WORLD TRADE ORGANIZATION

WT/DS184/R
28 February 2001

(01-0629)

Original: English

UNITED STATES – ANTI-DUMPING MEASURES ON

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I. INTRODUCTION

1.1 On 18 November 1999, Japan requested consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article 17.2 of the Anti-Dumping Agreement and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").[1] The United States and Japan consulted on 13 January 2000, but failed to settle the dispute.

1.2 On 11 February 2000, Japan requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.[2]

1.3 At its meeting on 20 March 2000, the Dispute Settlement Body (DSB) established a Panel in accordance with the request made by Japan in document WT/DS184/2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS184/2, the matter referred to the DSB by Japan in document WT/DS184/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 On 9 May 2000, Japan requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 24 May 2000, the Director-General composed the Panel as follows[3]:

Chairman: Mr. Harsha V. Singh

Members: Mr. Yanyong Phuangrach
Ms. Elena Lidia di Vico

1.5 Brazil, Canada, Chile, the European Communities and Korea reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 22-23 August 2000 and on 27 September 2000. It met with the third parties on 23 August 2000.

1.7

petitions also alleged that critical circumstances existed with regard to imports from Japan. Effective 30 September 1998, the United States International Trade Commission ("USITC") instituted its investigation to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports from the three countries of certain hot-rolled steel products that are alleged to be sold in the United States at less than fair value.[5]

2.3 After an examination of the information presented in the petition filed with respect to hot-rolled steel from Japan and the amendments thereto, the United States Department of Commerce ("USDOC") initiated an anti-dumping duty investigation on 15 October 1998.[6] USDOC determined that it was not practicable to examine all known producers/exporters and conducted its investigation on the basis of a sample of Japanese producers. Based on information concerning production volumes from all six Japanese producers, Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") were selected for individual investigation and calculation of a dumping margin (*i.e*, the "investigated respondents"), as these three companies accounted for more than 90 per cent of all known exports of the subject merchandise during the period of investigation.

2.4 Effective 16 November 1998, USITC issued an affirmative preliminary determination, finding a reasonable indication that the US industry was threatened with material injury by reason of hot-rolled steel imports from Brazil, Japan, and Russia.[7]

2.5 Effective 30 November 1998, USDOC issued its affirmative preliminary critical circumstances determination, finding that there is a reasonable basis to believe or suspect that critical circumstances exist for imports of hot-rolled steel from Japan and Russia. USDOC also determined not to make a preliminary determination of critical circumstances with respect to imports from Brazil. Based on its determination, USDOC stated that, upon issuance of an affirmative preliminary dumping determination, Commerce would direct the US Customs Service to suspend liquidation of all entries of Japanese hot-rolled steel for a period of ninety days prior to the preliminary dumping determination.[8]

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2.9 On 29 June 1999, USDOC published an anti-dumping duty order imposing estimated dumping duties on imports from Japan at the rates announced in its final determination.[14] Since USITC had not found critical circumstances to exist, USDOC ordered the refund of any cash deposits and/or release of any guarantees provided for the period of the preliminary critical circumstances finding, 21 November 1998 - 19 February 1999.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. JAPAN

3.1 Japan requests that the Panel:

(a) find that the specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are inconsistent with various provisions of the AD Agreement, as follows:

- USDOC's application of adverse facts available to KSC's dumping margin was inconsistent with Articles 2.3, 6.8, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NKK's dumping margin were inconsistent with Articles 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's application of adverse facts available and treatment of the facts with respect to NSC's dumping margin were inconsistent with Articles 2.4, 6.6, 6.8, 6.13, 9.3, and Annex II;
- USDOC's inclusion of margins based on partial facts available in the calculation of the "all others rate" was inconsistent with Article 9.4;
- USDOC's exclusion and replacement of certain home market sales in the calculation of normal value through use of the 99.5 per cent arm's length test was inconsistent with Articles 2.1, 2.2, and 2.4;
- USDOC's application of a new policy with respect to preliminary critical circumstances determinations was inconsistent with Articles 10.1, 10.6, and 10.7;
- USITC's application of the captive production provision was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1;
- USITC's finding of a causal connection between imports and the domestic industry's injury was inconsistent with Articles 3.1, 3.4, and 3.5;

and to recommend that the DSB request the United States to bring these measures into conformity with the AD Agreement.

(b) find that the following actions undertaken by the United States were inconsistent with GATT 1994 Article X:3, including:

- USDOC's accelerated proceeding;
- USDOC's application of a revised critical circumstances policy;
- USDOC's failure to correct, prior to the final determination, the clerical error committed in calculating NKK's preliminary margin;
- USDOC's resort to adverse facts available with respect to respondents, coupled with USDOC's and USITC's decisions against applying facts available with respect to petitioners;

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- USITC's limited analysis to two years of the three-year period of investigation, in abandonment of its normal policy to analyze all three years;

and to recommend that the DSB request the United States to bring these actions into conformity with the GATT 1994;

(c) find that the United States' anti-dumping laws, regulations, and administrative procedures governing:

- the use of adverse "facts available" are inconsistent with Article 6.8 and Annex II of the AD Agreement;
- the calculation of an "all others" rate based on partial facts available are inconsistent with Article 9.4 of the AD Agreement;
- the exclusion and replacement of certain home market sales in the calculation of normal value by the arm's length test are inconsistent with Articles 2.1, 2.2, and 2.4 of the AD Agreement;
- "critical circumstances," including the generally applicable interpretations reflected in the Policy Bulletin issued on 8 October 1998, are inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement;
- the focus on the merchant market sales to the exclusion of the remainder of the domestic industry when determining injury by reason of imports are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the AD Agreement;

and recommend that the DSB request the United States to ensure, as stipulated in Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, the conformity of the above-listed elements of its anti-dumping laws, regulations, and administrative procedures with its obligations under the AD Agreement;

(d) recommend that, if the Panel's findings result in a determination that the imported product was either not dumped or that it did not injure the domestic industry, the DSB further request that the United States revoke its anti-dumping duty order and reimburse any anti-dumping duties collected;[15]

(e) recommend that, if the Panel's findings result in a determination that the imported

- Japan's claim concerning the United States' general practice with respect to "facts available" was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference;

- the specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are consistent with the provisions of the Anti-Dumping Agreement identified by Japan under point (a);

- none of the actions identified by Japan under point (b) was inconsistent with Article X:3 of the GATT 1994;

- the United States' anti-dumping laws, regulations, and administrative procedures governing the issues identified by Japan under point (c) are not inconsistent with the provisions of the Anti-Dumping Agreement identified in that paragraph.

- The specific remedies requested by Japan in its first submission, reproduced at points (d) and (e) above, are contrary to established practice and the DSU.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel (see Annexes, as listed above).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Brazil, Canada, Chile, the European Communities and Korea, are set out in their submissions to the Panel (see Annexes, as listed above).

VI. INTERIM REVIEW

6.1 Both parties filed comments on the interim report on 29 January 2001. The parties' comments were limited to the identification of clerical errors. Neither party requested an interim review meeting.

6.2 In response to the parties' comments, the Panel corrected typographical and other clerical Tw (IV.) Tj

outside the Panel's terms of reference, to a claim made by Japan concerning the US "general practice", including statutory and regulatory provisions, regarding the use of adverse facts available.

1. Exclusion of certain evidence

(a) Arguments

7.2 The United States claims that evidence which was submitted by Japan during this proceeding, but which was **not** before the investigating authority during the anti-dumping investigation, may not be examined by the Panel. The United States, relying on Article 17.5(ii) of the AD Agreement, argues that we are to examine the decisions of the investigating authorities on the basis of the facts that were available to them and not on the basis of new facts revealed for the first time before the Panel. Consequently, the United States submits that we should disregard *in toto* four affidavits prepared for the purpose of these panel proceedings by the American attorneys of NSC, NKK, KSC and by one statistician, as well as numerous newspaper Articles that were not presented in the course of the investigation, or were presented to only one of the US authorities conducting the investigation.[17] In this latter regard, the United States argues that we should disregard documents submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record, even if those documents were put on the USITC administrative record.

7.3 The US argument is based in part on Article 17.5(ii) of the AD Agreement which provides that a panel shall examine the matter before it on the basis of "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" and the interpretation given to this provision by, *inter alia*, the Panel in *Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*[18] ("*Mexico-HFCS"*). The United States argues that by presenting new testimony that was not before the appropriate authority, Japan seeks to have the Panel go beyond its mission under Article 17.6(i) of the AD Agreement to determine whether the establishment of the facts by the investigating authority was proper and its evaluation of those facts

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> "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: …
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement[22] in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation. Thus, for example, in examining the USITC's determination of injury under Article 3 of the AD Agreement, we would not consider any evidence concerning the price effects of imports that was not made available to the USITC under the appropriate US procedures. Japan acknowledges that Article 17.5(ii) must guide the Panel in this respect, but argues that it "complements" the provisions of the DSU which establish that it is the responsibility of the panel to determine the admissibility and relevance of evidence offered by parties to a dispute. We agree, to the extent that it is our responsibility to decide what evidence may be considered. However, that Article 17.5(ii) and the DSU provisions are complementary does not diminish the importance of Article 17.5(ii) in guiding our decisions in this regard. It is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.[23]

7.7 The conclusion that we will not consider new evidence with respect to claims under the AD Agreement flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities. We note that several panels have applied similar principles in reviewing determinations of national authorities in the context of safeguards under the Agreement on Safeguards and special safeguards under Article 6 of the Agreement on Textiles and Clothing. There is no corollary to Article 17.5(ii) in those agreements. Nonetheless, these panels have concluded that a *de novo* review of the determinations would be inappropriate, and have undertaken an assessment of, *inter a28fund2 Tc 0i what*

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appropriately be brought before a panel. Thus, we have determined not to exclude the four affidavits, the newspaper articles, and the profit and web-site information contained in exhibits JP-16-23, 25-28, 32(a) - 32(f), 33, 34-38, 44, 46, 56, 105, and note 353 of Japan's second written submission. To the extent that these exhibits purport to present facts relating to the USDOC or USITC determinations different from or additional to those that were made available to those authorities in conformity with appropriate domestic procedures during the course of the investigation, we have not taken such facts into account in our review of those determinations.

7.12 There is, however, a significant distinction between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making our decisions. That we have

including in this section of its panel request a reference to all “above-detailed laws, regulations, and administrative rulings” and explicitly claiming them to be inconsistent with Article XVI:4 of the WTO Agreement, it made it perfectly clear to both the United States and interested third countries that the matter it was submitting to the DSB comprised not only the actions taken in the specific case but also the US anti-dumping law on which these actions were based, including the law governing the application of facts available as interpreted and applied by USDOC, which constitutes the "general practice" on facts available. Finally, Japan argues that the United States failed to demonstrate how Japan's panel request has prejudiced the United States' ability to defend itself.[34] Japan therefore requests the Panel to reject the US preliminary objections.

(b) Finding

7.16 We consider that the United States' preliminary objection raises two separate but related issues. First, has Japan identified as a measure at issue in this dispute the US "general practice" concerning facts available ? Second, and assuming that Japan has not identified the US "general practice" in this regard as a separate measure in dispute, has Japan, in the context of its challenge to the definitive anti-dumping measure, stated a claim regarding the "general practice" concerning facts available with sufficient clarity, consistent with Article 6.2 of the DSU.

7.17 The Appellate Body has made it clear that a matter referred to the DSB consists of a measure and the claims concerning that measure.[35] In this dispute, it is clear that Japan has raised the final anti-dumping measure as a measure at issue. Japan has also identified certain provisions of US laws and regulations as measures at issue -- these provisions are specifically identified in paragraphs A.3 (law governing calculation of the all others rate), A.5 (law governing preliminary critical circumstances determinations), and B.2 (law regarding treatment of captive production in injury analysis) of its request for establishment. However, based on our review of the request for establishment, we do not see that Japan has raised the US "general practice" regarding facts available as a measure at issue in this dispute .

7.18 The "general practice" regarding which Japan asserts it has raised a claim is the USDOC's practice of, when applying adverse facts available, looking for facts that are "sufficiently adverse" to accomplish the goal of inducing respondents to provide complete and accurate information. This practice, while it is based on the US statute, is not explicitly set out in either the US statute, regulation, or any other binding policy statement of USDOC. Rather, it has been set out in the determination in this and other investigations to explain the USDOC's choice regarding the particular facts available it will consider in making its determination. Even assuming that a claim regarding the consistency of a "general practice" can be made in the WTO dispute settlement system, we are of the opinion that the request for establishment in such a case must identify such practice with sufficient clarity.[36]

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argues that Section A and Section E of the request for establishment, which relate to these two claims respectively, must be read together.

