ANNEX D

Oral Statements, First and Second Meetings

ANNEX D-1

Opening Statement of Japan

(22-23 August 2000)

INTRODUCTION

1. Mr. Chairman, members of the Panel and members of the delegation of the United States, it is a great honour for me to represent the Government of Japan before this distinguished Panel of the WTO Dispute Settlement Body. On behalf of the Government of Japan and the Japanese delegation, I wish to express our appreciation to the members of the Panel for accepting the weighty responsibility of serving on this Panel.

I. STANDARD OF REVIEW AND AMERICAN POLITICS

2. At the core of this dispute lies a simple but fundamental question: will there be meaningful WTO review of antidumping measures? Or instead will the WTO review be so narrow, so constrained, with so much deference to Members implementing AD measures so as to render WTO oversight essentially meaningless except in the most egregious cases? As a number of antidumping measures proliferate, and increasingly replace other types of trade restrictions, the need for meaningful discipline becomes more and more important.

3. Before moving onto the specific issues in this case, I would first like to address two broader issues that are crucial to this Panel's work. The first is the issue of "permissible interpretations" under the standards of review. The second is the political context from which the United States seeks to divert the Panel's attention.

4. The United States tries to cloak its various abuses in this case behind the standards of review found in Article 17.6 of the Anti-Dumping Agreement. But, in doing so, it mischaracterizes the standards and seeks to have narrow exceptions swallow the basic rules.

5. With regard to Article 17.6(ii), it is well settled that interpretations of any given treaty provision should not be arbitrary. International agreements lose their *raison d'être* if signatories have unlimited liberty to craft their own arbitrary interpretations at will. Article 31.1 of the Vienna Convention requires a treaty to be interpreted in good faith in the light of its object and purpose, so as to avoid any situation in which the parties craft a plethora of self-serving interpretations. The United States argues that interpretation of any treaty should be done to ensure the maximum flexibility to do as it pleases, provided one of its lawyers can think of a clever interpretation to justify it. The US contention that ambiguity found in the Anti-Dumping Agreement and varying practices of other Members automatically serve as a basis for "multiple permissible interpretations" is based on self-serving interpretation of the Vienna Convention and runs counter to its basic tenet.

6. Even if more than one interpretation did apply in this case (which is not the case), this would not give carte blanche legitimacy for any interpretation. "Permissible interpretation" under Article 17.6(ii) does not mean any interpretation. The panel must closely scrutinize these alternative interpretations to determine whether they rise to the level of "permissible" in the context of the Anti-Dumping Agreement. The panel must also ensure that the alternative interpretations do not

compromise the proper establishment and unbiased and objective evaluation of the facts, all of which are crucial to proper implementation of the Agreement.

7. The United States similarly mischaracterizes the Panel's obligation when assessing the facts of any case. To protect the factual conclusions in its hot-rolled steel determinations, the United States claims that Japan is asking for *de novo* review, even though we clearly indicated that we are not doing so. The United States creates this straw man to sidestep the clear requirement of Article 17.6(i) that the Panel must evaluate whether the facts were established properly and evaluated in an unbiased and objective manner. As the panel decision in *the US-Wheat Gluten* case clearly recognized in paragraph 8.5, DSU Article 11 imposes a similar obligation on panels in all disputes. This requirement provides a solid basis for Japan's attack on factual conclusions made by the United States. Japan believes that the facts were established improperly, were evaluated in a biased and non-objective manner, and were inappropriate and insufficient to justify the conclusions being reached. Once these flaws in the establishment and evaluation of the facts are fixed, Japan believes a different conclusion is then warranted.

8. The second broad issue is the political context, which is indispensable to assess whether the United States conducted an unbiased and objective investigation. Japan opened its first submission with a discussion87.Tc (8.) Tj 36 hether the

so pre-ordained and biased in favour of the US industry that the United States ignored its own regulations for correcting clerical errors.

13. Finally, consider the double standard for applying "facts available" to foreign and domestic companies. For NSC and NKK, the United States applied a strict and unforgiving rule -- essentially

impact of imports was therefore not objective as required by Article 3.1, nor did it meet the standards of Articles 3.4 and 3.5 to evaluate all economic factors having a bearing on the state of the industry.

