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UNITED STATES – ANTI-DUMPING MEASURES ON STAINLESS STEEL PLATE IN COILS AND STAINLESS STEEL SHEET AND STRIP FROM KOREA

Report of the Panel

The report of the Panel on United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 December 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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I. INTRODUCTION

1.1 On 30 July 1999, Korea requested consultations with the United States regarding the preliminary and final determinations of the United States Department of Commerce ("DOC") on imports of stainless steel plate in coils ("Plate") from Korea, dated 4 November 1998 and 31 March 1999, respectively, and the preliminary and final determinations of the DOC on imports of stainless steel sheet and strip in coils ("Sheet") from Korea, dated 4 January 1999 as amended 26 January 1999 and 8 June 1999, respectively. Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding" or "DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VI of

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by the DOC on imports of Plate and Sheet from Korea. The DOC imposed definitive duties on Plate and Sheet through separate proceedings.

A. PLATE

2.2 On 31 March 1998, a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Plate from Korea and five other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC received supplemental information from the petitioners in April 1998. On 27 April 1998, the DOC published a notice announcing the initiation of an anti-dumping investigation on imports of Plate from Korea and the five other countries concerned.[4] The period of investigation selected by the DOC for the purpose of determining whether dumping had occurred went from 1 January 1997 through 31 December 1997.[5]

2.3 On May 27 1998, the DOC issued investigation questionnaires to two Korean companies, including Pohang Iron and Steel Company ("POSCO").[6] POSCO replied to Section A of the investigation questionnaire on 1 July 1998 and to Sections B through D of that same questionnaire on 20 July 1998. Additionally, in July, August, September and October 1998, POSCO submitted replies to supplemental questionnaires. In turn, the petitioners filed comments with respect to POSCO's submissions in July, August and September 1998.[7] On 4 November 1998, the DOC published a preliminary affirmative dumping determination, and instructed the U.S. Customs Service to require a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (2.77% for both POSCO and all the other Korean exporters).[8]

2.4 In November-December 1998, the DOC verified the sales data and the cost data submitted by POSCO. POSCO submitted revised sales data on 30 November 1998. Additionally, both POSCO and the petitioners filed case briefs on 26 January 1999, commenting on the preliminary determination, and rebuttal briefs, commenting on the case briefs, on 2 February 1999.[9] On 31 March 1999, the DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (16.26% for both POSCO and all the other Korean exporters).[10]

2.5 On 4 May 1999, the United States International Trade Commission informed the DOC of its final affirmative injury determination concerning imports of Plate from the six investigated countries,

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[4] *Initiation of Antidumping Duty Investigations: Stainless Steel Plate in Coils from Belgium, Canada, Italy, Republic of South Africa, South Korea, and Taiwan*, Federal Register Vol. 63, No. 80, at pages 20580-20585. Korea Exhibit 3.

[5] *Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea* (*"Preliminary Determination on Plate"*), Federal Register Vol. 63, No. 213, at page 59536. Korea Exhibit 4.

[6] In what follows, we only make reference to POSCO's participation in the investigation since Korea is not challenging the actions taken by the DOC with respect to the other Korean company.

[7] *Preliminary Determination on Plate*, at page 59536. Korea Exhibit 4.

[8] *Preliminary Determination on Plate*, at page 59539. Korea Exhibit 4.

[9] *Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea ("Final Determination on Plate")*, Federal Register Vol. 64, No. 61, at page 15444. Korea Exhibit 11.

[10] *Final Determination on Plate*, at page 15456. Korea Exhibit 11

including Korea.[11] Following this notification, on 21 May 1999 the DOC published an anti-dumping duty order with respect to imports of Plate from these countries, setting a cash deposit rate for imports of Plate from Korea equal to the dumping margins arrived at by the DOC in its final determination (16.26% for both POSCO and all the other Korean exporters).[12]

B. SHEET

2.6 On 10 June 1998, a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Sheet from Korea and seven other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC received supplemental information from the petitioners in June 1998. On 13 July 1998, the DOC published a notice announcing the initiation of an anti-dumping investigation on imports of Sheet from Korea and the seven other countries concerned.[13] The period of investigation selected by the DOC for the purpose of determining whether dumping had occurred went from 1 April 1997 through 31 March 1998.[14]

2.7 On 3 August 1998, the DOC issued investigation questionnaires to five Korean companies:

both POSCO and the petitioners filed case briefs on 15 April 1999, commenting on the preliminary determination, and rebuttal briefs, commenting on the case briefs, on 21 April 1999. A public hearing was held on 26 April 1999.[19] On 8 June 1999, the DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Sheet from Korea, equal to the calculated dumping margins (12.12% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.12% for all the other Korean exporters).[20]

2.10 On 19 July 1999, the United States International Trade Commission informed the DOC of its final affirmative injury determination concerning imports of Sheet from three of the eight investigated countries, including Korea.[21] Following this notification, on 27 July 1999 the DOC published an anti-dumping duty order with respect to imports of Sheet from these three countries, setting a cash deposit rate for imports of Sheet from Korea equal to the dumping margins arrived at by the DOC in its final determination (12.12% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.12% for all the other Korean exporters).[22]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 Korea respectfully requests the Panel to find that the U.S. anti-dumping measures at issue, including actions preceding those measures, are inconsistent with the following provisions of the AD Agreement and GATT 1994:

- Article VI:1 of *GATT 1994* and Article 2.4 of the *AD Agreement*, which permit adjustments to be made only for differences that are demonstrated to affect price comparability;

- Article 2.4 of the *AD Agreement*, which also requires the investigating authorities to make a fair comparison of the export price and the normal value;

- Article 2.4.1 of the *AD Agreement*, which permits alterations to the standard price comparison methodology to account for currency movements only when the exporting country's currency is appreciating against the importing country's currency;

- Article 2.4.1 of the *AD Agreement*, which also permits currency conversions only when such conversions are required;

- Article 2.4.2 of the *AD Agreement*, which requires that the calculation of dumping margins be based on a comparison of a single average normal value to a single average of prices of all comparable export transactions;

- Articles 6.1, 6.2, and 6.9 of the *AD Agreement*, which require the investigating authorities to give exporters notice of all essential facts in order to provide them with a full and ample opportunity to defend their interests;

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[19] *Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from the Republic of Korea ("Final Determination on Sheet")*, Federal Register Vol. 64, No. 109, at page 30665. Korea Exhibit 24.

[20] *Final Determination on Sheet*, at page 30688. Korea Exhibit 24.

[21] *Notice of Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from the United Kingdom, Taiwan and South Korea ("Anti-Dumping Duty Order on Sheet")*, Federal Register Vol. 64, No. 143, at page 40556. Korea Exhibit 26.

[22] *Anti-Dumping Duty Order on Sheet*, at pages 40556-40557. Korea Exhibit 26.

- Article 12.2 of the *AD Agreement*, which requires the investigating authorities to provide a full explanation of the reasons for their determinations;

- Article X:3(a) of *GATT 1994*, which requires each WTO Member to administer its laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner; and

- Article VI of *GATT 1994* and Article 1 of the *AD Agreement*, which only permit anti-dumping measures to be imposed in the circumstances provided for in Article VI and pursuant to investigations conducted in accordance with the *AD Agreement*.

3.2 Therefore, Korea requests that the Panel find that: (i) the United States has nullified or impaired a benefit accruing to Korea, directly or indirectly, under the *WTO Agreements*; and (ii) the

appropriate public notice and to timely provide the text of the application – were harmless. Here, the question is rather whether certain *factual errors* vitiate a determination, thus giving rise to a violation.

5.6 **Korea** contends that the interim report is incorrect in treating as a question of fact the issue whether the DOC adjusted for the unpaid sales as part of 'constructing the export price' or as an adjustment to the export price (paras. 6.62 to 6.70). There is no dispute between the parties as to what the DOC did: The DOC calculated a 'bad debt expense' for the unpaid sales and made an adjustment to all of POSCO's export sales to account for that expense. The only question is how to characterize

5.12 In response to comments by **Korea**

6.4. With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

> "(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."