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7.19 The US "general practice" concerning facts available is not identified on the face of the request for establishment as a measure in dispute. Japan has explicitly acknowledged that it has not challenged the US statute governing the application of facts available.[37] Japan argues that its claim concerning the conformity of the US anti-dumping laws, regulations, and administrative rulings, set out in paragraph E of its request for establishment, necessarily must be understood to include a challenge to the "general practice" in question.[38]

7.20 Japan did not separately set forth in the request for establishment an assertion specifically with respect to USDOC's general practice on facts available (or the statutory and regulatory provisions underlying that practice). Indeed, the phrase "general practice" does not appear in the request for establishment at all. Nor is there mention of the USDOC's interpretation or application of the statutory provisions regarding facts available in general, as opposed to its decision to apply facts available in this case. Moreover, the very fact that the other aspects of US law which are challenged on their face are spelled out in the request for establishment, as set out in paragraph 7.17 above, would lead the reader to conclude that there is no such challenge to the general practice regarding application of adverse facts available. Thus, in our view, the request for establishment does not identify USDOC's "general practice" regarding application of facts available as a measure in dispute.

7.21 Nor can we conclude, as Japan would apparently have us do, that the general claim regarding "Conformity" set out in paragraph E of the request for establishment is sufficient to bring the "general practice" on facts available before us. That claim asserts that, by maintaining "the above-detailed laws, regulations and administrative rulings of general application" which are allegedly not in conformity with its obligations under the WTO Agreements, the United States has acted inconsistently with Article XVI:4 of the Marrakesh Agreement, as well as Article 18.4 of the AD Agreement. These two provisions generally require that Members bring their laws and regulations into conformity with the WTO Agreements. The "general practice" regarding application of facts available is **not** identified among the "laws, regulations and administrative rulings of general application" detailed in preceding sections of the request for establishment. The specific section of the request for establishment addressing the application of facts available, paragraph A.2, does not refer to an inconsistency in the statute, regulations, policy or "general practice" regarding application of facts available, but to the **determination** regarding the application of facts available under the applicable statute. We do not find that this statement is sufficient to bring into this dispute USDOC's "general practice" regarding the application of facts available. To conclude otherwise would effectively allow a Member to challenge all statutes, regulations, and "general practices" in the context of a challenge to a measure imposed pursuant to such provisions or a challenge to any one of such provisions. Such a ruling would eviscerate the obligation to set forth, in the request for establishment, with sufficient specificity, the challenged measure or measures, and the claims regarding such measure or measures.

7.22 The Appellate Body has noted

> "As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel **very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU**. It is important that a panel request be sufficiently precise for two reasons: **first, it often forms the basis for the terms of reference of the panel**

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challenging a measure simply because that measure was adopted based in part on the application of that practice. Such a claim must itself be set forth in the request for establishment with sufficient clarity.

[37] See above, para. 7.15.

[38] Japan has not argued, and we therefore do not address whether, the US "general practice" in question is "sufficiently related" to the anti-dumping measure or statutes at issue in this dispute, within the meaning of the Panel's decision in *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.8.

> **pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint**." (emphasis added) [39]

In this case, we conclude that Japan has failed to state a claim at all with respect to the "general practice" of the USDOC concerning application of facts available. Assuming such practice could be challenged separately from a challenge to the statutory provision on which it is based, Japan has failed to present this problem in the request for establishment in this dispute. Thus, we conclude that the USDOC "general practice" regarding application of facts available is not within our terms of reference. Given that we find no claim was stated in this respect in the request for establishment at all, we consider that neither the United States nor potential third parties were informed of the legal basis of a complaint in this respect.

7.23 As a consequence of our ruling in this regard, we will assess the consistency with the AD Agreement of the USDOC's decision to apply facts available in the investigation underlying this dispute, but will not make a general ruling as to the consistency, on its face, of the USDOC's "general practice" in the application of adverse facts available.

B. S

panel to choose one interpretation of ambiguous language in the AD Agreement. Customary rules of interpretation, applied to Article 17.6(ii), prohibit an understanding of that provision under which the express language allowing for multiple permissible interpretations would be rendered a nullity. The United States further argues that in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties, where the AD Agreement is ambiguous or silent with respect to a particular methodology, but that methodology has been subsequently adopted as standard practice by a number of signatories to the Agreement, the practice of those signatories must be taken into account with regard to determining whether that methodology constitutes a "permissible interpretation" of the Agreement. The United States therefore considers that the relevant question in every case is not whether the challenged determination rests upon the best or "correct" interpretation of the AD Agreement but whether it rests upon a "permissible interpretation" (of which there may be many). The United States finally submits that actions that are reviewed under the applicable deferential standard of review of the AD Agreement cannot also be reviewed under a different standard of review as Japan is suggesting merely because the claim has been phrased differently.

2. Finding

7.26 Article 17.6 of the AD Agreement sets out a special standard of review for disputes arising under that Agreement. With regard to factual issues, Article 17.6(i) provides:

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

The question of whether the establishment of facts was proper does not, in our view, involve the question whether all relevant facts were considered including those that might detract from an affirmative determination. Whether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided - it essentially goes to the investigative process. Then, assuming that the establishment of the facts with regard to a particular claim was proper, we consider whether, based on the evidence before the US investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US investigating authorities reached on the matter in question.[40] In this context, we consider whether all the evidence was considered, including facts which might detract from the decision actually reached by the investigating authorities.

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

> "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."

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[40] We note that this is the same standard as that applied by the Panel in *Mexico - HFCS*, which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify initiation, stated: "Our approach in this dispute will … be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation." Panel Report, *Mexico - HFCS*, para. 7.95.

Thus, in considering those aspects of the US determination which stand or fall depending on the interpretation of the AD Agreement itself rather than or in addition to the analysis of facts, we first interpret the provisions of the AD Agreement. As the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties (the "Vienna Convention"). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the US interpretation is one that is "permissible" in light of the customary rules of interpretation of international law. If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

7.28 While the parties have not raised any issues about burden of proof, we note that in WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defence rests with the party that asserts such claim or defence.[41] The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".[42] In the context of the present dispute, which is concerned with the assessment of the WTO consistency of a definitive anti-dumping measure imposed by the United States, Japan is obliged to present a *prima facie* case of violation of the relevant Articles of the AD Agreement. In this regard, the Appellate Body has stated that ". . . a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[43] Thus, where Japan presents a *prima facie* case in respect of a claim, it is for the United States to provide an "effective refutation" of Japan's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that the United States complied with its obligations under the AD Agreement. Assuming evidence and arguments are presented on both sides, it is then our task to weigh and assess that evidence and those arguments in order to determine whether Japan has established that the United States acted inconsistently with its obligations under the AD Agreement.

C. OVERVIEW OF JAPAN'S CLAIMS

7.29 Japan submits that the United States violated various provisions of the AD Agreement in its imposition of anti-dumping duties on imports of certain hot-rolled steel products from Japan. Japan claims that the use of adverse facts available to determine the dumping margin for the three investigated respondents is inconsistent with Articles 2.3, 2.4, 6.1, 6.6, 6.8, 6.13, 9.3, and Annex II of the AD Agreement. Japan claims that the US statute, on its face and as applied in this case, requiring the inclusion of margins calculated based on facts available in the determination of a dumping margin for all other non-investigated producers is inconsistent with Article 9.4 of the AD Agreement. Japan further considers the exclusion of certain home-market sales to affiliates from the normal value calculation on the basis of the application of the "arm's length" test, and their replacement with downstream sales, is inconsistent with Articles 2.1, 2.2, and 2.4 of the AD Agreement. Japan claims that the US preliminary determination of critical circumstances is inconsistent with Articles 10.1,

United States were inconsistent with its obligations under Article X:3 of GATT 1994. Finally, Japan claims that certain laws, regulations, and administrative procedures governing various aspects of the investigations and determination in the underlying anti-dumping proceeding are not in conformity with its obligations, and thus that the United States has acted inconsistently with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the WTO Agreement.

7.30 We note that we need not reach conclusions on all of these claims in order to resolve the dispute before us. The Appellate Body has observed that a "panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[44] We keep in mind, however, the Appellate Body's further injunction that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members"".[45]

D. ALLEGED VIOLATIONS IN THE CALCULATION OF DUMPING MARGINS

1. Alleged violations of Articles 2, 6, and 9 and Annex II of the AD Agreement in the use of facts available in calculating dumping margins

7.31 Japan claims that the use of facts available by USDOC in the case of sales by the investigated respondents was inconsistent with, *inter alia*, Article 6.8 and Annex II of the AD Agreement since the requirements for the use of facts available were not met. Secondly, Japan claims that USDOC 's choice of facts available of an adverse nature, based on the application of the US statute which provides that adverse inferences may be drawn if a party fails to cooperate with the investigating authority, was inconsistent with those provisions of the AD

7.34 With respect to NKK, Japan asserts that NKK responded to the USDOC request for a conversion factor for sales made on the basis of theoretical weight that it was impracticable or impossible to provide a conversion factor with regard to such sales. After the preliminary

and the normal value." Japan asserts that for NSC's theoretical weight export sales, USDOC did not calculate an export price, but instead assigned the highest margin determined for that product type to those sales. Japan argues that USDOC could have used some form of conversion factor to generate surrogate export prices for those sales. Japan submits that the resort to facts available does not excuse authorities from their obligations, least of all from the obligation to make a fair comparison between export price and normal value. With regard to NKK, which had only made sales in theoretical weight in the home market, Japan submits that USDOC relied on isolated transactions with no relationship to NKK's overall average normal value as adverse facts available. Thus, Japan asserts, USDOC inflated

investigating authority to accept and use the late-provided data.[51]

impedes the investigation" the investigating authority may make determinations on the basis of the facts available. Thus, Article 6.8 ensures that an investigating authority will be able to complete an investigation and make determinations under the AD Agreement on the basis of **facts** even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period.

7.52 The question before us is whether the USDOC was justified in concluding that NKK and NSC refused access to or otherwise did not provide necessary information within a reasonable period.[54] Japan argues extensively that USDOC erred in applying "adverse" facts available in this case. However, before the question of applying "adverse" facts available need be addressed, we must first assess whether USDOC was justified under Article 6.8 AD Agreement to make its determination on the basis of facts available. If USDOC acted inconsistently with Article 6.8 in resorting to facts available at all, then the specific choice of which facts it applied is, in our view, moot.

7.53 The issue in the case of both NSC and NKK in the first instance is whether USDOC acted consistently with Article 6.8 and the provisions of Annex II in rejecting information that was actually submitted to it, and resorting to facts available instead. Both companies submitted the requested information concerning a weight conversion factor for their theoretical weight sales well after the deadlines for response to the questionnaires in which the information was requested had passed, but before verification.

7.54 The United States argues that these submissions were not in accordance with US regulatory provisions on the deadlines for submission of information, and thus that it was reasonable to return the information and refuse to verify it and consider it in making its determinations. However, these deadlines are not provided for in the AD Agreement itself. The AD Agreement establishes that facts available may be used if necessary information is not provided within a reasonable period. What is a "reasonable period" will not, in all instances be commensurate with pre-established deadlines set out in general regulations. We recognize that in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.[55]

7.55 In this regard, we note paragraph 3 of Annex II, which provides, in pertinent part "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, … should be taken into account when determinations are made." Particularly where information is actually submitted in time to be verified, and actually could be verified,[56] we consider that it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the Agreement. Such might be the case, for instance, if an entire questionnaire response were submitted only just before the time scheduled for verification. However, in this case, it seems clear that the information could have been verified and used, but was instead

[54] There is no assertion that the three investigated respondents significantly impeded the investigation.

[55] Japan asserts that the information was submitted as soon as the companies became aware of their ability to provide the information and before verification, and that the late submission was in accordance with certain provisions in the relevant US regulations. The United States argues that Japan misinterprets the relevant US regulations, and that the information was submitted one month after the expiration of the applicable deadline. We are not here concerned with interpreting US regulations or assessing whether NSC and NKK acted in accordance with US regulations in submitting the weight conversion factors. The question we are addressing is whether USDOC was entitled, under Article 6.8, to reject information it considered to have been submitted after the established USDOC deadlines, but still prior to verification, and to decide instead to apply facts available.

[56] It appears that NKK's weight conversion factor information was in fact verified, but was subsequently rejected as untimely and the relevant portions were expunged from the verification record. 64 Fed. Reg. 24363 (6 May 1999), Exh. JP-12.

> "Because NKK's conversion factor data were not timely submitted, the Department rejected these factors in a letter dated April 12, 1999. The Department, therefore, has not considered these data or retained them in the official record of the proceeding. … The Department does not agree with NKK's assertion that these data were verified. Rather, at verification, the Department specifically informed NKK and its counsel that the Department would not accept the conversion factor and would specifically instruct NKK to submit this information on the record if the Department determined that it was timely. However, any arguments as to the accuracy of these data are moot because the data in question are no longer part of the record before the Department…
>
> Further the Department finds that NKK, by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, failed to cooperate by not acting to the best of its ability. NKK's claims that it could calculate a conversion factor in February of 1999 but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NKK argues that it did not understand what the Department wanted when it originally requested a "conversion factor", although this was not stated at the time, and that it lacked the data necessary to calculate one,… it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NKK merely dismissed the Department's repeated requests. The fact that NKK ultimately did provide such a factor is the proof that they could have done so much earlier."[58]

7.59 It is thus clear to us that in the case of NKK as well, USDOC rejected information that was actually submitted to it, albeit not by the deadline specified, despite the fact that the information was available in sufficient time to allow its verification and use in the calculation of NKK's dumping margin. In our view, based on the evidence before USDOC at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that NKK had failed to provide necessary information within a reasonable period. Thus, we conclude that USDOC acted inconsistently with Article 6.8 in applying facts available in making its determination of NKK's dumping margin.