26. USITC's hot-rolled steel determination suffered from several other flaws as well. First, USITC focused on the final two years of financial performance rather than the full three years of the investigation period. This approach violated the Anti-Dumping Agreement's requirements that an authority's analysis be objective and that all factors be thoroughly considered. Focusing on the last two years of the period meant that USITC focused on a decline in domestic industry performance in 1998 from 1997 -- one of the best performance years the industry has ever had. Under a normal three-year analysis, the picture was much different: rather than declining, the financial performance of the domestic industry as whole improved -- in the face of increasing imports. Such a picture shows the clear disconnect between industry performance and imports. While Commissioner Askey centered on this fact in finding no current injury to the industry as a whole, the majority **did not even discuss it**. The two-year analysis was therefore not objective, as required by Article 3.1. It also prohibited a proper analysis of the relationship between trends in imports and the trends in injury factors, as required by Article 3.5.

27. Beyond its focus on the final two years, however, the USITC failed to discern the impact of other causes and ensure that it was not attributing to imports the effects of those other causes. Mini-mill capacity, the General Motors strike, and declining demand in the pipe and tube industry were all alternative reasons for the domestic industry's declining performance, but USITC did no more than pay lip service to these causes, if it addressed them at all. To the extent USITC considered alternative causes of injury, it held that each only partly explained the industry's problems in 1998, concluding that subject imports "materially contributed" to industry's injury. A finding that subject imports materially contribute to injury, however, is not the same as finding that subject imports caused present material injury. And indeed, USITC did not consider whether the injury caused by subject imports alone was material, as required by Article 3.5 of the Agreement.

28. The Panel in the *Wheat Gluten* dispute recently held that a similar USITC practice in the realm of the Safeguards Agreement was impermissible. According to that panel, a finding that imports caused more injury than any single alternative factor cannot substitute for a finding that imports themselves caused serious injury. In other words, an authority must isolate causes, not only to ensure that imports are in fact causing injury, but that the more serious impact of other factors is not mistakenly attributed to imports.

29. The language in the US First Submission itsej T* -0.1536 e

1. Critical Circumstances

31. Concerning critical circumstances, Japan has identified an abundance of violations, not only with the way in which the US policy was applied in this case, but with the statute itself.

32. The primary problem with the new policy adopted by the United States is that it permits

- Finally, USDOC did not even address whether imports would undermine the remedial effect of import relief that might be granted in the future.

34. The United States wants the Panel to

39. Why doesn't the US apply an "aberrationally low" test to low-priced sales to affiliates? The answer is that this would mean permitting low priced home market sales to stay in the database, thereby lowering normal value and, in turn, decreasing the dumping margin. This results-oriented approach to calculating dumping margins violates Article 2.1 because it is mechanical and does not truly determine whether a sale is outside the ordinary course of trade; it violates Article 2.4 because it is so unfair; and it violates the spirit of Articles 2.2 and 2.2.1 which set forth very carefully the circumstances in which home market sales may be excluded when they are below cost or of insufficient quantities. Perhaps most importantly, it also violates the principle that Members are supposed to adopt and apply their anti-dumping laws in good faith. The United States would have the Panel excuse this action under an extremely permissive interpretation of the Agreement. Yet doing so in the face of such result-oriented motivations cannot be tolerated under any reasonable interpretation of the Vienna Convention and the good faith obligations owed to Japan and other Members by the United States.

40. Once the prejudicial nature of the US arm's length test is laid bare, the US defence falls flat. Reliance on other countries' practices with regard to affiliated party sales is simply irrelevant. While other countries may have policies for excluding sales to affiliated parties, none of them has a test as mechanically unfair as the United States; Brazil and Korea -- two of the countries cited by the United

thousands upon thousands of hours of work; weeks and weeks of on-site verifications. These were companies that invested significant resources to comply with each and every one of the requests issued by the Department. In the few instances in which they had difficulties with a request, they explained themselves and asked for guidance. They did not submit false information; they did not purposefully withhold unfavourable information. They were in constant communication with USDOC regarding their progress in obtaining the information. But rather than consider the overall level of cooperation supplied by the respondents, instead of reacting to the respondents' requests for guidance, instead of applying what Annex II calls "special circumspection", each one of the respondents was punished.