Thus, in considering those aspects of the United States' determinations which stand or fall depending on the interpretation of the *AD Agreement* currency conversions only when such conversions are "required", i.e., when there is no other reasonable alternative. Korea considers that the "double conversion" by the DOC was unnecessary, as it could simply have used the original dollar prices in the invoices. Accordingly, the DOC's "double conversion" of local sales departed from the requirement of Article 2.4.1 that currency conversions be performed only when required. [30]

6.8. The **United States** argues that the phrase "[w]hen the comparison under paragraph 4 requires a conversion of currencies" in Article 2.4.1 establishes the condition under which the rules that follow will apply, but it cannot be read to require that currency conversions be avoided in any particular circumstances, particularly where the transaction occurs in a foreign currency. In any event, the United States considers that it made no "double conversion" of local sales in these investigations. Rather, the DOC made a proper factual determination that the local sales were won transactions as

6.11. Article 2.4.1 sets forth rules with respect to the conversion of currencies to be applied "[w]hen the comparison under paragraph 4 requires a conversion of currencies . . . ." While Article 2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, we consider that it does establish a general – and in our view, self-evident - principle that currency correct, then the factual predicate underlying Korea's claim is without basis and Korea's claim must fail.

(i) standard of review

6.16. In examining this issue, we must first consider the issue of the proper standard of review to be applied in reviewing the DOC's determination. The **United States** considers that whether the sales in question were in dollars or won is a question of fact. Accordingly, the Panel should assess pursuant to Article 17.6(i) whether the DOC's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. **Korea** by contrast argues that the determination in question was not a factual determination, because there were no facts in dispute.

6.17. As noted in Section VI.A, above, Article 17.6 sets forth the standard of review to be applied by a panel when examining a matter under the *AD Agreement*. It is evident from the text of Article 17.6 that the standard of review to be applied by panels depends upon the nature of the question before it. The relevant standard to be applied when considering questions of law, i.e., the interpretation of the *AD Agreement*, is set forth in Article 17.6(ii). The standard to be applied in reviewing determinations of an investigating authority in respect to questions of fact is set forth in Article 17.6(i). Thus, the question before us is whether that determination is one of fact and thus subject to the standard of review set forth in Article 17.6(i).

6.18. Korea's view appears to be that Article 17.6(i) applies only in respect of the establishment of certain objectively-ascertainable underlying facts, e.g., did the invoices express the sales values in terms of dollars or won, in what currency payment was made, etc. We consider that this interpretation does not however coincide with the language of Article 17.6(i). That Article speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation.

6.19. In this case, it is generally true that the underlying facts on the basis of which the DOC considered whether the sales in question were made in dollars or won are not disputed (although we will see that there is substantial disagreement between the parties about one key underlying factual issue). We consider, however, that the DOC's determination that the sales in question were made in won was a factual determination in as much as it represents a determination made on the basis of the evaluation of certain facts and does not involve the interpretation of provisions of the *AD Agreement*.

6.20. In light of the above, we consider that the task before us is to examine whether an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Plate* and *Sheet* investigations could properly have determined that the local sales in question were made in won rather than in dollars. Given the nature of the arguments before us, we recall that pursuant to Article 17.5(ii) of the *AD Agreement* we are to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Finally, we note that this dispute relates to two separate investigations, and that the facts before the DOC differ. Thus we will review the determinations of the DOC in these two investigations separately.

(ii) The *Plate* Investigation

6.21. In order to evaluate whether an unbiased and objective investigating authority could properly have determined that the local sales in the *Plate* investigation were made in won rather than dollars, we must first consider in detail the determination of the DOC and the evidence that was before the DOC at the time it made its determination.

> payment . . . . Therefore, for the final determination, we have used the won price for home market sales.[32]

6.23. On the basis of this discussion, we can perceive the core issue faced by the DOC and the manner in which it resolved it. It will be recalled that POSCO initially reported local sales to be won sales but subsequently reported them in dollars. In considering how to treat these sales, the DOC had before it evidence that local sales were ordered and invoiced in dollars (and, on some invoices, also in won) but paid in won. The question it faced was whether it should consider the sale to be a sale in dollars in the amount shown on the invoice (such that no currency conversion would be required) or a sale in won based upon the amount charged to the sales ledger. The DOC concluded that use of the won amount was appropriate because the customers paid in won, the merchandise was charged to the sales ledger in won, and the exchange rate used by POSCO to calculate the won equivalent of the dollar amount was dissimilar to the "market" exchange rate used by the DOC.

6.24. The heart of Korea's argument that these sales should have been treated as dollar rather than won sales is clearly stated in its first submission:

> "As discussed in the Statement of Facts, POSCO had a significant quantity of "local sales" of both SSPC and SSSS during the investigation periods. These "local sales" were negotiated and invoiced in US dollars, but the payments were made in Korean won. Significantly, to ensure that payment accurately reflected the actual dollar value of the sales, the amount of the Korean won payment for these "local sales" was not fixed at the time of the sales negotiation or at the time of invoice. Instead, the payment in Korean won was determined by applying the market exchange rate (as announced by the official Korean Exchange Bank) for the date of [payment][33] to the US dollar amount shown on the invoice. Thus, the economic reality is that the final payment for these sales is determined by the US dollar amount shown on the invoice, and not by the Korean won amount recorded in POSCO's accounting records at the time of invoice. In economic terms these "local sales" are equivalent to sales that are invoiced and paid in US dollars.[footnote omitted][34]

This argument – that the transactions in economic terms were dollar transactions because the amount of Korean won actually paid was established by converting the dollar amount invoiced by the exchange rate at the time of payment, rather that at the time of invoice – is repeated frequently by Korea in its submissions.[35]

6.25. We consider that the reasoning advanced by Korea is compelling. The issue in the *Plate* investigation whether the local sales in question were dollar or won sales arose because the invoices were expressed in dollars[36] but the payments were made in won. Thus, if the amount of won actually paid was based on the dollar amount identified in the invoice at the market rate of exchange on the date of *payment* (which, because the local sales in question were letter of credit sales, came some months after the date of invoice), then the controlling amount would be the dollar amount appearing in the invoice. This was in fact a key element in the reasoning of the DOC in *Fresh Cut Roses from*

[32] *Final Determination on Plate*, at pages 15455-15456, Korea Exhibit 11.

[33] The original Korean submission referred to "date of sale". Korea however informed the Panel that his was a typographical error and that the reference should be to the "date of payment". Responses of Korea to Questions Posed by the Panel and by the United States. (Question 6 on currency conversion, Annex 1-4).

[34] First submission of Korea, para. 4.64, Annex 1-1.

[35] *See* First submission of Korea, paras. 3.51-3.53, Annex 1-1; Oral statement of Korea at the First meeting of the Panel, paras. 60-61, Annex 1-2; Second submission of Korea, paras. 128, 139-140, Annex 1-5; Oral statement at the second meeting of the Panel, paras. 81-84, Annex 1-6.

[36] And sometimes also in won. *See* paragraph 6.5, *supra*.

Colombia[37], an anti-dumping investigation cited by both the petitioners and respondents in the *Plate* investigation and discussed by the DOC in its final determination, as quoted above. In that case, the DOC "established that respondent invoiced its home market customers in US dollars and received the equivalent value in pesos *at the date of payment*".(emphasis added) The DOC "found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made. Furthermore, since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar value, there is no distortion."[38]

6.26. Korea's argument, however, is dependent upon a particular factual predicate: that the amount of won actually paid in respect of local sales was determined by applying the market rate of exchange at the time of *payment* to the dollar amount stated in the invoice. Korea asserts, and the United States does not appear now to dispute, that the amounts paid were established based upon the application as of the date of payment of exchange rates established by the Korean Exchange Bank. The DOC was not however aware at the time of its final determination in the *Plate* investigation that this was the case. Rather, it is evident to us that the DOC considered at the time of its final determination that the actual won amount paid was the amount charged to the sales ledger, which in turn was derived by converting the dollar amount invoiced to won at the Korean Exchange Bank exchange rate prevailing *at the time of invoice*, and that there was no evidence in the record suggesting to the contrary.

