's claim ourselves. In previous Reports, we have emphasized that, after reversing a finding of the panel, we can complete the analysis only if the factual findings of the panel, or the undisputed facts in the panel record, provide us with a sufficient basis to do so.[178]

236. In this dispute, Japan argues that the United States acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement* because the USITC attributed to dumped imports injury that was, in reality, caused by four other factors. These four other factors are: an increase in capacity in mini-mills; the effects of a strike at GM in 1998; declining demand for hot-rolled steel from the United States' pipe and tube industry; and, the effects of prices of non-dumped imports. Japan's arguments regarding these four other factors are based on a series of detailed factual assertions. In our view, key aspects of these factual assertions were not the subject of findings by the Panel or were not agreed by the United States. We, therefore, find that, in the absence of an adequate factual record, there is no basis for us to complete the analysis of Japan's claim under Article 3.5 of the *Anti-Dumping Agreement*.

X. Conditional Appeals

237. In the event that we reverse certain of the Panel's findings that the United States acted inconsistently with the *Anti-Dumping Agreement*, Japan requests us to examine claims that it made under Articles 2.2, 2.3, 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II of the *Anti-Dumping Agreement*, but which the Panel did not examine for reasons of judicial economy. Three of these requests are

[178]Appellate Body Report, *European Communities – Asbestos*, *supra*, footnote 125, para. 78 and footnotes 48 and 49 thereto.

conditioned upon our reversal of the Panel's findings regarding the use of facts available by USDOC. As set forth above, however, we upheld the Panel's findings under Article 6.8 and Annex II of the *Anti-Dumping Agreement* regarding the use of facts available.[179] In these circumstances, the conditions on which Japan's appeals are made are not satisfied, and we do not address them.

238. The remaining two appeals made by Japan are conditioned upon a reversal of the Panel's findings, under Article 2.1 of the *Anti-Dumping Agreement*, regarding, first, the application of the 99.5 percent test and, second, the replacement of sales excluded under that test with the downstream sales made by affiliates of an investigated exporter to independent buyers. As set forth above, we upheld the Panel's finding that the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* as a result of the application of the 99.5 percent test, by USDOC, in this case.[180] Accordingly, we do not need to examine Japan's appeal, conditioned upon a reversal of this finding, as the condition does not arise.

239. As regards the second of these conditional appeals, we reversed the Panel's finding that, under Article 2.1 of the *Anti-Dumping Agreement*, USDOC could not use downstream sales by affiliates to independent buyers to calculate normal value.[181] In that part of our findings, we then went on to find that there is an insufficient factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the *Anti-Dumping Agreement*.[182]

XI. Findings and Conclusions

240. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Nippon Steel Corporation and NKK Corporation;

(b) upholds the Panel's finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Kawasaki Steel Corporation;

[179]See, *supra*, paras. 90 and 110.

[180]See, *supra*, para. 158.

[181]See, *supra*, para. 174.

[182]See, *supra*, para. 180.

(c) upholds the Panel's findings, in paragraph 8.1(b) of the Panel Report, that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement*; that, therefore, the United States acted inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* by failing to bring section 735(c)(5)(A) into conformity with the United States' obligations under the *Anti-Dumping Agreement*; and that the United States' *application* of section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, to determine the "all others" rate in this case, was also inconsistent with the United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*;

(d) upholds the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by excluding from the calculation of normal value, as outside "the ordinary course of trade", certain home market sales to parties affiliated with an investigated exporter, on the basis of the "99.5 percent" or "arm's length" test;

(e) reverses the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by using, in its calculation of normal value, certain downstream sales made by an investigated exporter's affiliates to independent purchasers;

(f) finds that there is an insufficient factual record to allow completion of the analysis of Japan's claim, under Article 2.4 of the *Anti-Dumping Agreement*, that the United States did not make a "fair comparison" in its use of downstream sales when calculating normal value;

(g) upholds the Panel's finding, in paragraph 8.2(b) of the Panel Report, that section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, the captive production provision, is not, *on its face*, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the *Anti-Dumping Agreement*; reverses the Panel's finding, in that same paragraph, that the United States did not act inconsistently with the *Anti-Dumping Agreement* in its *application* of the captive production provision in its determination of injury sustained by the United States' hot-rolled steel industry; and finds, instead, that the United States acted inconsistently with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* in the *application* of the captive production provision in this case;

(h) reverses the Panel's finding, in paragraph 8.2(c) of the Panel Report, that the USITC demonstrated the existence, under Article 3.5 of the *Anti-Dumping Agreement*, of a causal relationship between dumped imports and material injury to the United States' hot-rolled steel industry; but finds that there is an insufficient factual record to allow completion of the analysis of Japan's claim, under that provision, relating to causation;

(i) finds that the condition on which Japan's conditional appeal under Article 2.4 of the *Anti-Dumping Agreement* is made has been satisfied, as regards the United States' use of downstream sales by the affiliates of investigated exporters to independent purchasers; but finds, as stated in paragraph (f) above, that there is an insufficient factual record to allow completion of the analysis of Japan's claim under that provision; and

(j) finds that the conditions upon which Japan's remaining appeals under Articles 2.2, 2.3, 2.4, 6.1, 6.6, 6.8, 6.13 and 9.3, and Annex II of the *Anti-Dumping Agreement* are made have not been satisfied and, therefore, declines to rule on those conditional appeals.

241. The Appellate Body *recommends* that the DSB request that the United States bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 2nd day of July 2001 by:

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Yasuhei Taniguchi
Presiding Member

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Florentino P. Feliciano
Member

Julio Lacarte-Muró
Member