(i) KSC

51. This is particularly true for KSC. The evidence shows that KSC sent repeated letters to petitioner CSI to obtain its assistance; it sent repeated letters to USDOC explaining that CSI would not cooperate. Implicit in all of its letters to USDOC was a request that USDOC provide some guidance as to what it should do. USDOC said nothing until it issued its determination, at which point, without warning, it decided to punish KSC and apply adverse facts available.

52. The US approach of surprising and punishing respondents in this manner is the problem here, and it should be stopped. As Japan has detailed in its submission, there are several provisions of the Agreement that give the Panel a method for doing so.

(ii) NSC/NKK

53. With respect to NSC and NKK, we recognize that the impact of the use of adverse facts available here was small. But it is the principle that matters: USDOC should not be permitted to apply adverse facts available to punish respondents. Punish is never appropriate, but particularly those respondents who are not worthy of punishment. The fact is that NKK misunderstood what exactly USDOC was asking for; further, once NKK asked USDOC for guidance, the agency misled NKK. NSC had an internal misunderstanding between company departments that can only be described as an honest mistake. Despite these minor misunderstandings, the companies worked to ensure that USDOC had the information before the regulatory deadline for new facts and in plenty of time for verification. Nonetheless, USDOC refused the information and applied adverse facts available.

54. To be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The zero tolerance applied in cases such as these must not be permitted. The language of Annex II does not permit such an extreme and punitive approach.

(c) All Others Rate

55. Finally, we want to address just one minor point regarding the all others rate. Japan's point on this topic is rather simple: dumping margins calculated based on partial facts available are, in the words of Article 9.4, "margins established under the circumstances referred to in paragraph 8 of Article 6." They are therefore not permitted to be used in calculating the all others rate. The US believes that this phrase in Article 9.4 can only mean margins based <u>entirely</u> on facts available, but Japan respectfully disagrees. The word entirely does not appear in Article 9.4. A plain reading of the phrase is that a margin established using facts available, whether partially or entirely, cannot be used to calculate the all others rate.

ANNEX D-2

Closing Statement of Japan

(23 August 2000)

In its comments and questions yesterday and today, the United States tried to shift the focus of this dispute. This dispute is not about the existence of alleged Japanese dumping; rather, this dispute is about the ***manner*** in which the USDOC set the anti-dumping duties. This dispute is not about the alleged injury being experienced by the US steel industry; rather, this dispute is about the ***analytic basis*** for the USITC conclusion of material injury by reason of Japanese imports. Most fundamentally, this dispute is not about the commercial practices of Japanese companies; rather, this dispute is about the ***anti***-dumping measures adopted by the United States ***Government***. We urge the Panel to bear this important point in mind, as it considers this case.

We will respond in detail to the various US arguments in our Second Submission. Here, we simply want to stress for the Panel some very important basic principles that should guide the Panel in its deliberations.

First, we note that the United States repeatedly argues that as long as it can think of some interpretation of the Anti-Dumping Agreement that would permit its actions, then those actions are permitted. But the United States fundamentally confuses the distinction between possible interpretations and permissible interpretations. This Panel has the duty to interpret the Anti-Dumping Agreement properly, and decide whether the US interpretation is permissible and consistent with the text, the context, the purposes of the agreement, and with simple common sense. Contrary to the US argument, there are indeed limits to the permissible interpretations. As the Panel considers the permissible interpretations of the Anti-Dumping Agreement, the Panel should also consider whether the United States has been interpreting its obligations in good faith. Japan believes the concept of good faith plays a crucial role in interpreting legal obligations. So do some of the third countries to this dispute. We believe complying with international obligations means more than just clever lawyering to find loopholes.

Second, the Panel must not forget that Japan has claims under both the Anti-Dumping Agreement and GATT Article X. Japan did not take this step lightly. It is never easy to accuse another country of acting in a biased manner. Unfortunately, in this case the United States went too far. Its actions failed to meet the Article X obligation to administer laws in a uniform, impartial, and reasonable manner. These obligations are crucial to the sound functioning of the entire multilateral trading system. Contrary to the US argument, this case was not "business as usual". This case involved a number of extraordinary steps by the US Government to placate its domestic steel industry. These actions must be scrutinized closely and carefully.