6.27. In response to a question from the Panel, Korea acknowledges that "it is unaware of any evidence in the record of the Plate case that indicates that POSCO specifically informed the DOC that the amount paid in won differed from the converted won amounts shown in the invoice."[39] It contends however that, once POSCO had informed the DOC that local sales were denominated in dollars, the burden was on the DOC to ask for the necessary information. We consider this argument to be unpersuasive. This is not a case where the DOC did not know the actual won amounts paid and did not bother to ask. Rather, POSCO in its initial questionnaire reported local sales in won, and the amount reported was the invoiced amount rather than the – in most cases probably substantially higher – amount actually paid.[40] Even after POSCO reported dollar prices for the local sales and argued that those dollar prices should be used in place of the won prices, it never corrected the initial misimpression that the won amount reported was the amount actually paid.[41] Finally, the DOC did

[37] 60 Fed. Reg. 6980, 7006 (6 February 1995). Korea Exhibit 52.

[38] *Ibid.*

[39] Responses of Korea to Questions Posed by the Panel at the Second Meeting of the Panel, (Question on currency conversion, Annex 1-6).

[40] *Ibid*. POSCO informed the DOC in its initial questionnaire response that it had "reported the actual invoiced price per metric ton in Korean Won. In the home market, POSCO made local letter of credit sales ("local sales")[footnote omitted] and domestic sales. All sales were paid in Korean Won and have been recorded in Korean Won on the database." US Exhibit 21.

[41] When submitting revised data in response to a supplemental questionnaire in August 1998, POSCO noted that it had in addition made some "minor corrections", and had, *in.196cr 1 on.5 0 TD /F1 9.75 Tf 0.1457 15c -0.1394 78w*

not become aware at verification that the won amounts paid might be different from the won amounts charged to the sales ledger because customers paid on a rolling basis such that verification of payments on an individual basis was not possible.[42]

6.28. We now turn to a review of the DOC's determination on this issue in light of the facts as understood by the DOC on the basis of the record before it. As the DOC explained in its determination, it had verified certain local sales. For these sales, while the customers were invoiced in dollars (and sometimes also in won), *payment was made in won*, and the value of the merchandise was charged to the sales ledger in won, *based upon the exchange rate prevailing on the date of invoice*.[43] The *Plate* final analysis memorandum that underlies the final determination indicates that the date of *payment* for these sales however was some months later.[44] In other words, the record before the DOC indicated that the won amount the customer would pay on a given date was fixed some months earlier based upon the won/dollar exchange rate prevailing on the earlier date, irrespective of subsequent changes in the dollar/won exchange rate. The DOC's determination then notes that the exchange rate used by POSCO on the earlier date did not correspond to the market exchange rate used by the DOC. Again, the *Plate* final analysis memorandum indicates that the DOC was comparing POSCO's exchange rate on the date of invoice both to the DOC's exchange rate on that date and to its exchange rate on the date of payment.[45] The determination notes that "this is in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate *at the date of payment*" (emphasis added).[46] In short, the DOC concluded that local sales were made in won because the amount to be paid was fixed in won on the date of invoice irrespective of subsequent movements in the won/dollar exchange rate between the date of invoice and the date of payment.

6.29. In challenging the DOC's determination, Korea emphasizes an admitted error by the DOC regarding benchmark exchange rates. Specifically, although the DOC stated that it was comparing POSCO's internal exchange rates to US Federal Reserve exchange rates, it mistakenly compared POSCO's internal exchange rates – which were in fact the Korean Exchange Bank's official rates – to certain adjusted exchange rates prepared by the DOC on the basis of three-month rolling averages. This error however does not detract from the essential fact – as perceived by the DOC at the time it made its determination based upon the record before it – that the won price was determined as of the date of invoice and remained fixed irrespective of any subsequent changes in the won/dollar exchange rate between the date of invoice and the date of payment.

6.30. Korea also has emphasized that the order sheets for local sales, which were verified by the DOC, reflect a dollar amount but no won amount. Korea contends that this supports its view that

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application of the exchange rate prevailing on the date of *invoice*, differed from the won amount actually paid. Korea Exhibit 7, pp. 3-6. Nor does the petitioner's case brief indicate any awareness of this fact. To the contrary, the petitioner repeatedly asks the DOC to use "the won prices that POSCO's customers actually pay". Korea Exhibit 10, p. 1.

[42] Responses of Korea and of the United States to Questions Posed by the Panel at the Second Meeting of the Panel. (Question 2 on currency conversion, Annexes 1-7 and 2-7).

[43] It should be noted that, at the request of POSCO and over the opposition of the petitioners, the DOC found that the date of sale was the date of *invoice* and not the date of *order*. The DOC so found because there were changes in price for a significant proportion of shipments between the date of order and the date of invoice. *Final Determination on Plate*, p.15449, Korea Exhibit 11.

[44] Memorandum to File re: Analysis for the final determination in the investigation of stainless steel "D /F3 91 9.75 Tf 0.2631 Tc 0 Tte 44

local sales were negotiated as well as invoiced in dollars. While the fact that order sheets showed sales in dollars and not in won might be a relevant consideration in other circumstances, the fact remains that – based on the record as placed before the DOC – a won amount was fixed at the date of invoice and this won amount was controlling as to the amount to be paid several months later. We recall in any event that in this investigation the DOC determined that the date of invoice rather than the date of order confirmation was the "date of sale" because it was at the time of invoice that POSCO established the material terms of sale. In support of this view, POSCO had argued that "all POSCO's sales were subject to change between order and shipment".[47] Thus, the fact that the orders for local sales were expressed in dollars is in our view less than conclusive as to whether the sales were won or dollar sales.

6.31. For the foregoing reasons, we conclude that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Plate* investigation could properly have determined that the local sales in question were made in won.

(iii) The *Sheet* Investigation

6.32. We now consider whether an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Sheet* investigation could properly have determined that the local sales were made in won rather than dollars.

6.33. The arguments of the parties and the conclusions of the DOC are set forth in some detail in the DOC's final determination:

> "Respondent argues that the Department should calculate normal value for "local" sales made in the home market based on the US dollar price at which those sales were invoiced. Local sales are sales of subject merchandise to home market customers who will further process the merchandise into non-subject products for export. Respondent maintains that although POSCO is paid in Korean won, the amount of payment is based on the US dollar invoiced price. Respondent contends that because POSCO's local sales are denominated and invoiced in US dollars, the invoiced prices do not require conversion to won for US comparison purposes, and that the conversion of the US dollar price to won and then back to dollars is not only unnecessary, but would significantly distort the margin. Respondent cites to . . . *Roses from Columbia* [sic] . . ., noting that the Department agreed and accepted the US prices for sales invoiced in US dollars, notwithstanding that the respondent received payment from the customer in the home market currency. Respondent argues that in the final determination in *SSPC from Korea*, the Department's concern was that POSCO's customers paid for sales in won, the sales amounts were recorded in won in POSCO's accounting records, and that the exchange rates utilized by POSCO to determine the won equivalents were different from those exchange rates used by the Department. Respondent contends that the fact that payment is made in won is irrelevant, since both the contract and the invoice reflect a US dollar price, and that sales are converted to won for the purposes of consistency with POSCO's accounting records, which are maintained in won.
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> Petitioners claim that the use of the dollar value for local sales in the home market would be inappropriate, given that POSCO receives payment in won. Petitioners distinguish this case from *Roses from Columbia* [sic] by noting that in that case, the Department was factoring in the effects of inflation in the cost-of-production

[47] *Final Determination on Plate*, Korea Exhibit 11.

analysis, costs were converted into dollars; the payments in local currencies had reflected the prevailing exchange rate, and all home market sales had been invoiced in dollars and paid in pesos. Petitioners further contend that in *Roses from Columbia* [sic], the decision to use US dollar-based prices was presumably made for convenience and consistency, as costs were also dollar-denominated. Petitioners further note that the disparity between the exchange rates reflected in the price conversion and the rates used by the Department is too great to reconcile, and is in contrast to the situation in *Roses from Columbia* [sic]. Petitioners argue that the use of a constant index such as the dollar is used by the Department in the face of

> sales are dollar-denominated, and paid in won equivalents, POSCO records the sale in its won equivalent, reflected in the tax invoice to the customer. On payment, the exchange rate is determined based on the rates given to POSCO by Korean Exchange Bank for Inward Remittance. For this sale, POSCO recognized an exchange rate loss of [xxxx]. This difference between the recorded sales amount and payment amount is reflected in the "Foreign Exchange Currency Loss of Transaction for Local Sales" account. We examined all journal entries, ledgers, bank documents, and publicly available information (re: Korea Exchange Bank, Foreign Exchange Rates), and found no discrepancies."[49]

On the basis of this Verification Report, it seems clear to us that the DOC in the *Sheet* investigation was fully aware that the won amounts reported by POSCO in respect of local sales were in fact different from the won amounts actually paid.