7.60 Having determined that an objective and unbiased investigating authority could not, on the basis of the evidence in this dispute, have reached the conclusion that NKK and NSC failed to provide necessary information within a reasonable period, we do not consider it necessary or appropriate to

price, necessitating the resale and further manufacturing information, based on the assumption that because KSC and CSI were affiliated, CSI's resale prices were necessary. When those prices were not provided, Japan asserts that USDOC did not determine an export price for KSC's sales to CSI, and instead applied a margin from other sales. Japan maintains that this was inconsistent with Article 2.3, which permits the calculation of a constructed export *price*, not the imposition of a *margin*. Finally, Japan maintains that by wrongly applying adverse facts available, the United States ultimately applied an anti-dumping duty higher than the margin of dumping, inconsistent with Article 9.3 of the AD Agreement.

7.65 The United States argues that the application of adverse facts available to a part of KSC's sales was permitted under the AD Agreement, since KSC failed to act to the best of its ability with regard to submitting the requested data concerning its sales through CSI, its US affiliate. The United States points out that USDOC requested the information three times, and that KSC twice requested to be excused from giving the information and on the third occasion alleged that it was not possible to submit the data due to the unwillingness of CSI. However, the United States maintains that KSC never even raised the issue before the Board of Directors of CSI, of whom two out of four are appointed by KSC, never tried to enforce certain rights under the Shareholders' Agreement in an effort to obtain the requested information, and never directly raised the issue with its joint venture partner CVRD.[63] The United States submits that even if cooperation was refused by CVRD, internal means of forcing the issue and obtaining the information were available to KSC under the Shareholders' Agreement. In the US view, KSC's failure to use these means indicates that it acquiesced in the refusal of CSI to submit the requested information. As a result, KSC failed to provide the requested information within a reasonable period, and therefore USDOC was fully entitled to apply adverse facts available to that part of KSC sales to the United States that entered the United States market through CSI.

7.66 The United States argues that the assistance requirement of Article 6.13 of the AD Agreement invoked by Japan relates in particular to small companies while KSC is one of Japan's largest corporations and one of the biggest steel producers in the world. The United States asserts that it was not USDOC's responsibility to advise KSC on the steps to take to respond to the questionnaire and argues that the information requested was clear and unambiguous. In any case, the United States submits, contrary to Japan's assertions, KSC never requested such assistance.

7.67 Finally, the United States maintains that it did not act inconsistently with the requirements of Article 2.3 in applying, as facts available, a margin based on other KSC sales as the margin for the sales to CSI, rather than seeking to calculate an export price based on facts available. The United States maintains that KSC's refusal to provide the information necessary to construct an export price, made it necessary for USDOC to use the margin information as it was impossible to construct an export price based on available facts. The United States rejects Japan's further argument that USDOC's determination was inconsistent with Article 9.3 of the Agreement, maintaining that USDOC correctly calculated KSC's margin, and was therefore entitled to impose a definitive measure in the amount of the margin calculated.

7.68 With regard to the specifics of this case, Brazil questions the use of facts available in light of the fact that KSC was confronted with the refusal of CSI, which was itself a petitioner in the case, to provide the information. Korea objects to the use of fact available to KSC since it was CSI and not KSC that failed to cooperate. Chile considers that the US acted inconsistently with the AD Agreement by punishing KSC for not providing the information that was held by CSI, a petitioner in this case. According to Chile, it was unreasonable for USDOC to require cooperation between two companies having such a clear conflict of interests. Chile asserts that in any case, Article 6.8 and Annex II do not permit the choice of the most adverse facts available when a party fails to cooperate

"In essence, for purposes of the [constructed export price] calculation, the [US] statute treats the exporter and the US affiliate collectively, rather than independently, regardless of whether the exporter controls the affiliate. Accordingly, KSC's argument that it does not "control" CSI is misplaced and irrelevant.

Because the statute requires that the Department base its margin calculations for the CSI sales on record information concerning the CSI sales themselves, the Department required that KSC and CSI, collectively, provide the necessary price and cost data for KSC's US sales through CSI. It is also undisputed that KSC and CSI failed to provide this necessary information….KSC and CSI have neither provided the data on CSI's sales, as requested by the Department, nor demonstrated to the Department's satisfaction that this is not possible. Therefore, the Department finds that KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information with respect to the CSI sales. Therefore, we have used an adverse inference in selecting the facts available with respect to the CSI sales.

Allowing a producer and its US affiliate to decline to provide US cost and sales data on a large portion of their US sales would create considerable opportunities for such parties to mask future sales at less than fair value through the US affiliate. The fact that the affiliate is a petitioner does not allay such concerns. Thus, this fact does not constitute an exception to the principle that the Department may make an adverse inference with respect to sales for which data is not provided unless the foreign exporter and its US affiliate have acted to the best of their ability to provide such data.

While it is clear that KSC and CSI collectively have not acted to the best of their ability, we also disagree with KSC's claim that it alone acted to the best of its ability. … After careful consideration of all of the evidence on the record, the Department finds that KSC did not act to the best of its ability with respect to the requested CSI data.

CSI is a joint venture between KSC and a large Brazilian mining operation, Companhia Valle do Rio Doce ("CVRD"). Through their respective US affiliates, KSC and CVRD each own 50 per cent of CSI. KSC's claim that it acted to the best of its ability with respect to this issue rests on its assertion that it was powerless to compel CSI to provide the Department with this data, given that CSI as a petitioner in this case, refused to cooperated. Some of the most important evidence contradicting KSC on this issue, including information pertaining to the board and the Shareholders' Agreement, constitutes business proprietary information, and are discussed only in our proprietary *Analysis Memorandum*, which is hereby incorporated by reference. Generally, however, the record shows that, although KSC could have been much more active in obtaining the cooperation of CSI in this investigation, it limited its efforts to merely requesting the required data and otherwise took a "hands-off" approach with respect to CSI's alleged decision not to provide this data. For example, KSC officials stated that KSC did not instruct its members of the CSI board to address the issue, did not invoke the Shareholder's Agreement, and did not discuss this issue with its joint venture partner. This does not reach the "best efforts" threshold embodied in § 776(b). Furthermore, the fact that KSC has provided a great deal of information and has substantially cooperated with respect to other issues does not relieve it of the requirement to act to the best of its ability to provide the requested CSI information. With respect to the CSI sales, KSC has provided only minimal volume and value information and has not acted to the best of its ability to obtain further information. Thus, as to the missing CSI data, it

> cannot be said that KSC was fully cooperative and made every effort to obtain and provide the information requested by the Department. Therefore, even though full cooperation by KSC would not constrain the Department from using adverse facts available specifically with respect to the CSI sales, we do not agree with KSC's argument that it has "substantially cooperated" during this investigation….
>
> While the Department has considered that the record supports KSC's claim that it did make some effort to obtain the data and the CSI's management rebuffed these efforts, the record also shows that KSC essentially acquiesced in CSI's decision not to provide this data. Given KSC's relationship with this 50/50 joint venture, as detailed in the *Home Market Sales Verification Report*, dated 26 March 1999, this did not constitute making its best efforts to obtain the data."[64]

7.73 Our review of the facts on which USDOC based this conclusion, including confidential information, leads us to the conclusion that an unbiased and objective investigating authority evaluating the evidence that was before the USDOC could not reasonably have reached the conclusion that KSC had failed to cooperate and that relevant information was thus being withheld. "Cooperate" has been defined as "work together for the same purpose or in the same task."[65] In our view, USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for information in this case went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II. CSI was a petitioner in the investigation of hot-rolled steel imports from Japan, and thus had interests directly opposed to those of KSC. Indeed, this very fact suggests that KSC lacked the ability to control such important decisions of policy by CSI. USDOC's own conclusion that KSC "acquiesced" in CSI's refusal to provide the requested information itself suggests that KSC was not able to direct CSI's actions in this regard. CVRD, KSC's joint venture partner in CSI, was itself KSC's competitor in the US market for the steel products under investigation, and thus also had interests adverse to those of KSC. While it is conceivable that KSC could have undertaken certain measures under the Shareholders' Agreement with the possible result of forcing CSI to provide the requested information, such actions would have inevitably disrupted the on-going business relationships of the three companies. We do not consider that USDOC's conclusion that KSC's not hav g taken such measuresjuestfiked the conclusion that it had failed to cooperate wa. could

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impermissibly limits the exclusion provided for under Article 9.4 to only margins based entirely on facts available. Japan argues that the statutory distinction between margins based entirely on facts available, which are excluded, and margins based only partially on facts available, which can still form the basis for an "all others" rate, is, on its face, inconsistent with the AD Agreement In Japan's view, Article 9.4 is clear and explicit in prohibiting the inclusion of any margins based even in part on facts available in the calculation of the all others rate, and the US interpretation of Article 9.4 is impermissible. Japan notes that facts available may be used in determining a company's dumping margin under Article 6.8 of the AD Agreement due to a particular action or inaction of that particular company, and asserts that Article 9.4 of the AD Agreement establishes that other non-investigated companies should not be punished for the lack of cooperation of another company.

7.76 Second, Japan argues that, applying the statute in its determination of an all others rate, USDOC violated Article 9.4 of the AD Agreement since it used as the basis for the calculation of the all others rate the margins calculated for the three investigated respondents, each of which was based in part on facts available. Japan submits that the USDOC determination of an "all others" rate on the basis of margins that were calculated based in part on facts available was inconsistent with Article 9.4 of the AD Agreement.

7.77 The United States argues that Article 9.4 of the AD Agreement permits the inclusion of margins **partially** based on facts available in establishing an all others rate. Likewise, the United States argues, merely because a factor in the calculation of the overall margin for each of certain investigated producers is *de minimis* or zero does not mean that such margins cannot be used in the determination of an all others rate under Article 9.4 of the AD Aat surgins cae exly pa"tablishes dnder Are calircum

way to determining the margin does not, in the United States' view, result in a margin established under the circumstances referred to in Article 6.8

7.89 We note, however, that Article 6.8 itself does not refer to the establishment of margins *per se*, but rather specifies that in certain circumstances a determination may be made on the basis of facts available. We can perceive of no textual basis in Article 6.8 to suggest that a determination should be considered made under the circumstances referred to in that Article only if the determination is made **entirely** on the basis of facts available. We generally agree with the United States that a "margin" is the overall margin for a particular product from a particular source.[69] Where we part company from the United States is in our understanding of what it means to "establish a margin under the circumstances referred to in [Article 6.8]". The establishment of a dumping margin is a complex calculation comprising many elements. However, the "**determination**" with respect to the margin of dumping is the end result of all the calculation steps - the final margin that may be applied to the dumped products from the particular source. In our view, a margin determined under the circumstances referred to in Article 6.8 includes a margin determined on the basis of a calculation in which some element was established on the basis of facts available.[70]

7.90 We therefore conclude that the US statute governing the calculation of the all others rate, section 735(c)(5) of the Tariff Act of 1930, as amended, is, on its face, inconsistent with Article 9.4 of the AD Agreement insofar as it requires the consideration of margins based in part on facts available in the calculation of the all others rate.[71] Having found the statute governing the United States' actions in this regard inconsistent with the AD Agreement, and there being no dispute that the USDOC applied that statute in its determination in this case, we must perforce conclude that the calculation of the all others rate in this case was inconsistent with the United States' obligations under Article 9.4 of the AD Agreement. In addition, having determined that the statute is inconsistent on its face with the relevant specific provision of the AD Agreement, we consequently conclude that the United States acted inconsistently with Article 18.4 of the AD Agreement and Article XIV:4 of the Marrakesh Agreement in maintaining that provision after the entry into force of the AD Agreement.

3. Alleged violations of Article 2 of the AD Agreement in the exclusion of certain home market sales to affiliates and their replacement with downstream sales in USDOC's determination of normal value

(a) Arguments

7.91 Japan argues that USDOC's exclusion of certain home market sales to affiliates from the determination of normal value, based on the application of the "99.5 per cent" or "arm's length" test, and the replacement of such sales with re-sales by the affiliates to unaffiliated customers, is inconsistent with Articles 2.1, 2.2 and 2.4 of the AD Agreement. Japan challenges USDOC's established practice in this regard on its face, and USDOC's application of that practice in the investigation of imports of hot-rolled steel from Japan.

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[69] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India ("EC – Bed Linen")*, WT/DS141/R, para. 6.118 (presently under appeal).

[70] This does not require the conclusion that a zero or *de minimis* margin, which must also be disregarded under Article 9.4, relates to "portions" of margins or individual transactions having a zero or *de minimis* price difference. In this respect, we consider that Article 9.4 refers to overall margins that are zero or *de minimis*.