We find it quite ironic that the United States accuses Japan of seeking *de novo* review. Japan's position is that the Panel should simply test the US actions against US international obligations, and is not at all calling for *de novo* review. The Panel has a clear obligation to evaluate whether the US actions were biased or not consistent with the Anti-Dumping Agreement. Rather it is the United States that keeps trying to shift the focus away from its actions to the underlying facts. The US argues the finding of critical circumstances was justified; don't look at the rush to judgment and cursory review of the evidence, look instead at the surge in imports. The US argues the decision

to punish NSC and NKK was justified; don't look at the rigid policy of zero tolerance for any mistake or innocent oversight or the USDOC refusal to correct acknowledged clerical errors, look instead at those sneaky Japanese companies and their efforts to trick the authorities. The US argues the finding of material injury was justified; don't look at the statutory language that explicitly and significantly

14. A comprehensive review of Article 6.8 and Annex II of the Agreement demonstrates that they are designed *precisely* to provide uncooperative respondents with an incentive to participate in antidumping investigations. In our written submission, we have identified numerous passages in Article 6.8 and Annex II with which Japan's position cannot be reconciled. (1st US sub., ¶ 54 - ¶ 68.)

15. With regard to the two specific applications of facts available at issue here, I will simply make a few brief observations. First, Japan asserts that KSC cooperated in the investigation, as required by Paragraph 7 of Annex II. (Japan's 1st sub., ¶ 61 - ¶ 77.) The facts on the record do not support Japan's assertion. KSC never even *discussed* with its Brazilian joint venture partner the need to provide the CSI data, and never made any serious effort to obtain information from CSI. Instead, KSC was quite content with making pro-forma requests for the information. When those requests were declined, KSC did not even *attempt* to use any of its manifold powers under the joint venture shareholders' agreement to persuade CSI to supply the necessary information. These desultory

27. First, Japan argues that the Department violated Article 10.6 by basing its preliminary determination of critical circumstances on the preliminary determination of the US International Trade Commission that the imports posed a threat of injury (1st Japan sub., ¶ 201). Article 10.6, however, authorizes a finding of critical circumstances where an investigating authority finds that ". . . the importer should have been aware that the exporter practices dumping and that such dumping *would cause injury.*" Article 3, footnote 9, states that "unless otherwise specified" the term "injury" includes "threat of material injury." Therefore, because Article 10.6 does not otherwise exclude "threat of material injury," its reference to "injury" includes threat of injury.

28. Second, Japan argues that the Department violated Article 10.7 of the Agreement because it did not have sufficient evidence that the conditions of Article 10.6 were satisfied (1st Japan sub., ¶ 201). Because "sufficient" is not defined, the term must be understood in context, and the context here is that of a *preliminary* determination of critical circumstances. Article 10.7 permits an administering authority, at any time after the initiation of an investigation, to take measures necessary to collect final duties retroactively. This indicates that "sufficient evidence" is sufficient for that time, not the same degree of evidence that would be sufficient for a final determination.

29. The Department had "sufficient evidence" of all three conditions specified in Article 10.6, at the time of its preliminary determination of critical circumstances. As we have explained in full in our written submission, the petition in this investigation contained far more than the "mere allegations" that Japan has described. The 700 pages of exhibits in the petition contain very substantial information on all of the relevant points.

30. Finally, Japan argues that the US statute is inconsistent with Articles 10.6 and 10.7 because it does not require explicit findings on every element specified in those articles for a finding of critical circumstances. (1st Japan sub., ¶ 208). This argument is invalid. A law is not inconsistent with a WTO Agreement merely because it does not explicitly repeat those obligations in domestic law. In order to be inconsistent with an international agreement, a domestic law must *require* actions that are inconsistent with the Agreement. (1st US sub. at ¶ 282). In any event, the Department made a finding on every element specified in Articles 10.6 and 10.7 in making its early critical circumstances finding in this case.

31. Thank you, Mr. Chairman and members of the Panel. Mr. Chairman, if I may depart from the prepared text once more. I did not intend to take the Panel's time today to address Japan's allegations of bias. However, in light of Japan's opening statement, I would like to make a few observations on this point. Of the four main issues regarding the Department of Commerce in this case, Japan has virtually admitted that three of these issues have nothing to do with the alleged bias. First, with respect to the facts available claim, the Department has applied facts available in literally hundreds of cases. Japan has provided no evidence that the application of facts available in this case was unusual or was related to the "Stand up for Steel" campaign. Notably, Japan has not alleged that the acceleration of this case prevented them from responding to the Department's questionnaires in any but a fully adequate manner. Second, regarding the all-others i.5 -12.7ucu37 * -0.1523 that are-other7-ym

statement to Ms. Kimble, who will present the injury issues regarding the US International Trade Commission.