6.36. The United States argues that "the only suggestion that [the invoiced and paid] amounts differed came late in the proceeding amid conflicting information". It contends that POSCO only reported the invoice price and neither informed the United States nor claimed that the amount paid differed from the amount invoiced.[50] We note however that, unlike in the *Plate* investigation, POSCO in the *Sheet* investigation reported dollar amounts ("for ease of verification") in addition to won amounts in its initial questionnaire response.[51] This triggered a supplemental questionnaire from the DOC in response to which POSCO provided information suggesting that the won price paid was not the same as that invoiced.[52] More importantly, the sales verification report quoted above was dated 6 April 1999 and related to a verification performed in February. It thus predated the final determination in the *Sheet* investigation by several months. Moreover, the Verification Report quoted above does not suggest a hint of doubt about the manner in which local sales were handled. A page extracted from POSCO's accounts and attached to the Verification Report listed dozens of exchange rate losses related to local sales.[53] At this point, therefore, the record clearly showed that the amount of won actually paid in the case of local sales differed from the amount initially reported by POSCO and appearing on POSCO's tax invoices.[54]

6.37. In light of the foregoing, it is difficult to understand the basis for the DOC's statement, in its final determination, that, "[a]t verification, we found that local sales are the only sales made in the home market that are expressly linked to a dollar value, but that the sale is ultimately a won-denominated sale." Leaving aside that we can locate no such "finding" in the Verification Report, we are convinced that an unbiased and objective investigating authority could not so find on the basis of the facts before it in the *Sheet* case. As we have seen, it was clear from the record in the *Sheet* investigation that the won price which the DOC considered to be the price in which local sales were denominated was in no sense controlling. Rather, the won amount ultimately paid would be determined by converting the dollar amount appearing on the invoice into won at the rate of exchange prevailing on the date of payment. Thus, the dollar amount appearing on the invoices was controlling,

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[49] *Sheet* Sales Verification Report, 6 April 1999, p. 14, Korea Exhibit 19.

[50] Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 2 on currency conversion, Annex 2-7).

[51] US Exhibit 41, pp. B-21, B-22.

[52] POSCO stated that "[p]ayment is received on a letter of credit basis in dollars as well. Payment is booked in won with the difference in the exchange rate on the date sale and the date of payment recorded as a transaction gain or loss." US Exhibit 42. It is unclear why POSCO indicated that payment was received in dollars. However, the DOC determined, and POSCO did not subsequently dispute, that payment was in fact made in won.

[53] *Ibid*.

[54] We note that the local sales issue was briefed by the parties and decided by the DOC well after this date.

while the won equivalent appearing on the tax and certain shipping invoices and noted in POSCO's accounts[55] played no role in determining the amount the purchaser ultimately would pay. As explained above, we agree with Korea that there is no logical basis under these circumstances to consider that the sales in question were denominated in won.

6.38. In its determination, and before this Panel, the United States has emphasized that there were differences between the exchange rates used by POSCO and the market exchange rates relied upon by the DOC. We agree that the DOC might have been entitled to disregard the dollar prices stated in the invoices if the won amounts actually paid had been based on fictitious or inaccurate exchange rates, as this would have indicated that the economic value of the transactions was not in fact determined in dollars at all.[56] In this case, however, the DOC verified, and the United States does not now dispute, that the "internal exchange rates" used by POSCO were in fact the official exchange rates published by the Korea Exchange Bank.[57] Further, we consider that the differences between the Korea Exchange Bank rates and the Federal Reserve rates cited in the *Sheet* investigation[58] are not the result of fictitious or inaccurate exchange rates, but merely reflect the existence of a 14-hour time difference between New York and Seoul.[59]

6.39. For the foregoing reasons, we conclude that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Sheet* investigation could not properly have determined that the local sales in question were made in won.

(iii) Did the United States perform unnecessary currency conversions in violation of Article 2.4.1 of the AD Agreement?

6.40. As discussed above, we have concluded that the DOC did not err in considering that the local sales in question in the *Plate* case were denominated in won rather than in dollars. Therefore the factual predicate underlying Korea's claim under Article 2.4.1 – that the DOC performed an unnecessary "double conversion" in respect of those sales – is without foundation. To the contrary, having properly treated the sales in question as having been made in won, the DOC made only a single conversion, from won to dollars. Accordingly, we conclude that, in the *Plate* investigation, the United States did not act inconsistently with Article 2.4.1.

6.41. With respect to the *Sheet* investigation, we have concluded that the DOC's factual determination that the local sales in question were won-denominated sales was in error. In our view, the DOC improperly treated sales that were denominated in dollars as won sales. We have further concluded that it would be inconsistent with Article 2.4.1 to undertake currency conversions in

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[55] The fact that local sales were entered into POSCO's accounts in won is in and of itself of little significance. As Korea points out, *all* sales – including dollar-denominated US sales – are entered into Korea's books in won, and it keeps all its accounts in that currency.

[56] As the petitioners argued before the DOC, "a respondent could quote understated dollar prices [in the home market]and then use an artificially high exchange rate to collect the 'real' amount being charged in the local currency". (Korea Exhibit 23, p. 5). Even in this case, however, an investigating authority presumably would use the actual won amounts *paid* where that amount differed from the nominal won amount appearing on certain invoices.

[57] *Sheet Final Analysis Memorandum*, Korea Exhibit 25; Responses of the United States to Questions Posed by the Panel the Second Meeting of the Panel, question 7 on currency conversion, Annex 2-7.

[58] *Sheet Final Analysis Memorandum*, Korea Exhibit 25, p.3. The differences relied upon by the DOC were of less than one percentage point.

[59] As Korea points out, the Federal Reserve rates are based on rates prevailing in New York City at 12:00 p.m. Given the 14-hour time difference, the Federal Reserve rates for a given day are not established until nine hours after close-of-business (17:00) in Seoul. Thus, some difference between the exchange rates is inevitable.

instances where the prices being compared were in the same currency. It being undisputed that in this case the export prices in question were also in dollars, we conclude that, in the *Sheet* investigation, the United States acted inconsistently with Article 2.4.1.

3. Claims under Article 2.4 of the *AD Agreement* ("fair comparison")

(a) Arguments of the parties

6.42. **Korea** asserts that the "double conversion" of local sales from dollars to won and back to dollars was inconsistent with a "fair comparison" requirement in the chapeau of Article 2.4. In Korea's view, the conversion of these sales from dollars to won at the exchange rate prevailing as of the date of the home market sale, and their re-conversion from won to dollars at a different exchange rate prevailing as of the date of a corresponding US sale, unfairly penalised POSCO for changes in the exchange rate between these two dates that were beyond its control. Korea further contends that as a result of this double conversion at different rates, the United States compared the export price to an inflated normal value.

6.43. The **United States** contends that it made a proper factual determination that the local sales were made in won, and that it made a single conversion of those won sales to dollars.

(b) Evaluation by the Panel

6.44. Although Korea expresses its fair comparison claim in slightly different ways at different points in its submissions, it is clear that this claim, like Korea's claim under Article 2.4.1, relies upon the existence of a "double conversion" – i.e., the conversion of dollar-denominated prices into won at one exchange rate and the conversion back into dollars at a different exchange rate. We have concluded that, in the *Plate* investigation, no such "double conversion" occurred, because the DOC properly determined that the sales in question were denominated in won. Accordingly, we find that the United States did not act inconsistently with any "fair comparison" requirement under Article 2.4 in the *Plate* investigation.

issue in this dispute and *Roses* do not withstand scrutiny. In addition, the United States acted unreasonably by penalizing exporters for differences between official Korean and US exchange rates that existed because of a time difference between Korea and New York. Korea further argues that, by providing incorrect and irrelevant arguments to justify its departure from the standard methodology, the United States failed to provide the statement of reasons required by Article 12.2 of the *AD Agreement*.[61]

6.47. In the view of the **United States,** Korea in effect argues that Article X provides for panel review of the consistency of any action by a Member with its own domestic law, regulation or practice. However, the task of a panel under the *DSU* is to review the consistency of a Member's actions with a covered agreement. Further, as observed by the Appellate Body in *EC - Bananas,* Article X:3 does not address the consistency of particular administrative rulings, but rather the *administration* of such rulings. In this dispute, Korea's complaint focuses on the anti-dumping rulings in the *Plate* and *Sheet* investigations themselves, and not on the administration of those rulings. In any event, the United States disputes that *Roses from Colombia* reflects US practice. *Roses* was a single case exception to US practice, not the rule. The facts in these investigations differ significantly from those in *Roses*, and no subsequent case has followed the position taken in *Roses*.