[71] We recognize that this conclusion has certain practical consequences, as it leaves it unclear how Members are to establish the maximum rate of duty applicable 6.75 o4c A388refers to ove926 Bed Lin368DO

7.92 Japan agrees with the general definition of the term "ordinary course of trade" used by the United States -- "the conditions and practices which, for a reasonable period of time prior to the exportation of the subject merchandise, have been normal" for sales of the foreign like product.[72] In addition, Japan appears to agree that sales to affiliated purchasers may not be in the ordinary course of trade. However, Japan argues that the "arm's length" test applied by the United States is an unreasonable basis for determining whether such sales are in the ordinary course of trade, and that Article 2 does not allow a Member to treat sales that fail the "arm's length" test as "outside the ordinary course of trade". Japan argues that there is nothing in the AD Agreement that supports the premises of the "arm's length" test - that sales made to affiliates[73] at average prices more than 0.5 per cent below the average prices for the same product sold to unaffiliated customers are outside the "ordinary course of trade". According to Japan, a 0.5 percentage point average price differential is too small a difference upon which to base a finding that sales to affiliates are not made in the ordinary course of trade. Japan submits that Article 2.2 of the AD Agreement makes clear that the exclusion of sales as outside the ordinary course of trade is a rigorous undertaking, and that the "arm's length" test is too mechanical and not consistent with the rigorous tests applicable to determining whether sales below cost may be considered outside the ordinary course of trade.

7.93 Second, Japan argues that Article 2.2 of the AD Agreement prescribes what an authority shall do if there are no home market sales in the ordinary course of trade. In Japan's view, Article 2.2 does

prices of a producer's own direct sales[76], and the downstream home-market sales are often made at a different level of trade and therefore cannot be compared in a fair manner to export sales made directly to unaffiliated customers.

7.96 The United States argues that Article 2.1 of the AD Agreement, which requires that normal value be based on sales made in the ordinary course of trade, allows for more than one permissible interpretation. The United States submits that the USDOC's "arm's length" test of sales to affiliates is one way of examining whether sales were made in the ordinary course of trade. The United States asserts that it is generally recognized that sales to affiliates are suspect and it is expressly recognized in Article 2.3 of the AD Agreement that association may lead to prices that are unreliable. The United States points out that other Members have a similar practice of doubting the reliability of prices of sales to affiliates.[77]

7.97 Since Article 2.1 of the AD Agreement does not specify how to determine whether sales are made in the ordinary course of trade, the United States asserts that the "arm's length" test is one permissible way of making this determination, on the basis of consideration whether sales to affiliates are made at prices that are comparable to those of sales to unaffiliated customers. In the United States view, in the absence of guidance in the AD Agreement on how to assess whether sales are outside the ordinary course of trade, it cannot be argued that a difference of 0.5 percentage points between the prices of sales to affiliated and unaffiliated customers is too small. The United States submits that the authority is free under the AD Agreement to consider a difference of 0.5 per cent significant.[78]

7.98 The United States considers that USDOC's "arm's length" test, which compares the average price of sales to each affiliated customer to the average price of sales of the same product by the same producer to all unaffiliated customers, is preferable to the alternative suggested by Japan, because it focuses on the relationship between the seller and the customer, not on a particular product. The United States believes that the standard deviation analysis suggested by Japan would lower the threshold and provide no certainty that sales included in the calculation of normal value are not affected by the relationship between the seller and the buyer. Moreover, USDOC's weighted average methodology is consistent with the way dumping margins are normally calculated under the AD Agreement.[79] The United States further asserts that USDOC may otherwise consider

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[76] Japan argues that it is not fair to compare an export price, ex-factory, with normal value based on downstream sales without making any adjustments to address differences in price comparability due to the reseller's added costs and profit.

[77] First Written Submission of the United States, Annex A-2, section B, footnotes 265–269. The United States considers its own practice more transparent and concrete than that of some other Members and better suited for its own administration of the dumping law.

[78] The United States specifically argues that there is no reason to require a difference of at least 2 per cent merely because this is the *de minimis* dumping margin. Moreover, the United States points out that 0.5 per cent is the *de minimis* standard it applies in the context of administrative reviews, a practice the United States asserts was sanctioned by the Panel in *United States-DRAMs*. The United States asserts that the Panel held that, because the function of the 2 per cent *de minimis* standard in Article 5.8 was to determine "whether or not an exporter is subject to an anti-dumping order," it did not preclude Members from adjusting the threshold for other purposes. Specifically, the Panel found "logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures," and upheld the application of a 0.5 per cent *de minimis* test in administrative reviews. See *Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, ("*United States – DRAMs*") WT/DS99/R, adopted 19 March 1999, para. 6.90. Article 5.8 contains no *de minimis* standard for comparisons involved in determining whether sales have been made outside the "ordinary course of trade".

[79] The United States further argues that the Japanese producers could be glad that higher priced sales were included since it means that such sales would not be replaced with even higher priced downstream sales. The United States further asserts that it is logical that only lower prices are targeted by the test since it is through selling to their affiliates at lower prices that producers will try to manipulate normal value.

aberrationally high prices, as well as prices that fail the "arm's length" test, to be outside the ordinary course of trade - these are simply not what is being tested for by the "arm's length" test.[80]

7.99

USDOC only disregards the lower priced sales that fall outside the "arm's length" test and replaces certain related-party sales with higher downstream prices demonstrates the bad faith in which the United States has implemented the AD Agreement.

7.104 Korea argues that the "arm's length" test is inconsistent with the AD Agreement. In Korea's view, the only basis for considering home market sales as outside the ordinary course of trade is set out in Article 2.2.1 concerning sales below cost, and even then only under certain conditions. In Korea's view, the "arm's length" test mixes together all models of subject merchandise sold to affiliated and unaffiliated parties, without taking into account differences in prices and/or product that existed independent of the factor of affiliation. Moreover, Korea considers the test biased since USDOC disregards only lower priced sales, guaranteeing that higher-priced sales remain in the database for the calculation of normal value.

7.105 Chile supports Japan's view that the "arm's length" test, because it excludes only lower priced sales to affiliated customers, does not allow for a fair comparison between normal value, which is artificially inflated as a result of the application of the test, and export price. Moreover, Chile considers that a difference of 0.5 per cent in price does not constitute a sufficiently significant price difference.

7.106 According to the EC, the "arm's length" test applied by the US authorities is not a "permissible" interpretation of the terms "in the ordinary course of trade" in Article 2.1. The EC considers that it is unreasonable and contrary to Article 2.1 for the US authorities to treat in all circumstances a 0.5 per cent difference in average prices as irrefutable evidence that sales are not made in the ordinary course of trade.

(b) Finding

7.107 The parties are in general agreement that sales between affiliated parties may not be in the ordinary course of trade, and therefore not included in the determination of normal value.[82] However, Japan disagrees with: (i) the "arm's-length" test applied by the USDOC in determining whether affiliated party sales are not in the ordinary course of trade, and (ii) the methodology applied by the USDOC in using the resale price of the affiliated purchaser as a substitute price for sales excluded from the calculation of normal value on the basis of the application of the "arm's length" test.[83]

(i) The use of the "arm's-length" test by USDOC in determining whether affiliated party sales are in the ordinary course of trade

7.108 Turning to the first issue, we note that Article 2.1 of the AD Agreement specifies that a product is to be considered as dumped if the export price is less than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." However, the AD Agreement does not define the concept of "ordinary course of trade", either in Article 2.1 or elsewhere, and establishes no general tests for determining whether sales are

[82] We do not address Korea's argument that only sales below the cost of production may be considered as not in the ordinary course of trade, as third parties may not raise claims before the Panel.

[83] We note in this regard that Japan purports to make a claim concerning the "general practice" of the United States with respect to the application of the "arm's length" test and the replacement of excluded sales. As with its purported claim concerning the "general practice" regarding facts available, we do not consider that Japan has stated a claim in this regard in the request for establishment. Although the United States has not raised a specific objection in this regard , we limit our ruling to the question whether the United States acted inconsistently with its obligations under the AD Agreement in applying that test in this case, and do not rule on

made in the ordinary course of trade, or not.[84] It seems clear to us, and the parties do not dispute, that investigating authorities must determine whether sales in the home market are made in the ordinary course of trade in order to determine which of these sales are to be considered in the determination of normal value. The parties also seem to be in general agreement that sales to affiliates may, in some circumstances, be made **not** in the ordinary course of trade. It thus seems indisputable that an investigating authority may "test" home market sales to affiliated customers to decide whether they are made in the ordinary course of trade and consequently are to be considered in determining normal value. The difference between the parties is in their position as to whether the USDOC's "arm's length" test is an appropriate basis for making this decision.

7.109 The "arm's length" test, as we understand it, is intended to test for differences in pricing to affiliated customers as compared with pricing to unaffiliated customers. In the United States' view, such differences demonstrate that sales to affiliated customers are not in the ordinary course of trade. We can certainly accept, as Japan appears to accept, that a pattern of prices to affiliated customers that is different from the pattern of prices to unaffiliated purchasers might support a conclusion that sales to affiliated customers are not in the ordinary course of trade. However, a test intended to distinguish sales that are "in the ordinary course of trade" from those that are not must be based on a permissible interpretation of that term as used in the Agreement.

7.110 Our concern with the "arm's length" test arises because it does not, in fact, test for differences in prices of sales to affiliated customers as compared with unaffiliated customers, which might indicate that sales are not made in the ordinary course of trade. Rather, the "arm's length" test only tests whether prices to affiliated customers are **lower**, on average, than prices to unaffiliated customers.[85] There is no reason to suppose, and the United States has not proposed any, that affiliation only results in sales that are outside the ordinary course of trade because they are lower priced on average than sales to unaffiliated customers. One example of prices to affiliated customers that are higher as a result of affiliation, and might be considered not in the ordinary course of trade, would be where prices between affiliates are established in order to allocate profits, and consequently tax burdens, among affiliates. These prices might, on average, be higher than prices to unaffiliated customers, but would not be caught by the USDOC's "arm's length" test.

7.111 The United States argues before us that it would, if the situation arose, test for "aberrationally high" prices to affiliated customers. However, merely that the United States might apply a different test in other circumstances does not mean that the "arm's length" test is based on a permissible interpretation of "sales in the ordinary course of trade". Moreover, it is clear that the "arm's length" test was applied in this case without consideration of any particular factual circumstances. USDOC stated, in the preliminary determination

> "Sales to affiliated customers in the home market not made at arm's length prices (if any) were excluded from our analysis because we considered them to be outside the

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[84] Article 2.2.1 of the Agreement does provide that sales made below cost may be treated as not in the ordinary course of trade and disregarded in calculating normal value if certain conditions are satisfied. Thus, it implies that sales below cost are not in the ordinary course of trade. Further, Articles 2.2.1.1 and 2.2.2 contain detailed rules on the calculation of costs in assessing whether sales are made below cost. However, merely that one category of sales that may be considered not in the ordinary course of trade is set out in the Agreement does not illuminate how an investigating authority is to determine, with respect to sales other than sales below cost, whether such sales are in the ordinary course of trade. We note in this regard that although an illustrative list of sales outside the ordinary course of trade was the subject of discussion in the negotiation of the AD Agreement, no such list was ultimately agreed to. *See*, GATT Doc. MTN:GNG/NG8/15 (19 March 1990) at page 13.

[85] We note that we have doubts as to whether a price difference of, on average, 0.5 per cent, can reasonably be considered as sufficiently different so as to support the conclusion that the lower priced sales are not in the ordinary course of trade. However, we do not consider it necessary or appropriate to resolve this question, as our conclusion rests on the more basic problem that the "arm's length" test does not, in our view, reasonably relate to the question whether sales are in the ordinary course of trade.

ordinary course of trade.

alternative methods for establishing export price in situations where there is no export price or the export price is deemed unreliable.

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either necessary or appropriate to consider whether that test also is inconsistent with the more general obligation of fair comparison set out in Article 2.4 of the AD Agreement.

7.120 Similarly, having found that the USDOC acted inconsistently with Article 2.1 in replacing, in the determination of normal value, certain "excluded" sales by investigated companies with downstream sales made by purchasers affiliated with the investigated companies, we do not consider it necessary to go on to consider whether the replacement of excluded sales with sales by affiliates was consistent with Articles 2.2 and 2.4 of the AD Agreement.