32. ***Ms. Kimble.*** Thank you, Mr. Chairman, and members of the Panel. I will now address Japan's allegations concerning the captive production provision of the US antidumping statute and the United States International Trade Commission's determination finding material injury due to dumped hot rolled steel. I will first discuss why Japan's contentions regarding the captive production provision misread the US statute and ignore provisions of the Antidumping Agreement. Then, I will show why Japan's arguments about the USITC's particular findings only reinforce the fact that the US authority conducted a thorough and objective evaluation of all relevant factors in keeping with the Agreement.

33. ***The captive production provision is consistent with the Anti-dumping Agreement.*** Both Japan and the United States agree on one important point -- a determination of injury that is consistent with the Antidumping Agreement must assess injury to the industry as a whole. The US statute directs the USITC to assess injury to the domestic industry, and defines the domestic industry as "producers as a whole of a domestic like product." The captive production provision is consistent with this statutory requirement and merely supplements it with an additional layer of analysis -- telling the USITC to focus primarily on the merchant market for particular factors when the USITC determines that certain threshold requirements are satisfied.

34. Congress expressly recognized in adopting the captive production provision that "focus primarily" on the merchant market did not mean to focus *exclusively*. The captive production provision instead contemplates a two

38. The two-step, segmented analysis called for by the captive production provision is similar to the type of analysis that a panel recently found consistent with the Antidumping Agreement. In *Mexico -- Antidumping Investigation of High Fructose Corn Syrup from the United States*, the panel determined that a finding of injury resting exclusively on an examination of only one segment of the market violates the Agreement. The decision stressed, however, that an examination of one, relevant segment of the market to determine the effect of subject imports on the industry as a whole may be a useful exercise in keeping with the Agreement. The captive production provision does not require an examination of one segment exclusively, the analysis criticized in *HFCS*, but requires the USITC to look primarily at the segment of the market most relevant to any consideration of the effects of dumped imports on the domestic industry as a whole -- the segment where competition with dumped imports occurs. The statute does not instruct the USITC to limit its analysis to that segment, however, and requires the USITC to make a material injury determination as to the industry as a whole. Such an approach is entirely in accord with Article 3.

39. ***The USITC's determination was based on objective evidence showing injury.*** In this case, the captive production provision was not outcome determinative. First, a dispositive majority of three Commissioners rendered a binding affirmative determination under US law without applying the provision. Second, even those Commissioners that applied the provision found that both trends in the merchant market and the overall industry trends showed that dumped imports were causing material injury. Therefore, even without applying the captive production provision, those Commissioners would have reached the same conclusion.

40. In keeping with Article 3.1, the USITC considered the volume, price, and impact of dumped imports on the domestic industry as a whole. In keeping with Article 3.2, the USITC found that the volume and share of consumption of dumped imports more than doubled in each year of the period of investigation while the domestic industry's market share declined significantly in both the merchant market and for the industry as a whole.

41. The USITC objectively considered all the required factors listed in Article 3 for both the merchant market and the entire industry in reaching its affirmative injury determination. The objective findings made by the USITC provide more than adequate support for an affirmative determination and address Japan's unfounded concerns with the decision rendered.

42. As to price effects, the USITC concluded that prices for both dumped imports and the domestic like product showed mixed trends until mid-1997, after which point they dropped steadily for the remainder of the period of investigation. The USITC found that prices declined much more than domestic producers' costs and that at the same time consumption increased. It identified no change that could explain this new price pattern other than the fact that beginning in 1997, the frequency of underselling by dumped imports also increased as their volumes surged. The USITC found that these trends established a causal relationship between the increasing dumped imports and the significant depression of US prices.

43. Finally, the USITC's analysis complied with Article 3.4 in its assessment of the negative impact that dumped imports were having on the domestic industry. Domestic producers ' market share declined at a time of growing consumption because dumped imports captured all the growth in the market in 1998. As a result, the domestic industry's appropriate capacity increases were immediately transformed into excess capacity. As the USITC found, these effects were reflected in significant deterioration of the domestic industry's financial performance.