(b) Evaluation by the Panel

(i) The Plate investigation

6.48. Article X:3(a) of the GATT 1994 provides as follows:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

6.49. In considering Korea's claim under Article X:3(a), we first note the contention of the United States that Korea is challenging the DOC's anti-dumping rulings in these investigations while Article X:3(a) permits challenges only to the administration of those rulings. It is of course clear from the text of Article X:3(a) that that provision relates to the *administration* of laws, regulations, decisions and rulings, and not to the laws, regulations, decisions and rulings themselves. Korea's claim however is not that the DOC's anti-dumping determinations were rulings which the United States administered in a manner inconsistent with Article X:3(a), but rather that the United States administered its anti-dumping laws and regulations in a manner inconsistent with that Article.[62] Thus, we must consider whether the alleged departure of the United States from alleged established policy in these investigations represents a breach of the United States' obligation to administer those laws and regulations in a uniform and reasonable manner.

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[61] Korea also suggests in its first submission (para. 4.70) that the United States acted inconsistently with Articles 6.1, 6.2 and 6.9 of the *AD Agreement* in its treatment of local sales. It does not however identify any specific basis for these claims. In its second submission, Korea indicates in general terms that the United States' alleged Article 6 violations in this dispute arise where the DOC agreed with respondents on key issues in the preliminary determination but reversed position in the final determination. In respect of the local sales issue, however, this factual situation did not exist, as local sales were erroneously excluded from the preliminary determination altogether. Thus, we do not consider that Korea has made a *prima facie* case of violation of Article 6 in respect of local sales.

[62] There can be no doubt that the US anti-dumping laws and regulations are "laws" and "regulations" of general application "pertaining to . . . rates of duty, taxes or other charges, or to other requirements, restrictions or other prohibitions on imports or exports" within the meaning of Article X:1 of *GATT 1994*.

6.50. We note at the outset of our examination that we have grave doubts as to whether Article X:3(a) can or should be used in the manner advocated by Korea. As the United States *(ii) The Sheet investigation*

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did not know that a particular customer would fail to pay at the time it set its prices, the subsequent failure to pay did not affect the prices that POSCO set. In any event, the allocation by the DOC of the cost of unpaid sales of ABC Company over *all* US sales to all customers is inconsistent with Article 2.4 because the failure of one company to pay did not affect the price comparability of sales to other customers who did pay for their purchases.

6.59. The **United States** considers that its treatment of the cost of unpaid sales was consistent with Article 2.4. The United States first notes that certain US sales were made through the associated importer POSAM. For these sales it constructed an export price by deducting from the price charged to the first independent buyer in the United States the expenses and profits associated with the transaction between that buyer and the associated importer, including an allocated portion of the bad debt expense. In respect of these sales, therefore, the bad debt expense was not an *adjustment* to export price under the "due allowance" provision of Article 2.4, but rather a deduction made to *construct* an export price under Article 2.3. The United States maintains that, because Korea has made no claim under Article 2.3, the methodology used by the DOC to construct an export price is not before the Panel. In any event, the United States acted consistently with Article 2.3 in deducting an allocated portion of the bad debt expense when constructing the export price because the bad debt expense was a "cost[] . . . incurred between importation and resale".

6.60. In respect of those sales for which it did make adjustments, the United States contends that bad debt represents a "difference in conditions and terms of sale" for which due allowance shall be made pursuant to Article 2.4. In the United States' view, the term "differences in conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, i.e., but for the sale the expense would not be incurred. The United States considers that whenever a seller sells on credit, it accepts a credit expense, including any bad debt that may result from the sale. As in the case of a warranty, the expense is part of the bargain and but for the sale the expense would not be incurred. As for the amount of the bad debt allowance, the United States considers that the only practicable method for making such allowances is based on the exporter's actual expense during the period of investigation. The United States does not rely on the reference in Article 2.4 to "other differences" demonstrated to affect price comparability as a basis for its adjustment, but neither does it concede that bad debt could not be treated as such an "other difference".

6.61. Korea disputes the United States' view that, in respect of sales made through the associated importer POSAM, the bad debt expense was not an adjustment to export price but was rather a deduction made to construct an export price. In Korea's view, it is clear that the adjustment was not made to construct the export price because the DOC made the same adjustment to all US sales, whether or not they were made through an associated importer. Further, the DOC's determinations refer to the adjustment as one for "direct selling expenses", which under US law signifies that the DOC determined that a "circumstance of sale" adjustment – equivalent in US law to an adjustment under Article 2.4 – was appropriate. In any event, Korea considers that an adjustment for non-payment is not a permissible adjustment for purposes of constructing an export price because it is not a cost incurred "between importation and resale" and because an item may properly be included as an adjustment for purposes of constructing an export price only if it is the type of item that might reasonably be included in an unaffiliated importer's mark-up.

(b) Evaluation by the Panel

(i) Was the DOC's treatment of unpaid sales in respect of POSAM part of the construction of the export price?

6.62. As discussed above, Korea claims that the DOC's treatment of unpaid sales was an adjustment for differences affecting price comparability pursuant to the third sentence of Article 2.4 which was inconsistent with the requirements of that provision. The United States has responded that, *in respect of those sales made through POSAM*, its treatment of unpaid sales did not represent an *adjustment* to export price pursuant to the third sentence of Article 2.4 but was rather one aspect of the *construction* of an export price pursuant to Article 2.3.

6.63. This issue is important for two reasons. First, if the United States' treatment of unpaid sales in respect of POSAM was one aspect of the construction of the export price, we must consider whether claims relating to construction of the export price are within the Panel's terms of reference. Second, it is clear that a Member's actions regarding the construction of an export price are subject to different rules than a Member's actions with respect to the making of allowances for differences affecting price comparability. Thus, we must as a threshold matter determine whether the DOC's treatment of unpaid debt in respect of sales through POSAM was one aspect of the construction of the export price.

6.64. In addressing this issue, we must of course look to what the DOC actually did during these investigations. This is a factual issue that we must resolve on the basis of the DOC's final determinations and on the publicly available final analysis memoranda which are cross-referenced in those determinations.

6.65. Turning first to the *Plate* investigation, the DOC stated the following in its Final Determination:

> "For US sales made through POSAM, we calculated CEP [constructed export price] based on packed prices to unaffiliated customers in the United States . . . . In accordance with section 772(d)(1) of the Act, *we deducted those selling expenses associated with economic activity occurring in the United States, including direct selling expenses* (credit costs, bank charges, and US commissions) and indirect selling expenses. Also, we made an adjustment for CEP profit in accordance with

> *expense to account for bad debt losses incurred by POSAM for sales made to a bankrupt customer*. . . . Also, we made an adjustment for CEP profit in accordance with section 772(d)(3) of the Act.[70]

Once again, the final analysis memorandum confirms that the amount for unpaid sales was deducted from the price charged to the first unaffiliated purchaser as part of the construction of the export price.[71]

6.67. These determinations and underlying memoranda demonstrate that, in the case of sales through POSAM, the DOC deducted an allocated portion of the unpaid sales as part of its construction of the export price. We note in this respect that the provision of US law on the basis of which the DOC made these deductions, section 772(d) of the Act,[72] is entitled "Additional Adjustments to Constructed Export Price", applies exclusively in the CEP context, and, as made clear by implementing regulations, only for adjustments for expenses associated with commercial activities occurring in the United States.[73] By contrast, adjustments for differences between the normal value and the export price *or* constructed export price in respect of, *inter alia*, taxation, physical characteristics, quantities, level of trade and "other differences in the circumstances of sale" are made to the *normal value* pursuant to section 773 of the Act.[74]

6.68. Korea contends that the DOC's reference to "direct selling expenses" was a "signal" that the DOC had decided to make a circumstances of sale adjustment, which Korea equates to an allowance for differences affecting price comparability under the third sentence of Article 2.4. We note however that Section 772(d) of the Act identifies "expenses that result from, and bear a direct relationship to the sale", i.e., direct selling expenses, as one category of expense for which adjustment shall be made in the construction of an export price.[75] Thus, we cannot agree that the DOC's reference to "direct selling expenses" means that the allowances for unpaid sales in respect of sales through POSAM must be deemed to be adjustments for circumstances of sale.