E. ALLEGED VIOLATIONS IN THE PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES

1. Arguments

7.121 Japan claims that USDOC's preliminary critical circumstances finding is inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement because (i) USITC had preliminarily found only a threat of injury to the industry while Article 10.6 of the AD Agreement requires evidence of current injury; and (ii) the preliminary determination of critical circumstances was not supported by sufficient evidence as required by Article 10.7 of the AD Agreement. Japan moreover asserts that the evidentiary standard in the US statute governing preliminary critical circumstances findings on its face is inconsistent with the "sufficient evidence" standard of Article 10.7 of the AD Agreement. Fithat s idiminasison fsuphing, in

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knew or should have known that the exporter was practising dumping. The United States emphasises that the several hundreds of pages of exhibits to the petition are not "mere allegations" of dumping, but contain substantial factual information on the export price and normal value of the subject products and thus constitute evidence. On the basis of this information, knowledge of dumping was imputed to the importers on the basis of dumping margins in excess of 25 per cent.[96] The United States argues that since the AD Agreement does not dictate how to determine whether the importers were aware that products were being dumped, it is both reasonable and permissible to deduce such knowledge from the degree of the dumping margin as preliminary established.[97]

7.128 The United States asserts that USDOC also had sufficient evidence of massive imports over a short period of time. USDOC compared two six month periods and established that there was an increase in imports of 100 per cent. The United States asserts that nothing in the AD Agreement dictates which date to choose to assess whether there have been massive imports over a short period. Therefore, USDOC was permitted to choose the date on which it became common knowledge that anti-dumping proceedings would be initiated in the near future, and the date of April 1998 was therefore reasonable. The United States argues that because petitioners wait to submit their petition in order to gather more evidence does not mean that they should be deprived of their remedy against massive dumped imports that entered the country in anticipation of the anti-dumping investigation.[98]

7.129 The United States refutes Japan's challenge to the consistency of section 733(e) of the Tariff Act of 1930, as amended. First, the United States submits that it is clear that section 733(e) does not mandate any WTO inconsistent action and can therefore not be found to be inconsistent on its face with the AD Agreement. Moreover, the United States submits, the evidentiary standard of "a reasonable basis to believe or suspect" is similar to that of "sufficient evidence" and both are used interchangeably by USDOC.[99] The United States asserts that it is not a lower evidentiary standard. The United States further argues that it is general USDOC practice to make all the determinations as required by Article 10.6 of the AD Agreement concerning massive imports, knowledge of dumping and injury and the causal link between the dumping and the injury.

7.130 Brazil supports Japan's argument that the US critical circumstances determination was inconsistent with Article 10.6 of the AD Agreement, as in Brazil's view a preliminary finding of material injury to the industry and not just threat thereof is required. Brazil argues that the USDOC determination was not based on sufficient evidence as required by Article 10.7 of the AD Agreement but on mere allegations of the petitioners. Moreover, Brazil submits that the evidentiary standard in

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[96] Japan argues that knowledge of dumping cannot be determined without a preliminary dumping finding. The United States submits that Article 10.6 directs the administering authority to determine whether importers *should have known that dumping was occurring and that such dumping would cause injury*. The Agreement does *not* specify how to determine such awareness. The United States asserts that although Japan would prefer a requirement that there be a determined dumping margin, this is simply not necessary under the Agreement. The United States concludes therefore that if USDOC's method for determining importer knowledge is a permissible interpretation of the Agreement, and if it rests upon sufficient evidence, it must be upheld.

[97] The United States notes in this respect that Japan never alleged that the evidence contained in the petition of the US industry was not sufficient to initiate an investigation under Articles 5.2 and 5.3 of the AD Agreement.

[98] The United States stresses that Section 351.206(i) of USDOC's regulations provides that USDOC will "normally" compare the three months following initiation of an investigation to the three months preceding initiation in order to determine whether critical circumstances exist. These comparison periods are appropriate where companies learn of the investigation when it is initiated and then try to beat the preliminary determination with a surge of imports of the subject merchandise. However, the United States points out, Section 351.206(i) provides that if USDOC finds that importers, exporters, or producers had reason to believe, at some point prior to the beginning of the proceeding, that an investigation was likely (as it did in this case), USDOC may consider a period of not less than three months from that earlier time for comparison purposes.

[99] The United States provides examples in its answer to question 31 of the Panel, footnote 6. Responses of the United States to Questions from the Panel, Annex E-3, para. 24, footnote 6.

the US statutory provisions is lower than that set forth in the AD Agreement and that US law does not require a finding of all the elements of fact of Article 10.6 of the AD Agreement.

7.131 Korea agrees with Japan's view that USDOC's critical circumstances determination was not based on sufficient evidence of current injury, but only of threat of injury, and is therefore inconsistent with Articles 10.6 and 10.7 of the AD Agreement. Korea asserts that this interpretation, that evidence of current material injury is necessary, comports with the limited object and purpose of Article 10.6 of the AD Agreement which is to assure that the remedial effects of the final duties are not eviscerated. Korea argues that, if only threat of injury exists, the remedial effect will not be undermined since the prospective application of the duties will precisely prevent injury from occurring.

7.132 Chile is of the opinion that information from petitioners is not "sufficient evidence" and the USDOC critical circumstances determination therefore is inconsistent with Articles 10.7 of the AD Agreement.

2. Finding

7.133 We recall certain of the facts that are relevant to our examination of the matter before us. On 8 October 1998, USDOC issued a policy bulletin stating that the USDOC would, if adequate evidence of critical circumstances was available, issue preliminary critical circumstances determinations prior to preliminary dumping determinations.[100] On 30 November 1998, USDOC issued an affirmative preliminary critical circumstances determination regarding imports of hot-rolled steel from Japan.

7.134 Although USDOC made a preliminary determination of critical circumstances, no measures "necessary to collect anti-dumping duties retroactively" were actually taken until the preliminary determination of dumping by USDOC, effective 19 February 1999.[101] USDOC made a second and final critical circumstances determination as part of its final dumping determination on 6 May 1999. Under US law, however, it is the USITC, in its final determination of injury, which determines whether critical circumstances exist that warrant the retroactive application of duties to 90 days prior to the date of application of provisional measures. USITC in its final injury determination of 23 June 1999 made a negative critical circumstances finding. USITC concluded that "we do not find that the record evidence indicates that the subject imports from Japan would seriously undermine the remedial effects of the order".[102] Therefore, anti-dumping duties were ultimately not collected retroactively.

7.135 Japan is challenging the consistency of the USDOC preliminary critical circumstances determination with Articles 10.6 and 10.7 of the AD Agreement. Japan claims that by violating these two provisions, USDOC also acted inconsistently with Article 10.1 of the AD Agreement.

7.136 Article 10.1 of the AD Agreement reads as follows:

> "Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph

[100] Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations, 63 Fed. Reg. 55364 (15 October 1998) ("Policy Bulletin"), Exh. JP-3

[101] At that time, USDOC directed the US Customs Service to suspend liquidation and require the posting of bonds or cash deposits retroactively to 90 days prior to the date of publication of the preliminary dumping determination, *i.e.* 90 days prior to 19 February 1999. USDOC Preliminary Dumping Determination, 64 Fed. Reg. 8299. Exh. JP-11.

[102] Certain Hot-Rolled Steel Products From Japan, 64 Fed. Reg. 33514, 33514 (23 June 1999). Certain Hot-Rolled Steel Products From Japan, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 (June 1999) ("USITC Report"), page 23.

1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article"

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(A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and

(B) there have been massive imports of the subject merchandise over a relatively short period". [103]

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collect anti-dumping duties retroactively. We do not believe that this provision of the US statute requires USDOC to take WTO inconsistent action. Nor does it preclude USDOC from acting consistently with the Agreement.

7.143 First, the evidentiary standard set forth in the US statute is "a reasonable basis to believe or suspect". Article 10.7 of the AD Agreement on the other hand uses the term "sufficient evidence". It is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact.[106] The analysis of the consistency of the US statute with Article 10.7 must take into account, therefore, its application in practice, as interpreted and applied by the administering and judicial authorities. We recognize that the actual terms used in the US statute differ from those of the Agreement. However, we believe that the consistency of this evidentiary standard is not determined by a semantic difference. Rather, we must examine how this standard has been applied in practice.

7.144 In our view, "sufficient evidence" refers to the quantum of evidence necessary to make a determination. "A reasonable basis to believe or suspect" on the other hand, seems to refer to the conclusion reached on the basis of evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented. It appears that in past cases the US authorities have applied the standard as set out in the statute interchangeably with a standard expressed as "sufficient evidence" and have made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied.[107] We therefore consider that the US statute, as it has been applied is not inconsistent with the requirement of the AD Agreement that the investigating authority must have sufficient evidence of the conditions of Article 10.6 before taking measures necessary to collect the duties retroactively.[108]

7.145 Japan further argues that the US statute does not require evidence that all the conditions of Article 10.6 of the AD Agreement are satisfied, as required by Article 10.7. Japan claims in particular that the statute does not require sufficient evidence of dumping, injury and causation, and that it does not require evidence that massive dumped imports are likely to seriously undermine the remedial effect of the duty. We recall that the question we must address in this regard is whether the statute requires action inconsistent with, or prevents actions consistent with, the requirements of the Agreement.

7.146 In our view, the US statute allows the investigating authority to make its determinations consistently with the AD Agreement in this respect. We recognise that the statute does not explicitly set out the same requirements as are set out in Article 10.6. However, this does not imply that USDOC is precluded from taking these elements into consideration, in so far as necessary. In our view, the text of the US statute in this regard does not preclude USDOC from determining whether there is sufficient evidence that the conditions set out in paragraph 10.6 are satisfied. The question then becomes whether USDOC did so in this case. We will discuss this question below.

7.147 We note that Article 10.7 requires that there be sufficient evidence that the conditions of Article 10.6 are satisfied. Article 10.6 of the AD Agreement of course presupposes a final dumping and injury determination, without which no definitive dumping duties may be applied in any case.

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[106] *Certain German Interests in Polish Upper Silesia*, 1926, PCIJ Rep., Series A, No. 7, p.19; See also Panel Report, *United States – Section 301*, para. 7.18.

[107] The United States refers to various instances in which the two standards have been used interchangeably by USDOC in anti-dumping and countervailing duty cases, See First Written Submission of the United States, Annex A-2, para 290 and footnote 405.

[108] We note that Japan made several claims concerning USDOC's preliminary critical circumstances determination arguing a lack of sufficient evidence in support of its determination. However, as we will discuss in detail below, Japan did not argue that the lack of sufficient evidence was somehow due to a flawed evidentiary standard, but instead pointed to the evidence actually relied upon, which Japan considers

Rather than being conditions set out in Article 10.6, we consider that findings of dumping and injury are a precondition for any *definitive* duty to be applied. Article 10.7 of the AD Agreement provides that certain *preliminary* measures may be taken "after initiation". This implies that at the time of the critical circumstances determination, the authority has already determined, under Article 5.3, that the petition contained sufficient information of dumping, injury, and a causal link to justify the initiation of the investigation. For a preliminary critical circumstances determination, Article 10.7 requires, in addition, sufficient evidence of the specific conditions of Article 10.6 as set forth in 10.6 (i) and (ii). It does not, however, in our view necessarily require additional or different evidence of dumping or injury from that on which the decision to initiate was based.

7.148 We note that the US statute governing preliminary critical circumstances determinations does not expressly refer to the question whether massive dumped imports seriously undermine the remedial effect of the duty. However, we do not consider that the Agreement requires that a separate determination be made with regard to this aspect of Article 10.6 at the preliminary stage of considering whether to take action under Article 10.7. Rather than a "condition" of Article 10.6 of which there must be sufficient evidence in order to act under Article 10.7, in our view, this requirement establishes the conclusion that must be reached in order to justify retroactive application of the anti-dumping duty under Article 10.6.[109] Consideration of this question at the preliminary stage of deciding whether to apply measures under Article 10.7 would, in our estimation, at best be speculative. Our view is reinforced by the fact that the possible undermining of the remedial effect of a definitive anti-dumping duty is not a question of which evidence would be available at the very early stages of an investigation, after initiation, when the determination under Article 10.7 may be made and authorized precautionary measures taken. The conclusion that the remedial effect of a definitive duty would be undermined by the effect of massive dumped imports can only meaningfully be addressed at the end of the investigation, when it has been determined that the imposition of a definitive anti-dumping measure is warranted, based on a final determination of dumping, injury, and causal link. To require investigating authorities to undertake what is likely to be an impossible, meaningless task under Article 10.7 is not, in our view, necessary or appropriate.

7.149 Moreover, in this respect, we note the US regulation set out in 19 CFR § 351.206 (h). It provides that, in assessing whether imports of the subject merchandise have been massive, USDOC is to examine the volume and value of the imports, the seasonal trends and the share of domestic consumption accounted for by the imports, and establishes that imports over a relatively short period of time may be determined based on the knowledge of exporters that an anti-dumping proceeding was likely or had been initiated. We recall that Article 10.6 (ii) of the AD Agreement provides that injury must be caused by massive dumped imports "which *in light of the timing and the volume of the dumped imports* and other circumstances (such as a rapid build-up of inventories) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied". Thus, the Agreement requires that the likelihood that the remedial effect of the duty will be undermined be assessed in light of timing and volume of the dumped imports. In our view, by requiring that the assessment of massive dumping in a relatively short period be made in light of the exporters' knowledge of an initiation or a likely initiation, USDOC addresses whether massive imports are likely to seriously undermine the remedial effect of the duty.

7.150 On the basis of the foregoing, we conclude that the US statute, section 733(e) of the Tariff Act of 1930, as amended, is not, on its face, inconsistent with Articles 10.1, 10.6 and 10.7 of the AD Agreement. Having reached this conclusion, we also find that the United States has not acted inconsistently with its obligations under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the AD Agreement in maintaining this statutory provision.

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[109] In this respect, we note that the USITC, which makes the final determination establishing whether definitive duties will be collected retroactively, is required to consider this element under section 735(b)(4)(A) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1673d(b)(4).

(b) Is the USDOC preliminary critical circumstances determination concerning hot-rolled steel from Japan inconsistent with Articles 10.6 and 10.7 of the AD Agreement ?