44. Japan falsely portrays the USITC as using comparisons based only on two year changes in data. The USITC both analyzed trends over the entire three year period of investigation and performed an analysis based on the most recent period. The USITC has used this approach in many prior cases where it found that the most recent period was highly probative of the current state of the industry because of recent changes in the market conditions affecting the industry. As we noted in

presence in the US market while dumped imports more than doubled their market share in both the merchant market and the market as whole. There is no basis to conclude that the USITC incorrectly attributed to subject imports effects that were really due to the steady volume of nonsubject imports.

52. The captive production provision and the determination by the USITC are in keeping with the Antidumping Agreement. In fact, the captive production provision assures a full evaluation of the factors listed in the Agreement. The USITC's determination in this case objectively assessed the effects of dumped imports on the state of the domestic industry as a whole in finding that they caused material injury.

53. ***Mr. Hirsh.*** Mr. Chairman and members of the Panel, we have devoted our efforts today to demonstrating how each agency's actions, in the context of the facts of each specific issue, are consistent with the pertinent provisions of the Anti-dumping Agreement. It is on that basis – and not on the basis of vague allegations of conspiracy – that this Panel must judge the issues in this case. At this point, we would be pleased to entertain the questions of the Panel, as well as the questions of Japan. In turn, we look forward to posing questions to Japan. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-4

Closing Statement of the United States

(23 August 2000)

Thank you Mr. Chairman. This is Mr. McInerney from the Department of Commerce.

I would note at the outset that, in its closing statement, Japan has chosen not to address any of the specific substantive issues in this case, but instead has returned to its efforts to persuade the Panel that all of the Department's actions should be viewed as part of a conspiracy to treat Japan unfairly. Japan wants this Panel to regard the United States' repeated resort to its legitimate remedies under the WTO Agreement to redress repeated dumping by Japan as an abuse of antidumping measures. But it is no abuse to resort repeatedly to antidumping remedies in the face of repeated dumping. Every time that Japan has trouble in its own market, it seeks to export the problem to the United States. Repeated resort to WTO remedies in the face of such repeated dumping is perfectly legitimate and exactly what the Agreement provides for. This case does not involve a conspiracy. As Japan has acknowledged, it involves substantial dumping in massive quantities.

The AD Agreement is a set of agreed limitations on the exercise of AD remedies. The question before this Panel is whether any of the Department's specific methodologies or applications of which Japan complains in fact exceed those agreed limitations. I will now briefly turn to those specific issues.

First, with regard to facts available, we will await further submissions from Japan to see whether they have revised their absolute position on this issue, taken in their first written submission, that adverse inferences are never permitted. This interpretation would encourage exporters NOT to cooperate in AD investigations, rather than to cooperate, as so plainly intended by Article 6.8 and Annex II.

I would also encourage the Panel to recall that the Department's approach to applying facts available proceeds through three distinct steps: whether a resort to facts available is necessary, whether the selection of adverse facts available is justified, and, finally, if an adverse inference is to be employed, the selection of the specific adverse facts available. Japan has repeatedly collapsed these three steps, so as to imply that, if the last step -- selection of the specific adverse facts available -- was impermissible, the entire decision to resort to facts available was also impermissible. This is incorrect. I hope that the Panel will keep these distinctions in mind in considering this issue.

With regard to both the joint venture (CSI) and the two companies that did not submit conversion factors in a timely manner, there is a common thread - - passive resistance, rather than cooperation. These two concepts are worth pausing to consider. First, what is cooperation? The Oxford English Dictionary says (approximately) that cooperation is "acting together for a common purpose." How does this differ from passive resistance? I think the most obvious example with

high-priced sales in the home market are, in fact, ordinary. Discarding such sales as aberrations would mask dumping.

The simple fact is that Japan does not want the United States to use its home-market sales, presumably because it has a protected home market that ensures high-prices in that market. This is what is behind Japan's desperate attempt to argue that related-party resales in the home market do not fall within Article 2.1's requirement for "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Japan would like to have all of its dumping margins in the United States calculated by comparing its export prices to the United States to its export prices to Canada - - an approach calculated to find no dumping.

Acceptance of Japan's argument that related-party resales in the home market may not be used to determine normal value would encourage foreign producers to manipulate normal value by making *all* their home-market sales through related parties. This would be easy to arrange, and would force investigating authorities to use third-country sales or constructed value in every case - - a result plainly not intended by the Agreement.