6.69. Our conclusion on this point is a limited one, relating to a specific factual question: was the DOC's deduction of an amount for unpaid sales in respect of sales through POSAM performed as an element in the construction of an export price? Having answered this question in the affirmative, we agree with the United States that the DOC's actions in respect of those sales must be measured against the provisions of the *AD Agreement* relating to the construction of the export price, or not at all.[76]

6.70. The foregoing conclusion does not of course imply a view about whether the DOC's actions were *consistent* with the provisions of the *AD Agreement* regarding construction of an export price. That is an issue to be taken up only after a consideration as to whether such claims are within the Panel's terms of reference. Nor does it mean that the DOC's adjustments for unpaid sales in respect of sales through *unaffiliated* importers should be measured against the provisions relating to construction

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of the export price. As discussed below, the WTO-consistency of these adjustments must be measured against the provisions of the *AD Agreement* governing adjustments for differences affecting price comparability. It is to the latter issue that we now turn.

(ii) Was the DOC's adjustment for unpaid sales in respect of sales through unaffiliated importers a permissible allowance for a difference affecting price comparability?

6.71. As we have seen, Korea claims that the *AD Agreement* allows adjustments only for "differences which are . . . demonstrated to affect price comparability" within the meaning of Article 2.4, and that because the non-payment by ABC company of certain sales was not such a difference, the adjustments made by the DOC were inconsistent with that Article. Although the United States contends, and we have found, that in its treatment of sales *through affiliated importer POSAM* the DOC was constructing an export price, the United States does not dispute that the WTO-consistency of its adjustments with respect to sales *to unaffiliated buyers* must be assessed by reference to the "due allowance" provision cited by Korea.[77]

6.72. In examining this claim, therefore, we first consider the relevant provisions of the *AD Agreement*. Article 2.4 of the *AD Agreement* provides as follows:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.*[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. 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)
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> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

6.73. The third sentence of Article 2.4 identifies five specific categories of "differences which affect price comparability": differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics. The United States does not assert that the cost of unpaid sales represents a difference in taxation, levels of trade, quantities or physical characteristics.

6.74. The **United States** does contend, however, that the allowances it made here were for "differences in conditions and terms of sale". It considers that a permissible interpretation of differences in "conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, i.e., but for the sale the expense would

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[77] First submission of the United States, para. 81, Annex 2-1 ("When comparing that export price [i.e., the price charged by POSCO to independent buyers] to normal value, the United States made an adjustment to normal value to account for differences affecting price comparability that was consistent with Article 2.4.")

not be incurred. In the United States' view, bad debt is an expense directly related to the payment terms of the contract, because whenever a seller sells on credit he accepts a credit expense, which includes any bad debt that may result from the sale. **Korea** responds that "conditions and terms of sale" are the agreed upon bundle of rights and obligations created by the sales agreement, and that no contract contains terms authorizing a customer to go bankrupt and refuse to pay.

6.75. We do not consider that the phrase "differences in conditions and terms of sale", interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales. In this respect, we note that Article 2.4 refers to the "terms and conditions *of sale*". Although of course both words – "term" and "condition" – have many meanings, both are commonly used in relation to contracts and agreements. Thus, "term" is defined, *inter alia*, to mean "conditions with regard to payment for goods or services",[78] while "condition" is defined, *inter alia*, as "a provision in a will, contract, etc., on which the force or effect of the document depends".[79] Thus, we consider that, read as a whole, the phrase "conditions and terms of sale" refers to the bundle of rights and obligations created by the sales agreement, and "differences in conditions and terms of sale" refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the conditions and terms of sale exists. The failure of a customer to pay is not a condition or term of sale in this sense, however. Rather, non-payment involves a situation where the purchaser has violated the "conditions and terms of sale" by breaching its obligation to pay for the merchandise in question.

6.76. We perceive no textual basis for the United States' effort to characterize all differences in costs associated with the terms of the contract and expenses directly related to the sale as "differences in terms and conditions of sale". The United States contends that "conditions" of sale can be read in this context to mean the "mode or state of being" of sales, such that "differences in conditions and terms of sale" include the "mode or circumstances" under which sales are made.[80] Assuming this interpretation to be a permissible one, it might allow for adjustments for "differences in conditions and terms of sale" in cases where the contractual provisions governing sales in the two markets were identical but the seller was aware from circumstances existing at the time of sale that those provisions would likely entail different costs.[81] Thus to take an example often cited by the United States in this dispute, a seller might extend identical warranties in different markets or to different customers, knowing in advance that the costs related to those warranties in one market would likely be higher than in the other. Similarly, a seller might extend sales on the same credit terms in two different markets or to two different customers in the awareness that the risk of default – and thus the likely costs associated with the extension of credit – would be higher in one case than in the other. However, we fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed

[78] *New Shorter Oxford English Dictionary*, Oxford University Press, 1993, p. 3253. The United States apparently agrees that "terms" in Article 2.4 refers to contractual terms, as it states that an ordinary meaning of "terms of sale" is "the situations and conditions that define the nature and extent of the sales contract (*e.g.*, quantity, delivery)". First Submission of the United States, para. 83, Annex 2-1.

[79] *Id.*, p. 472.

[80] First Submission of the United States, para. 83, Annex 2-1. Like the dictionaryc 0 fid on cy the Tj -435en4ri44I

a "circumstance under which sales are made", at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.[82]

6.77. We consider that an examination of the context in which the phrase "differences in conditions and terms of sale" is used supports our understanding of the ordinary meaning of this phrase. We recall that Article 2.4 identifies "differences in conditions and terms of sale" as one of several "differences which affect price comparability".[83] Thus, the notion of price comparability informs our interpretation of "differences in conditions and terms of sale". In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing.[84] A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4. This reinforces our view that the phrase "differences in conditions and terms of sale" cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for certain sales.

6.78. In the latter phases of the proceeding, and in response to a question from the Panel, the United States contended that its methodology for the treatment of bad debt was simply a practical way to address differing levels of risks between markets in cases where sales are made on credit.[85] As our previous discussion suggests, we agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4. Nor do we preclude that actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a difference.[86] The United States did not however treat actual experience with respect to levels of unpaid sales as *evidence* of different levels of risk in the two markets in these investigations. Rather, it stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise.[87] Thus, even assuming that the US methodology was somehow intended to address differences in *risk* of non-payment, we do not accept the proposition that

[82] The United States concedes that there was no evidence in the record in either investigation that POSCO had any knowledge at the time of sale that ABC company was in a precarious financial situation. Responses of the United States to Questions posed by the Panel at the First Meeting of the Panel, (Question 2 on treatment of unpaid sales at the first meeting of the Panel, Annex 2-4).

[83] The parties disagree as to whether a "difference in conditions and terms of sale" is by definition a difference affecting price comparability or whether, having established that such a difference exists, it is still necessary to determine that such a difference affects price comparability in order to make an adjustment. *See* responses of Korea and the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 6 on treatment of unpaid sales, Annexes 1-7 and 2-7). This is not however an issue we need resolve in this dispute.

[84] The United States appears to have a similar view. Thus, it states that "[s]elling expenses such as warranty costs and bad debt not only reflect conditions of sale in the market, *they are also an element of price*.[footnote omitted]. Therefore, differences in such selling expenses affect price comparability". First Submission of the United States, para. 84, Annex 2-1.

[85] The United States contended that the risk of non-payment "may differ between the two markets being compared and thus have different effects on prices in the two markets. Because it is the only practical means – and a method as reasonable as any other – of making a due allowance for any such difference, we base the allowance on the company's actual bad debt experience in the two markets during the period of investigation.[footnote omitted] That is, we rely on the actual bad debt expenses the company recognizes with respect to each of the two markets being compared." Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel. (Question 8 on bad debt, Annex 2-4).