7.151 Japan further challenges the specific preliminary critical circumstances determination made by USDOC in the investigation of imports of hot-rolled steel from Japan. As a preliminary matter, we note that we understand Japan to argue that a Member is precluded from making a preliminary determination of critical circumstances in the absence of a preliminary determination of material injury to the domestic industry. According to Japan, USDOC's preliminary determination of critical circumstances thus violated Article 10.6 of the AD Agreement since USITC had found threat of injury to the industry, but not current material injury, in its preliminary determination. However, Article 10.6 sets out the conditions for retroactive application of "**definitive** anti-dumping duties"(emphasis added). In the case of imports of hot-rolled steel products from Japan, no duties were actually levied retroactively, since USITC in its final determination of injury found that the conditions of Article 10.6 were not satisfied. In our view, Article 10.6 does not directly govern the determination at issue here – rather, USDOC's preliminary critical circumstances determination must be judged against the obligations set out in Article 10.7. Those obligations, while related to the obligations set out in Article

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be taken under Article 10.7, why that same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7.

7.159 Turning to the conditions of which there must be sufficient evidence, we note that Article 10.6 requires authorities to determine that, for the dumped product in question,

> "(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
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> (ii) the injury caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other
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taken.[112] Thus, in a sense, Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* - they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant.

7.164 The third condition of Article 10.6 of which sufficient evidence is required by Article 10.7, is that the injury be caused by massive dumped imports in a relatively short period of time. In this case, USDOC assessed the question whether there were massive dumped imports in a relatively short time by comparing imports during a period of five months preceding and following April 1998. That date was established based on press reports which, USDOC concluded, established that importers, exporters, and producers knew or should have known that an anti-dumping investigation was likely.[113] USDOC found an increase of imports of hot-rolled steel of more than 100 per cent between the period December 1997-April 1998 and May-September 1998.[114]

7.165 The Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan asserts that the latter part of Article 10.6 (ii) of the AD Agreement, r

segment of the industry, rather than the industry as a whole as provided for in that provision. Japan argues that the statutory provision leaves no discretion to consider fully both the merchant market and the overall industry, nor does it require an explanation of how the merchant market relates to the industry as a whole or is representative of it.

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7.180 The EC agrees with the US that, where a significant portion of domestic output of the like product is for captive use, it is not inconsistent with the AD Agreement to focus the injury analysis on the "merchant" or "free market", since it is there that the immediate injurious effects of the dumped imports takes place. The EC considers that such a focus is even needed in order to avoid that the effects of dumped imports become obscured through the use of aggregate data.

7.181 Chile considers that Articles 3 and 4 of the AD Agreement clearly support Japan's claim that an authority is to examine injury with regard to the industry as a whole.

7.182 Brazil supports Japan's claim that an authority is required to examine the domestic industry as a whole, not merely part of it, when determining injury and causation. Brazil considers that consideration of only one segment of an industry is simply not permitted under the AD Agreement. Brazil is therefore of the view that the US captive production provision, which requires the authority to ignore the captive portion of the industry, is inconsistent with the AD Agreement.

7.183 Korea asserts that Article 3.4 of the AD Agreement requires an analysis of "all relevant economic factors and indices bearing on the state of the domestic industry", *i.e.* the industry as a whole. It considers that an authority may not unduly emphasize a particular segment of the industry at the expense of the industry as a whole.

(ii) Finding

7.184 Section 771(7)(c)(iv) of the Tariff Act of 1930 provides that, in a case in which domestic producers internally transfer significant production of the domestic like product for the production of a downstream article, and under certain specified circumstances, the USITC, in its injury analysis shall **focus primarily** on the merchant market for the domestic like product in determining market share and factors affecting financial performance.[117] This provision is commonly referred to as the captive production provision since it distinguishes between the merchant market, the segment of the market consisting of commercial shipments on the open market, and the captive segment of the market - production which is internally consumed by the producer in the production of downstream products. In the investigation underlying this dispute, the USITC found that the domestic industry comprised US producers of hot-rolled carbon steel flat products. The USITC further found that these same producers used hot-rolled steel they had produced in the manufacture of downstream products such as cut to length, tubular, cold-rolled, and plated or galvanized steel. This "captive" consumption of hot-rolled steel by the domestic producers thereof was the subject of substantial argument by the parties to the investigation. In particular, its effect on the domestic industry underlies the dispute regarding the US captive production provision and its application in this case.

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

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

7.185 Japan alleges that the US captive production provision violates Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement concerning the determination of injury to the domestic industry. The thrust of Japan's argument is that the captive production provision's "primary focus" on the merchant market is inconsistent with the Agreement's requirement to determine injury to the "domestic industry" which is defined in Article 4 as domestic producers as a whole of the like products.

7.186 In relevant part, Article 3 provides as follows:

"Determination of Injury[9]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the

effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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[9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

7.187 In relevant part, Article 4.1 of the AD Agreement provides as follows:

"For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products,"

7.188 In addressing Japan's claim that the US statute is inconsistent with the AD Agreement on its face, we must resolve two questions. First, we must determine what is required by the AD Agreement, that is, whether the investigating authority is in all cases required to make a

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attention for a particular segment of the domestic market does not, in our view, necessarily imply that the overall injury analysis is not performed with respect to the industry as a whole. The statute does not require a general and exclusive focus on the merchant market when considering market share and industry performance, but only a "primary" focus.[122] It certainly does not require a determination of injury based only on consideration of the merchant market.

7.196 We believe that the context of the captive production provision confirms our view. The general obligation for injury determinations is set out in section 735(b)(1)(A) of the Tariff Act of 1930, as amended. That provision requires USITC to make a final determination of whether "an industry in the United States is materially injured or is threatened with material injury by reason of imports". Section 771(4)(A) of the Tariff Act of 1930, as amended, defines the relevant industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product".[123] US law specifically requires USITC, in making this determination, to consider "the impact of imports of such merchandise on domestic producers of domestic like products".[124] In addition to the volume of imports and the effect of imports on prices, which the statute provides "**shall** be considered",[125] the statute further provides that "such other economic factors as are relevant

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the statutorily required determination of material injury to the domestic industry as a whole. It does not affect the nature of the determination of injury that must be made, only the analysis underlying that determination. While there is no guarantee that this analysis will result in a determination consistent with US obligations under the AD Agreement, it does not require any action inconsistent with those obligations.

7.198 This is our reading of the statutory captive production provision. Equally important, this is our understanding of how the relevant US authorities have interpreted and applied this provision. We recall that, for the purposes of international law, domestic legislation is to be considered as a fact.[129] In this respect, we believe it is of great importance that the Statement of Administrative Action notes that "the captive production provision does not require USITC to focus exclusively on the merchant market".[130] The SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of

(b) Was USITC's application of the captive production provision in this case consistent with

(ii) Finding

7.204 The question before us is whether the USITC's determination of injury is consistent with the requirements of Articles 3 and 4 of the AD Agreement, in light of the focus on the merchant market

7.212 We considered the data contained in the report in order to assess whether the evaluation of the USITC of the facts and data concerning market share and financial performance was that of an unbiased and objective investigating authority. We note that the USITC report includes two tables detailing the same sort of information for the industry as a whole and for the merchant market.[143] These tables appear to support the conclusions of the report that the trends that are apparent in the merchant market also appear in the overall US market, albeit sometimes less pronounced.

7.213 Japan asserts that the application of the captive production provision's primary focus for certain factors on the merchant market by three of the Commissioners so influenced their overall evaluation that it cannot be said with certainty what their conclusion would have been had they not applied the captive production provision. We do not consider it appropriate to engage in speculations about what could have or might have been. Upon careful examination, we consider that the USITC determined that the domestic industry producing hot-rolled steel as a whole, defined in the report as the domestic producers as a whole of hot-rolled steel in the United States, was materially injured, or threatened with material injury. We further consider that the determination was one that could properly be reached by an objective and unbiased investigating authority on the basis of the information before the USITC, and in light of the explanations given in its analysis. The mere fact that the analysis also included a discussion with regard to a certain segment of the industry most affected by the subject imports, in our view, does not at all necessarily imply that the analysis was faulty. Quite the contrary is true. As the Panel in *Mexico – HFCS* stated:

> "There is certainly nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. Indeed, in many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion".[144]

Again, however, such an analysis does not excuse the investigating authority from making the determination required by the AD Agreement concerning injury to the domestic industry as a whole.

7.214 We conclude that the analysis performed by USITC established injury with regard to the industry as a whole, in spite of, or regardless of, the application of the captive production provision by three of the Commissioners. We note that in any case all six commissioners made an affirmative injury or threat of injury determination whether they applied the captive production provision or not. This to us confirms our view that the application of the captive production provision did not undermine the examination of injury to the industry as a whole which is required under the AD Agreement.

7.215 We therefore find that the USITC's analysis was consistent with the obligations of the United States under Articles 3.1, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement in so far as it examined and determined injury to the domestic industry as a whole.

2. Alleged violations of Article 3 of the AD Agreement in the USITC's injury and causation analysis.

(a) Arguments

7.216 Japan submits that the USITC injury and causation analysis is inconsistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement since it focused on data for only two years of the normal three-year period of investigation and ignored or marginalized alternative causes of injury.

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[143] USITC Report, Tables C-1 and C-2, pages C-3-6
[144] Panel Report, *Mexico – HFCS*, para. 7.154.

7.217 First, Japan submits that the USITC eschewed its traditional three-year analysis and instead compared industry data for 1998 with those for 1997.[145] Japan points to a recommendation of the AD Committee to argue that an investigating authority is to examine imports, prices and the industry performance over a three-year period of investigation, and asserts that this was the USITC's longstanding practice. Japan alleges that if applied in the hot-rolled steel case, a three-year analysis would have revealed that virtually all the major domestic industry performance indices improved between 1996 and 1998. According to Japan, the base year 1997, which Japan asserts was used by USITC in this investigation, happened to be the best year the industry had experienced in a decade and any comparison with this record-breaking year almost guaranteed an affirmative determination of injury. Japan asserts in particular that the USITC's analysis reveals an unexplained shift from a three-year to a two-year analysis for financial performance.[146] In support of its argument, Japan refers to the views of Commissioner Askey who considered the entire three-year period of investigation in her analysis, and found no material injury to the domestic industry by reason of imports, but only threat of injury.

7.218 Japan submits that by manipulating the period of investigation, USITC violated Article 3.1 by failing to base its material injury determination upon "positive evidence" and an "objective examination". Moreover, Japan argues that USITC violated Article 3.4 of the AD Agreement by failing to consider and to “make apparent" its consideration of the Article 3.4 factors for the first year of the period.[147] Japan further alleges that the USITC determination was also inconsistent with Article 3.5 of the AD Agreement by failing to conduct a proper causation analysis that covered the full three years period and took into account the injury trends for this three year period.

7.219 Japan also claims that USITC acted inconsistently with Article 3.5 of the AD Agreement by inadequately analyzing "other" causes of injury. Japan refers in particular to the strike at General Motors (the largest steel consumer in the US) in 1998, the increased capacity of and production by low-cost mini-mills, and faltering demand for pipe and tube due to collapsing oil prices. According to Japan, USITC did not consider the price effects of non-subject imports, as explicitly required by Article 3.5 of the AD Agreement. Japan asserts that the USITC mentions certain other relevant causal factors but fails to reconcile the facts and arguments presented by the parties.

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factors over a period of three years and the data used also covered three years.

USITC treatment of alternative causes of injury in light of the requirements of Article 3.5 of the AD Agreement.

(i) Did USITC properly discuss and evaluate data covering the whole period of investigation ?

7.226 We note with regard to Japan's claim concerning USITC's alleged focus on two years of the three-year period of investigation that the AD Agreement does not specify the period of investigation and thus does not prescribe that the data used in the injury analysis have to cover three years.[152] While the United States does not dispute that a three-year period of investigation should be considered for the purpose of making an injury determination, it asserts that the USITC in this case **did** consider a three-year period of investigation (1996 – 1998) and analysed all relevant economic factors having a bearing on the state of the industry on the basis of data covering this three-year period. Japan acknowledges that the USITC gathered data for the entire three-year period and that those data are mentioned in the USITC report in various tables and annexes. However, Japan argues, USITC failed to adequately factor this information into its determination and failed to compare the state of the industry at the end of the period of investigation in 1998 with the state of the industry in 1996.

7.227 We note that throughout the USITC report there are various instances in which USITC does discuss trends in the data for the three-year period. For example, the USITC report discusses data from three years when examining the conditions of competition[153] and the evolution in the volume of imports and the market share held by imports.[154] The price effects of subject imports are also evaluated over the entire period of investigation 1996 – 1998.[155] In the section of the report concerning impact of the subject imports on the domestic industry, the factors regarding capacity and capacity utilization are likewise discussed for the entire three-year period of investigation.[156]

7.228 Japan's argument thus appears mainly based on the section of the USITC report that examines the impact of the subject imports on the domestic industry, and in particular, the data concerning financial performance of the industry.[157] We note that the USITC report discusses production and sales as well as financial performance of the industry by comparing data for 1998 with data from 1997, without explicitly mentioning the 1996 values. In relevant part, the USITC report reads as follows:

> "The domestic producers' production and shipments declined from 1997 to 1998, both on a merchant market and overall basis.[98] The domestic industry's financial performance likewise deteriorated significantly. From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half.[99]

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[152] We note that the Committee on Anti-Dumping Practices recently adopted a recommendation which provides that "the period of data collection for injury investigation normally should be at least three years". Committee on Anti-Dumping Practices, Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the Committee on 5 May 2000, G/ADP/6. We note, however, that this recommendation was adopted after the investigation at issue in this dispute had been completed. Moreover, the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para 40, G/ADP/AHG/R/7 at para. 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself.