[86] Although in our view the existence of different levels of non-payment during prior periods would appear to be much more relevant.

[87] *Final Determination on Plate*, p. 15448, at Korea Exhibit 11; *Final Determination on Sheet*, p. 30674, Korea Exhibit 24.

the existence of a higher level of non-payment in one market than in another during the period of investigation may be *deemed* to demonstrate the existence of such differences in risk and thus represent a permissible adjustment for "differences in conditions and terms of sale".[88]

6.79. We note that the United States does not appear to argue that the adjustment made by the DOC in these investigations is justified on the basis that it represented an adjustment for "other differences which are also demonstrated to affect price comparability."[89] Nevertheless, taking into account the ambiguity of the United States' position on this question, and in the interests of achieving a full resolution of this dispute, we conclude that, for the reasons set forth in paragraph 6.77 above, the adjustment in question in this dispute could not be justified as an adjustment for "other differences which are also demonstrated to affect price comparability".

6.80. For the foregoing reasons, we conclude that the DOC's adjustment for unpaid sales through unaffiliated importers was not a permissible due allowance for differences affecting price comparability and was thus inconsistent with the third sentence of Article 2.4 of the

Thus, a claim that the construction of an export price is in violation of the *AD Agreement* must be based on Article 2.3.[92]

6.83. **Korea**, citing the Appellate Body report in *Argentina - Footwear*,[93] responds that the fact that Article 2.4 specifically refers to Article 2.3 should be sufficient to bring Article 2.3 within the Panel's terms of reference. In any event, Korea asserts that it has not claimed that Article 2.3 establishes a separate basis for a finding that the United States acted inconsistently with the *AD Agreement*. Rather, Korea has addressed Article 2.3 merely to refute a defense offered by the United States. Finally, Korea considers that the rules governing the methodology used to construct an export price are found in the fourth sentence of Article 2.4, not in Article 2.3.[94]

6.84. In considering this issue, we note first that Korea's request for establishment of a panel, which represents the basis for our terms of reference, contains no mention whatsoever of Article 2.3 of the *AD Agreement*, nor of Article 2 generally. Rather, it refers exclusively to Articles 2.1 and 2.4.[95] It is well established that a panel may not, consistent with Article 6.2 of the *DSU*, consider a claim of violation of a treaty provision which has not been identified in the request for establishment underlying the panel's terms of reference.[96] Nor do we consider that a claim of violation of Article 2.3 would be within this Panel's terms of reference merely because Article 2.4 makes a reference to Article 2.3.[97]

6.85. We recall however Korea's statement that it has not claimed that Article 2.3 establishes a separate basis for a finding that the United States acted inconsistently with the *AD Agreement*. Thus, the question before us is not whether a claim *under Article 2.3* is within our terms of reference. Nor does the United States anywhere in its submissions suggest that a claim *under Article 2.4* regarding treatment of bad debt in respect of construction of the export price is not within the Panel's terms of reference. Rather, the issue as framed by the parties relates to the nature of the obligations, if any, *(iv) Is the DOC's adjustment for unpaid sales in respect of sales through POSAM to construct an export price consistent with Article 2.4, fourth sentence, of the AD Agreement?*

6.86. As is evident from the preceding section, the parties to this dispute disagree as to what obligations, if any, Article 2.4 imposes in respect of the construction of the export price. In considering this question, we must of course turn first to the relevant provisions of the *AD Agreement*.

6.87. Article 2.1 of the *AD Agreement* provides as follows:

> "For the purposes of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

6.88. Article 2.3 of the *AD Agreement* provides as follows:

> "In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, *the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer*, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine." (emphasis added)

6.89. Article 2.4 of the *AD Agreement* provides as follows:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] *In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.* If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. 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).
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> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

6.90. In our view, both Article 2.3 and Article 2.4 play an important role in respect of the construction of export prices. When determining whether dumping exists, Article 2.1 usually requires a comparison

Member were free to make any additional allowances it desired, there would be no effective disciplines

6.99. We are cognizant, however, that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.[107] As discussed above, it is clear that the purpose of allowances to construct an export price is not to insure price comparability *per se*. Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price[108] or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.[109]

6.100. Read in light of this object and purpose, we recognize that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be "incurred between importation and resale" and thus deducted in order to construct an export price. Nor do we preclude that an amount to cover the risk of non-payment might be considered to be such a cost. We do not believe, however, that this interpretation of costs "incurred between importation and resale" can be stretched to include costs that not only were not incurred in alhis d240fy3M91.5 -12.7311

3. Claims under Article 2.4 ("fair comparison")

(a) Arguments of the parties

6.102. Korea also claims the DOC's actions in respect of unpaid sales were inconsistent with the "fair comparison" requirement of Article 2.4. In Korea's view, the adjustments made by the DOC in respect of unpaid sales violated this requirement because non-payment is not a "difference affecting price comparability" for which adjustment may be made under Article 2.4. Korea further considers the DOC's treatment of unpaid debt was inconsistent with the "fair comparison" requirement because it is fundamentally unfair to penalize an exporter for an event that it could not have anticipated and that was beyond its control. In addition, Korea considers that the inclusion of the unpaid sales to the ABC Company in the calculation of the export price was inconsistent with the "fair comparison" requirement. In this respect, Korea considers that the unpaid sales in question were atypical, and that,

(b) Evaluation by the Panel

(i) Does Article 2.4.2 prohibit multiple averaging?

6.110. Korea's first claim regarding the use by the DOC of multiple averaging is based upon Article 2.4.2 of the *AD Agreement*. Article 2.4.2 provides as follows:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

6.111. In considering this claim, we first make clear that we do not consider that Article 2.4.2 prohibits the use of multiple averaging *per se*, as Korea's first submission could be taken to suggest. To the contrary, Article 2.4.2 provides that the existence of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of all *comparable* export transactions" (emphasis added). The inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions.[114] It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.

6.112. We recall Korea's view that the reference in the singular to "a weighted average normal value" means that the use of multiple averages is prohibited. In our view, however, the reference in the singular to "a weighted average normal value" means simply that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value.

6.113. An examination of the context of the provision in question and of its object and purpose in our view provide further support for the above conclusion. The chapeau of Article 2.4 states that "[a] fair comparison shall be made between the export price and the normal value." Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties[115] – it is evident to us that the provisions of Article 2.4.2 must be read

[114] We note that insertion of the word "comparable" into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. *See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991. This suggests that its inclusion w fions of Articla At 1us thNegbunt tflhe 1ert.1.75 TD /F1 6.75 Tf 1ert.1Negbunt tfaUu 7ruest

against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are "subject to the provisions governing fair comparison in paragraph 4." An interpretation of Article 2.4.2 that

6.117. The *Sheet* final determination contains an explanation for the DOC's determination that closely parallels that in the *Plate* final determination. The DOC found that:

"Under section 777A(d)(1)(A) of the Act, the Department has broad authority to use a

6.120. In examining this question, we first note that the term "comparable" has been defined to mean "able to be compared (with)".[120] This definition however does not cast great light on the meaning of the term as used in Article 2 of the *AD Agreement*. Thus, we consider it useful to turn to the context in which this term appears. In this respect, we agree with the parties that the meaning of the term "comparable" as used in Article 2.4.2 can best be established by an examination of other provisions of Article 2 of the *AD Agreement* that address the issue of comparability. We further note that the chapeau to Article 2.4 provides that the comparison between the export price and the normal value shall be made "in respect of sales made at as nearly as possible the same time".[121] Thus, we consider it clear that the timing of sales may have implications in respect of the comparability of export and home market transactions.[122]

6.121. This does not mean, however, that where an average to average comparison methodology is used, individual home market and export sales that are not made at the same time necessarily are not comparable and thus cannot be included in the weighted averages. To the contrary, it is in the very nature of an average to average comparison that, for example, transactions made at the beginning of the averaging period in the export market will be made at a different moment in time than sales in the home market made at the end of averaging period. If the drafters had considered that this situation would necessarily give rise to a problem of comparability, surely they would not have explicitly authorized the use of averaging in Article 2.4.2. Thus we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires *as a general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same.

6.122. The United States argues, in effect, that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods.[123] In our view, however, the US argument proves too much. If the requirement to compare sales at "as nearly as possible the same time" means that sales within an averaging period covering a POI are not comparable, then a Member presumably would be *obligated* to break a POI into as many sub-periods as possible. Yet to interpret the word "comparable", when combinof ontext of weighted average to weighted

6.129. In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates. We note Korea's view that the requirements of the second sentence of Article 2.4.1 prescribe specific results, rather than describing a method for selecting exchange rates. It appears to us, however, that, read in context, these special rules also relate to the selection of exchange rates, and not to the construction of averages. Rather, the permissibility of the use of multiple averaging is an issue addressed by Article 2.4.2.

6.130. Even if Article 2.4.1 were not restricted to the issue of the selection of exchange rates, we find nothing in that Article that would prohibit a Member from addressing, through multiple averaging, a situation arising from a currency depreciation. Korea contends, and the United States does not dispute, that the provision of Article 2.4.1 requiring Members to allow exporters sixty days to adjust their export prices to sustained movements in exchange rates applies only in the case of currency appreciation, and not in the case of currency depreciation. Assuming that the parties are correct in this regard, the requirement that a Member take certain actions in the case of currency appreciation does not in our view mean that Members are prohibited from taking any action to address a situation arising from a currency depreciation.[129]

6.131. For the foregoing reasons, we conclude that the United States' use of multiple averaging periods in these investigations was not inconsistent with Article 2.4.1 of the *AD Agreement*.

4. Claim under Article 2.4 ("fair comparison")

(a)

(b) Evaluation by the Panel

6.134. Korea contends that the averaging methodology used in these investigations was inconsistent with the United States' obligations to perform a "fair comparison" *because* the allegations of injury by petitioners, and the analysis of injury by the US International Trade Commission's, focused on post-devaluation imports. We cannot agree. In our view, the consistency of a determination of dumping with Article 2, including with any "fair comparison" requirement under Article 2.4, cannot depend upon how that determination is used in the context of an analysis of injury pursuant to Article 3. In this respect, we note that the final determination of injury in these investigations, as in all US anti-dumping proceedings, was not even made until well after the date of the final determination of dumping. Surely, a determination of dumping that was consistent with the provisions of Article 2 when it was made could not be rendered inconsistent by reason of the manner in which that determination was used for purposes of a subsequent injury analysis.

6.135.

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these circumstances, we do not consider it necessary to address Korea's additional claims under the above provisions.

2. Claims under Article VI of GATT 1994 and Article 1 of the AD Agreement

6.138. Korea has also asserted that the United States has acted inconsistently with Article VI of the *GATT 1994* and Article 1 of the *AD Agreement*, "which only permit anti-dumping measures to be imposed in the circumstances provided for in Article VI and pursuant to investigations conducted in accordance with the Anti-Dumping Agreement".[133] We note that Korea's claims in respect of these two articles are dependent claims, i.e., Korea argues that *because* certain provisions of the *AD Agreement* have been violated, Article VI of the GATT 1994 and Article 1 of the *AD Agreement* are consequently violated.[134] Because of their dependent nature, we can perceive of no useful purpose that would be served by ruling on these claims. Accordingly, we do not consider it necessary to address them.

VII. Csl8 TCLUSIONS AN98ng AgU1.5567 Tw (Because of their dependent nature, we can perceive of no u

(b) The United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with Article 2.4.1 of the *AD Agreement;*

(c) The United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with the first sentence of the chapeau of Article 2.4 of the *AD Agreement* ("fair comparison").

7.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that the United States has acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Korea under that *Agreement*.

B. RECOMMENDATION AND SUGGESTION

7.5 In accordance with Article 19.1 of the *DSU*, we therefore recommend that the Dispute Settlement Body request that the United States brings its definitive anti-dumping duties on imports of stainless steel plate and sheet from Korea into conformity with the *AD Agreement*.

7.6 **Korea** requests that the Panel suggest, pursuant to Article 19.1 of the *DSU*, that the United States revoke its anti-dumping orders on stainless steel plate and sheet from Korea. In support of its request, Korea identifies prior panel reports under the WTO and Tokyo Round *AD Agreements* in which panels have suggested revocation of an anti-dumping order. Korea considers that Article 1 of the *AD Agreement*, which provides that "[a] anti-dumping measure shall be applied only under he circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement", precludes the possibility that the United States could bring the anti-dumping measures into conformity without revocation.

7.7 The **United States** considers that Korea seeks to convert the Panel's discretionary mechanism for suggesting ways that a Member could implement its recommendation into a device for obtaining a specific remedy that is inconsistent with established GATT/WTO practice and the *DSU*. Further, it is impossible for the Panel to know whether a dumping analysis that conformed to the Panel's decision would result in a zero or *de minimis* margin such that revocation would be necessary in order to bring the measures into conformity. Finally, the United States considers that Korea's broad interpretation of Article 1 of the *AD Agreement* to require revocation of an anti-dumping measure regardless of the nature or magnitude of the violation would render meaningless the provision of Article 19.1of the *DSU* that the Member bring the *measure* into conformity.

7.8 In considering Korea's request, we note first that Article 19.1 of the *DSU* gives this Panel the clear authority to "suggest ways in which the Member concerned could implement the recommendations". Thus, we do not accept the United States' proposition that a suggestion that a Member withdraw an anti-dumping measure would be inconsistent with the *DSU*. Nor do we consider that such a recommendation would be inconsistent – or consistent – with "established practice", as only a handful of WTO panels under the *AD Agreement* have even addressed a request for a suggestion to revoke.[135] Rather, we consider that Article 19.1 of the *DSU* allows but does not require a panel to make

[135] *Compare Guatemala – Anti-Dumping Investigation Regarding Portland on Cement From Mexico,* Report of the Panel, WT/DS60/R, para. 8.6, *reversed on other grounds*, WT/DS60/AB/R and *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, para. 9.6, adopted on 17 November 2000 (Panels suggest revocation in the context of a WTO-inconsistent initiation) to *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit and Above from Korea*, WT/DS99/R, para. 7.4, adopted 19 March 1999 (request for a suggestion to revoke was denied "in

a suggestion where it deems it appropriate to do so.

7.9 That we have the *authority* under Article 19.1 of the *DSU* to suggest revocation of an anti-dumping measure does not mean that we must or should do so in a given case. To the contrary, the *AD Agreement* is comprised of eighteen separate articles and innumerable obligations. Thus, violations of the *AD Agreement* may take many different forms and have different implications for the anti-dumping measure in question. In our view, Korea's contention that Article 1 of the *AD Agreement* dictates that any violation of the *AD Agreement*, irrespective of its nature and severity, requires the revocation of the anti-dumping measure is unsustainable. Although we do not agree that such an interpretation would render Article 19.1 of the *DSU* a nullity in the strict legal sense,[136] we do believe that, had the drafters intended to deviate from the general rule of Article 19.1 and *require* revocation of anti-dumping measures in all cases of a violation, they would have manifested that intention through a special or additional dispute settlement provision in Article 17 of the *AD Agreement*.

7.10 Turning to the case at hand, we recall that Korea's claims related to the determinations of the DOC regarding the margin of dumping. While we have found those determinations inconsistent with the *AD Agreement* in a number of respects, we cannot say that, had the DOC acted consistently with the *AD Agreement*, it would not have found the existence of dumping.[137] Under these circumstances, while there can be little doubt that revocation would be *one* way that the United States could implement our recommendation, we are not prepared to conclude at this time that it is the *only* way to do so. Accordingly, we decline Korea's request to suggest that the United States revoke the anti-dumping duties at issue in this dispute.[138]

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light of the range of possible ways in which we believe the [defendant] could appropriately implement" the recommendation).

[136] Because, *inter alia*, Article 19.1 would of course continue to operate in disputes relating to measures other than anti-dumping measures.

[137] Nor would it be appropriate for the Panel to try to recalculate the margin itself in light of its conclusions.

[138] *Cf. United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, para 596 (Panel under Tokyo Round *AD Code* declined to recommend revocation because "[I]t could not be presumed that a methodology of calculating dumping margins consistent with the Panel's findings on these aspects would necessarily result in a determination that no dumping existed . . . .")