[153] USITC Report, pages 10 – 11.

[154] USITC Report, pages 12 – 13.

[155] USITC Report, pages 13 – 16.

[156] USITC Report, pages 17 – 18.

[157] This is apparent from Japan's answer to Panel question 18: "The contrast between the bottom of page 17 and the top of page 18 of the USITC decision is quite dramatic. The USITC inexplicably shifts from a three-year analysis to a two-year analysis. This unexplained shift for financial performance – one of the most important factors to be considered – does not constitute "an objective examination" as required by Article 3.1". Japan's Answers to questions from the Panel, Annex E-1, para. 64.

> On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998, and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998.[100] [101] This decline was due largely to declines in unit values of the industry's hot-rolled steel shipments and sales. As described above, unit values fell significantly in 1998 as subject imports increased in volume and market share".

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[98] CR & PR at Tables C-1 and C-2

[99] CR & PR at Tables C-1 and C-2

[100] CR & PR at Tables C-1 and C-2. In addition the domestic industry's productivity improved and COG's declined from 1997 to 1998. The domestic industry's productivity (measured in short tons per 1,000 hours worked) increased from 864.8 in 1996, to 905.3 in 1997 and to 938.7 in 1998. As discussed in our analysis of the price effects of the subject imports, the domestic industry's unit COG's declined from 1996 to 1998, but not by as much as the decline in the industry's unit values. CR & PR at Table C-1.

[101] CR & PR at Table C-1. Aside from productivity, which increased during the investigation period, a number of the industry's other employment indicators declined somewhat during the period of investigation. CR & PR at Table III-5 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998; hours worked declined from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998; wages paid were essentially flat from 1996 to 1998; hourly wages increased somewhat from $23.04 in 1996 to $24.13 in 1997, to $24.46 in 1998; unit production costs were $26.65 in 1996 and 1997 and declines somewhat to $26.06 in 1998). US producers' inventories were also relatively stable during the investigation period, both on an absolute basis and relative to production and shipments. CR & PR at Table III-4. Capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and to $715 million in 1998. CR & PR at Table VI-7. We also note that one firm filed for bankruptcy protection in September 1998 and another in February 1999. See CR & PR at Table III-1 nn.1 & 3; Petitioners' Prehearing brief at 51-52, 54; Respondents' Joint Prehearing Brief at 143. Both firms ***. See Questionnaire Responses of Geneva and Acme Metals, Inc." (footnotes in original) [158]

7.229 The USITC report contains the following explanation for comparing 1998 data with data for 1997 and omitting to discuss 1996 data:

> "The respondents have argued that 1997 was a banner year for the domestic industry and, hence, is not an appropriate year with which to compare the domestic industry's results in 1998. However, US apparent consumption increased throughout the period of investigation, both from 1996 to 1997 and from 1997 to 1998, reaching record levels. Accordingly, we disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which US consumption reached record levels, and the US industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry. Instead, the domestic industry, although it maintained an operating profit, performed consistently worse".[159] (footnotes omitted)

7.230 We turn to the question whether the USITC failed to properly establish the facts or to make an unbiased and objective evaluation because it did not explicitly discuss the data for the first year of the period of investigation with regard to certain factors examined and failed to compare the data at the

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[158] USITC Report, page 18.
[159] USITC Report, page 18.

end of the period of investigation with those gathered for the first year of this period. We note that Japan admits that USITC gathered data for the entire period of investigation for all factors of Article 3.4 of the AD Agreement. Japan also agrees that the data for the three years of the period of investigation are reported in various tables in the report. As noted above, with regard to most factors these data are explicitly discussed and evaluated in the determination for all three years, 1996, 1997 and 1998. With regard to production, sales and certain factors affecting financial performance, USITC discusses and compares data for the years 1997 and 1998 only.

7.231 Article 3.4 of the AD Agreement, provides in pertinent part that "the examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including …". The clear requirement for the investigating authority under this provision is "**to evaluate** all relevant factors having a bearing on the state of the industry" (emphasis added).[160] There is no disagreement among the parties that USITC mentioned and discussed, to a certain extent, the challenged factors. Japan's claim is that the USITC discussion did not sufficiently evaluate certain factors by failing to discuss data for the year 1996 and to compare the industry performance in 1996 with the situation in 1998.

7.232 We believe it would not be sufficient if the investigating authority merely mentioned data for certain of the Article 3.4 factors without undertaking an evaluation of that factor. An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined. Only on the basis of the evaluation of data in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority.[161]

7.233 In this case, USITC did not explicitly discuss data for production, sales and financial performance of the industry for the first year of the period of investigation, 1996, although it is clear that the data were before the USITC at the time it made its determination. It did evaluate and assess the declining trend for these factors from 1997 to 1998. USITC explained why it focused on 1997-1998 in its evaluation of these factors. The United States argued before us that the reason USITC did not compare data for 1996 with those for 1998 was because "changes created a new economic context for the performance of the industry".[162] We do not find a similar explanation in the USITC report. Indeed, we regret that, with regard to these specific factors, USITC did not even mention data for 1996 in its discussion and did not explain why it considered those data no longer relevant in light of the changed economic circumstances, although it explained why it focused on the comparison between 1997 and 1998.

7.234 We are of the view that in this case it was not improper of USITC to focus on the sudden and dramatic decline in industry performance from 1997 to 1998, at a time when demand was still increasing. The period USITC considered explicitly (1997 – 1998) is the most recent period, and is the period that coincides with the period of the alleged dumped imports. In our view, to the extent that Japan is suggesting that USITC should have made a static end-point-to-end point comparison, comparing 1996 levels to 1998 levels, we note that such a comparison, by ignoring intervening changes in circumstances and conditions in which the industry is operating, would present a less complete picture of the impact of dumped imports.[163] In our view, a proper evaluation of the impact

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[160] We agree with the view of the panel in *Mexico – HFCS* that "consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination". Panel Report, *Mexico – HFCS*, para. 7.128.

[161] Panel Report, *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and -Beams from Poland*, WT/DS122/R (circulated 28 September 2000, appeal pending), para. 7.236.

[162] First Written Submission of the United States, Annex A-2, para. C – 105.

[163] In this regard, we share the views of the Panel in *Argentina – Footwear*: "An end-point-to-end-point analysis, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant

of dumped imports on the domestic industry is dynamic in nature and takes account of changes in the market that determine the current state of the industry. USITC gathered the information and discussed in some detail developments in the performance of the domestic industry over the entire period of investigation. Against this background, it discussed the impact of imports both over the period of investigation, and with specific reference to the period 1997-1998, a period when demand continued to increase, but the performance of the domestic industry worsened. We believe USITC thus performed a dynamic analysis for all relevant factors. Merely that it did not explicitly address production, sales, and financial performance during 1996 does not, in our view, undermine the adequacy of the USITC's evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement.

7.235 It is another question whether the evaluation and the conclusion with regard to these factors is supported by the facts. It is important in this respect to keep in mind that we are bound in our analysis by the standard of review set forth in Article 17.6 of the AD Agreement. The question we face in this respect is whether the USITC failed to conduct an objective and unbiased evaluation because it did not explicitly compare production, sales and financial performance of the industry in 1998 with the situation in 1996. We do not find this to be the case. USITC provided a reasoned and reasonable explanation of why it compared data for 1998 with data for 1997. Although it might have been preferable for USITC to have acknowledged the fact that these factors did not decline if one compares 1996 to 1998 in an end-point-to-end-point comparison, this lack is not sufficient in and of itself to conclude that the investigating authority failed to evaluate all relevant factors objectively and in an unbiased manner. We note that Commissioner Askey, who found threat of injury, in her separate views emphasised that the industry in 1998 "remained profitable and its profitability generally exceeded 1996 levels".[164] Based partly on this observation, Commissioner Askey concluded that the industry was not presently injured by the subject imports and she went on to find threat of injury. We believe this statement by Commissioner Askey supports the view that these data could be weighed and assessed differently. It is however, not for us to reweigh and re-evaluate the data that were before the USITC.

7.236 In sum, we find that USITC properly evaluated all relevant factors over the period investigated and in this respect therefore did not violate Article 3.4 of the AD Agreement. We find that USITC conducted an objective examination of the impact of the imports on the domestic industry, consistent with Article 3.1 of the AD Agreement.

(ii) Did USITC examine all known factors other than dumped imports and ensure that injuries caused by these factors were not attributed to the dumped imports ?

7.237 We turn next to the question whether USITC established a causal relationship between the dumped imports and the injury to the domestic industry consistently with Article 3.5 of the AD Agreement.

7.238 There are two aspects to Japan's argument in this regard. Both relate to the way USITC dealt with possible alternative causes of injury to the domestic industry. First, Japan alleges that USITC inadequately analysed other factors affecting the industry. Second, Japan submits that USITC failed to ensure that injury caused by these other factors was not attributed to the dumped imports. The United States, in response to these arguments, points to the various paragraphs in the USITC report in which other factors affecting the industry are discussed. The United States further argues that the USITC was not required under the AD Agreement to establish that dumped imports are the sole cause

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factors as required". Panel Report, *Argentina – Footwear*, para. 8.217. This statement was of course made in the context of the Agreement on Safeguards, but the relevant provision in the Safeguards Agreement, Article 4.2(a) is very similar to Article 3.4 of the AD Agreement.n -0 T4lar to the s476 dw-4 9264

of injury and that its analysis did ensure that any injuries that were caused by other factors were not attributed to dumped imports.

7.239 We will first consider the factors that Japan alleges were ignored or marginalized by USITC in order to assess whether the statement in the USITC report, "[I]n assessing whether the domestic industry is materially injured by reason of subject imports, USITC considered all relevant economic factors that bear on the state of the industry in the United States" is justified.[165]

7.240 Japan alleges that USITC ignored the impact of the increase in capacity of mini-mills and the ensuing expansion of US steel supply.[166] We note however that the USITC, in discussing the capacity of the domestic industry observed that

> "the domestic industry increased its capacity from 67.3 million short tons in 1996, to 70.0 million short tons in 1997, and to 73.5 million short tons in 1998, at a rate largely commensurate with the increasing US consumption from 1996 to 1998".[167]

The USITC further observed that "there were some additional increases in capacity from 1997 to 1998 by EAF producers, but as discussed below, these increases were not as great as the increases in capacity by EAF producers from 1996 to 1997".[168] USITC thus considered increased capacity, and increased mini-mill capacity in particular, but found that it was largely commensurate with increases in demand and that most of the increased capacity was in place by 1997, when the industry was performing well.

7.241 Moreover, the report goes on to discuss Japan's argument that the industry's poor performance in 1998 reflects increased competition within the domestic industry, particularly from EAF producers:

> "Minimill competition was an important condition of competition in 1997, yet the domestic industry performed well that year. The incremental increase in mini-mill capacity from 1997 to 1998, particularly in light of the substantially larger increase in minimill capacity from 1996 to 1997, does not account for the bulk of the downturn in the domestic industry's financial indicators from 1997 to 1998".[169]

7.243 We note that USITC explicitly addressed the 1998 General Motors strike in its report, considering it as a condition of competition. The strike lasted five weeks in June and July of 1998. The total amount of **all** flat-rolled steel (including hot-rolled, cold-rolled and corrosion resistant steels) that was not purchased was about 685,000 tons.[171] USITC concluded in this respect that

> "the GM strike had some effect on overall demand in 1998 and hence played some role in contributing to declining domestic prices. However, the strike lasted only five weeks and the total quantity of material not purchased during the GM strike (no more than 685,000 tons of all types of flat-rolled steel) was not large enough to explain the kind of price declines that occurred in 1998. Indeed, despite the GM strike, merchant market and overall consumption of hot-rolled steel were at an all-time high in 1998. Thus, at most, we consider the GM strike to be only a partial explanation for declining prices in 1998".[172]

7.244 This statement, in our view, demonstrates that USITC did not ignore the General Motors strike as an alternative factor, and did indeed examine its effect on the industry, finding that despite the strike, consumption increased in 1998. It is true that USITC did not consider the effect of the strike on merchant market consumption as opposed to overall consumption, but we do not find that this is required under the AD Agreement. While this might have been an interesting additional point to address, as we discussed above, it is the impact of imports on the domestic industry **as a whole** that needs to be examined and assessed in light of other causal factors. This, we consider, USITC has done with respect to the General Motors strike.

7.245 Japan asserts that declining demand for hot-rolled steel from the pipe and tube industry was an important alternative causal factor that was not addressed in the USITC report. Japan argues that the US argument before the Panel regarding why USITC failed to discuss this element is nothing more than a *post hoc* rationalization. Japan submits that this omission is a plain violation of the requirement of Article 3.5 of the AD Agreement to examine all relevant evidence and any known factors other than dumped imports which at the same time are injuring the domestic industry.

7.246 We agree with Japan that errors made during the investigation cannot be rectified in subsequent submissions before a WTO panel. However, in this case, it seems clear to us that the factor allegedly not examined, a decline in demand by pipe and tube producers, is merely a subset of a factor that **was** explicitly examined at length by USITC -- overall consumption or demand for hot-rolled steel. While there may have been a decline in demand from this particular user industry, USITC determined that both for the hot-rolled steel industry as a whole and in the merchant market, demand increased substantially throughout the period of investigation. As discussed previously, the investigating authority is obliged to consider the impact of imports on the industry as a whole, which the USITC did with respect to changes in demand. We do not agree with Japan that a failure on the part of USITC to discuss a decline in one particular aspect of demand, in a case in which the overall increase in demand for the product was thoroughly examined and discussed in examining the impact of imports, constitutes a violation of Article 3.5 of the AD Agreement.

7.247 Finally, Japan argues that USITC failed to examine the prices of non-dumped imports and only collected information on the volume of non-subject imports. Japan submits that Article 3.5 requires consideration of the volume *and prices* of imports not sold at dumping prices. USITC examined non-subject imports and found that they maintained a stable presence in the US market throughout the period of investigation.[173] We disagree with Japan that Article 3.5 of the AD Agreement **requires** that the investigating authority explicitly examine the volume and price

[171] It is noteworthy that General Motors did not provide a figure limited to hot-rolled steel, the domestic like product.

[172] USITC Report, page 16.

[173] USITC Report , page 10.

effects of non-subject imports. Article 3.5 provides in relevant part that "factors which **may** be relevant in this respect include *inter alia*, the volume and prices of imports not sold at dumping

7.252 The AD requirement requires that "a causal relationship" between dumped imports and material injury to the industry be demonstrated and that authorities in their examination of other factors causing injuries make sure that they do not mistake coincidence in time for a causal relationship. In this context, we consider the decision of the Panel in *United States – Atlantic Salmon,* a decision under the Tokyo Round AD Code, to be useful and persuasive on this issue. We note that the relevant language addressed by that Panel, concerning non-attribution of injuries caused by other factors to the dumped imports, is identical in Article 3:4 of the Tokyo Round Anti-Dumping Code to that in Article 3.5 of the AD Agreement.

7.253 Japan argues that the addition of the explicit requirement to "examine any known factors other than the dumped imports" which are injuring the domestic industry, as opposed to the

domestic industry's poorer performance in 1998", but concluded that "it only partially explains the substantial declines in the domestic industry's performance in 1998".[177]

7.256 We note that USITC concluded its analysis as follows:

> "In sum, the domestic industry's performance was substantially poorer than what would be expected given record levels of demand in 1998. We recognize that other economic factors – especially increased intra-industry competition – have contributed to the industry's poorer performance in 1998. Having taken these factors into account however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance, as reflected in nearly all economic indicators. Accordingly, in light of the domestic industry's declining production, shipments, market share, prices, capacity utilization and financial condition, in the face of increasing subject import volume and market share and declining subject import prices, we determine that the domestic industry producing hot-rolled steel is materially injured by reason of LTFV imports from Japan".[178]

7.257 We find that the USITC's analysis of the effects of the dumped imports on the domestic industry, in light of, and taking into account the impact of other factors on the state of the industry, is consistent with the requirement of Article 3.5 of the AD Agreement to demonstrate a causal relationship between dumped imports and material injury without attributing injuries caused by other factors to the dumped imports.

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[63] We base our understanding of the Panel's reasoning on paragraphs 8.138, 8.139, 8.140 and 8.143 of the Panel Report."[180]

The Appellate Body agreed with the first and second steps, but found no support in the text of the Safeguards Agreement for the latter two steps, and therefore "reversed the Panel's interpretation of Article 4.2(b) of the *Agreement on Safeguards* that increased imports "alone", "in and of themselves", or "*per se*", must be capable of causing injury that is "serious".[181]

7.260 The Appellate Body was considering the language of Article 4.2(b) of the Safeguards Agreement, which provides in pertinent part that "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Japan's argument relied on the similarity of this language to the language of the AD Agreement to argue that the standard set forth by the Panel in *United States - Wheat Gluten* should also apply in the anti-dumping context. In light of the decision of the Appellate Body, which reversed the decision of the Panel on this very point, we reject Japan's argument that the USITC was obligated under the AD Agreement to demonstrate that dumped imports alone have caused material injury by deducting the injury caused by other factors from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury. The AD Agreement requires that the investigating authority demonstrate that dumped imports are causing material injury.[182] The USITC determined that the domestic industry "is materially injured by reason of" the dumped imports. We consider that the USITC's consideration of the alternative causes of injury, as discussed above, was consistent with its obligations under the AD Agreement, and that the USITC did not attribute to dumped imports injury caused by other factors.

7.261 We therefore find that the USITC demonstrated the existence of a causal relationship between dumped imports and material injury to the industry consistently with the requirements of Article 3.5 of the AD Agreement.

G. ALLEGED VIOLATIONS OF ARTICLE X OF GATT 1994

1. Arguments

7.262 Japan claims that the United States violated the obligation of Article X:3(a) of GATT 1994 to administer its measures in a uniform, impartial and reasonable manner by (i) accelarating all aspects of the proceedings, (ii) revising its policy concerning critical circumstances during the proceeding, (iii) failing to immediately correct a calculation error in NKK's preliminary dumping margin, (iv) not taking any adverse action against US steel companies that refused to provide highly material information while applying adverse facts available to Japanese producers, and (v) deviating from its practice and considering data from only two years when examining the state of the industry.[183]

7.263 Japan argues that the standards contained in Article X:3 represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process". Japan submits that Article X of GATT 1994 goes beyond the elements of due process established in the AD Agreement and is in essence a comparative provision that ensures that certain parties are not afforded less due process rights than others. According to Japan, when parties are treated differently in different cases or in a single investigation, based simply upon differences in the administration of anti-dumping rules (which may or may not be consistent with the AD Agreement), these fundamental principles are

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violated. Japan claims that in its investigation into imports of hot-rolled steel from Japan, the United States ignored the principle of good faith and did not act in a reasonable and equitable manner.

7.264 The United States argues that it administered its laws and regulations in a perfectly uniform, impartial and reasonable way. The United States first points out that Article X:3 only refers to the **administration** of a Member's laws, and not to the law itself. Secondly, the United States claims that since the AD Agreement is the more specific relevant rule, containing both procedural and substantive provisions, its provisions should prevail in case of conflict over the general rule of Article X:3. This also implies that if the measure is consistent with the AD Agreement, no claim can be brought under Article X:3, since this general provision cannot be used to undercut the specific disciplines of the AD Agreement. The United States also warns that a distinction must be made between the way one specific case was dealt with and the overall administration of laws and regulations envisaged in Article X:3. The United States stresses the fact that Japan is not arguing that the overall AD practice of the United States is arbitrary or does not ensure the necessary due process rights, but only challenges the way this case has been dealt with.

2. Finding

7.265 In considering these claims, we first consider the scope and applicability of Article X:3 of GATT 1994 to this case. Article X:3(a) of GATT 1994, which is at issue here, provides:

> "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."

7.266 In considering the applicability of Article X:3(a) in this case, we look to decisions of the Appellate Body which address this question. The Appellate Body, in considering Article X:3(a), has made it clear that the provision does not apply to laws, regulations, decisions and rulings in themselves, but applies "rather to the *administration* of those laws, regulations, decisions and rulings…To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."[184] Moreover, the Appellate Body has held that where another WTO Agreement deals specifically and in detail with the issue in question, panels should apply the provisions of such agreement first, after which there would be "no need … to address the alleged inconsistency with Article X:3(a) of the GATT 1994"[185] in the event that the Panel finds a violation of the more specific provision.[186] As to the scope of Article X, the Panel in *EC-Poultry Products* observed that "Article X is applicable only to laws, regulations, judicial decisions and administrative rulings of general application."[187] The Panel considered that an import license issued to a specific company or applied to a specific shipment did not meet this criterion. The Appellate Body upheld the Panel's finding, noting that it agreed with the Panel that "licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X."[188]

7.267 Based on these previous decisions, we consider that certain principles are clear. First, we consider that Article X:3(a) addressed the **administration** of a Members laws, regulations, decisions and rulings. In this case, it is not at all clear to us that Japan has presented such a challenge. In essence we understand Japan to argue that five separate actions or categories of action taken by the

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[184] Appellate Body Report, *EC - Bananas,* para 200 (emphasis in original).

[185] *Id*., para. 204.

[186] *Japan - Measures on Imports of Leather*, BISD 31S/94, adopted 15 May 1984; *EEC-Regulation on Imports of Parts and Components*, BISD 37S/132, adopted 16 May 1990; *United States-DRAMs*, para. 6.92.

[187] Panel Report, *European Communities - Measures Affecting the Importation of Certain Poultry Products* ("*EC – Poultry Products*"), WT/DS69/R, adopted as modified (WT/DS69/AB/R) 13 July 1998, paras. 269-270.

[188] Appellate Body Report, *EC-Poultry Products*, para 114.

USDOC in the course of making its decision to impose the challenged final anti-dumping duty measure demonstrate a lack of uniform, impartial and reasonable administration of the US anti-dumping law. We will consider each of these actions or categories of action separately, first with respect to whether we have found a violation of some other, more specific WTO obligation. Where we have found that a particular action or category of action is not inconsistent with a specific provision of the AD Agreement, we are faced with the question whether a Member can be found to have violated Article X:3(a) of GATT 1994 by an action which is not inconsistent with the specific WTO obligations governing such actions. We have serious doubts as to whether such a finding would be appropriate. Some of Japan's arguments concerning the alleged lack of uniform, impartial, and reasonable administration of the US anti-dumping law assert that USDOC made different decisions in this case than it has made in other cases, or that the decisions were in violation of controlling US legal authority. It is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation.

7.268 Finally, we have been presented with arguments alleging violation of Article X:3(a) of GATT 1994 which relate to the actions of the United States in the context of a single anti-dumping investigation. We doubt whether the final anti-dumping measure before us in this dispute can be considered a measure of "general application". In this context, we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law. While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where the actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements.

7.269 With regard to Japan's specific claim that USDOC unduly accelerated the proceeding, Japan cites as evidence the fact that USDOC initiated the investigation on 15 October 1998, which according to Japan was five days earlier than normal, and sent out questionnaires four days after initiation, instead of 30 days, as Japan maintains is the USDOC's normal practice.[189] The preliminary finding of dumping was issued 120 days after initiation, which Japan asserts is 25 days earlier than normal. Japan asserts that the USDOC has only rarely accelerated proceedings, and has more commonly extended them, in similar circumstances, and that the accelerated actions in this case were neither impartial nor reasonable in light of the complex nature of the case. Japan submits that USDOC's actions to accelerate deadlines constitute a pattern of abusive exercise of rights and a

AD Agreement, USDOC violated Article X:3 of GATT 1994. We do not find any basis for such a conclusion.

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8.6 Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> "it shall recommend that the Member concerned bring the measure into conformity with that agreement" (footnotes omitted).

Article 19.1 goes on to provides that:

> "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member.

8.7 Thus, in our view, the language of Article 19.1 constrains us to recommend that the United States bring its measures into conformity with the provisions of the AD Agreement, and permits us to make suggestions regarding implementation of that recommendation.

8.8 We therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the AD Agreement.

8.9 Japan further requests that we recommend that, if reconsideration of this case by the US anti-dumping authorities in accordance with our findings results in a determination that the imported product was either not dumped or that it did not injure the domestic industry, the United States should revoke its anti-dumping duty order and reimburse any anti-dumping duties collected, and that if reconsideration of this case by the US anti-dumping authorities in accordance with our findings results in a determination that the imported product was dumped to a lesser extent than the duties actually imposed, the United States should reimburse the duties collected to the extent of the difference. In other words, Japan wants us to recommend that the DSB request the United States to undertake certain specific actions in the event that its implementation of our decision has certain consequences.

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In our view, this language clearly establishes a distinction between the **recommendation** of a panel, and the **means** by which that recommendation is to be implemented.[192] The former is governed by Article 19.1, and is limited to the particular form set out therein. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned.

8.12 Viewing Japan's request as a request that we suggest ways in which the United States could implement our recommendation, we decline to make such conditional suggestions. First, we note that, under US law, duties are not actually collected in the amounts determined as the dumping margin in the investigation, but on the basis of the calculations in subsequent administrative reviews. Thus, it is not clear to us that there are any "duties collected" that would be subject to such a suggestion.

8.13 Second, and more importantly, we recall that suggestions under Article 19.1 relate to ways in which a Member could implement a recommendation to bring a measure into conformity with a covered agreement. Japan's request for reimbursement raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which we do not believe have been fully explored in this dispute.

8.14 On the basis of the foregoing, we decline Japan's request for a conditional suggestion regarding revocation of the anti-dumping order and reimbursement of anti-dumping duties collected.

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[192] See Panel Report, *Guatemala-Cement I*, para. 8.3.