So, in reviewing this issue, I would urge the Panel to keep in mind not only the individual pieces of Japan's argument, but the overall design of that argument - - to force the Department to base normal value on prices to third countries or on constructed value, rather than on prices in Japan.

Finally, with regard to critical circumstances, I would like to point out that, during the course of this hearing, we seem to have heard in great depth and detail about every provision in Article 10 *except* Article 10.7, which is the provision pursuant to which the Department acted in making its preliminary determination of critical circumstances. This case is not about whether the United States could have collected final duties retroactively, for the simple reason that the United States did not collect such duties, and agrees that it cannot do so. It is about what effectively were preliminary measures taken to preserve the *option* of collecting such retroactive duties, if all of the conditions of Article 10.6 were met in the final determination.

I would like to thank the Panel again for its consideration. My colleague from the US International Trade Commission will now present the closing statement for the United States on the issues relating to injury.

I will now pick up on Mr. McInerney's issue-by-issue approach. I will look at two issues: whether the captive production provision is consistent with the Antidumping Agreement and whether the USITC's determination in this case was based on objective evidence.

The captive production provision permits a better understanding of the effects of dumped imports on the domestic industry because it directs the USITC to primarily focus on the merchant market, where competition occurs. This provision, despite Japan's argument to the contrary, requires the USITC to consider both the merchant market and the entire industry when making this assessment.

In this case, the captive production provision was not outcome-determinative because there was a 3-3 split among the Commissioners as to whether the provision applied, but all the Commissioners made an affirmative determination. In any event, those Commissioners that applied the provision properly analyzed the merchant market data because they looked at it in addition to the data for the industry as a whole. Looking at the market in this way, the USITC objectively considered the volume, price, and impact of those imports on the domestic industry over the period of investigation, ensuring not to attribute injury from other causes to those imports.

ANNEX D-5

Oral Statement of Canada as a Third Party

(23 August 2000)

I. INTRODUCTION

1 The Government of Canada appreciates this opportunity to provide its views to the panel on certain issues in this dispute. Canada reserved its right to participate as a third party in this proceeding because of our substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement. In this regard, Canada will confine its submissions to two issues: (i) the drawing of "adverse inferences" when recourse is had to the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii**)** the appropriate treatment to be accorded captive production in injury investigations.

II. LEGAL ARGUMENT: ISSUES ADDRESSED BY CANADA

(i) "Facts Available"

2. Turning to the issue of the United States' general practice regarding "facts available", Canada first wishes to clarify that it takes no position on the jurisdictional question of whether the Japanese claim is properly before this Panel. Canada's submissions are made in the event that the Panel decides that it does have jurisdiction over the claim.

3. As set out clearly in our written submission, Canada cannot support Japan's claim that the US "practice of applying adverse facts available in certain situations to punish respondents" is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement because neither Article 6.8 nor Annex II use the word "adverse".

4. In Canada's view, the wording of Article 6.8 makes clear that an investigating authority may have resort to the "facts available" provisions of the Anti-Dumping Agreement in circumstances where i) the

6. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-

for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

13. Canada also submits that the Japanese position blurs the distinction between the concepts of "domestic industry" and "domestic market(s)". This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include "… an objective examination of the effect of the dumped imports on prices in the domestic market for like product …".

14. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products "in the domestic market for like products", i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, such as with hot-rolled steel, this will be the merchant market.

15. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again necessarily focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

16. Accordingly, for these reasons, failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Anti-Dumping Agreement its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

III. CONCLUSION

17. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with "facts available" and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

ANNEX D-6

Oral Statement of Chile as a Third Party

(23 August 2000)

Chile is taking part in this case because, like many other countries, it is concerned by the United States' regulations and practices with respect to investigations and the application of anti-dumping measures. What Japan has experienced in this case is a source of constant concern and constitutes a threat to Chilean exporters.

Chile is a country which depends primarily on its exports, and in spite of the diversity of destinations, the United States continues to be a very important market for Chilean exports, accounting for some 20 per cent of total export revenue in 1999. Because of the way in which the United States applies these measures, a considerable share of the burden of proof during the investigation process falls on the exporters, and in spite of the efforts and the resources invested in their defence, experience has shown that the system ultimately makes it very difficult to avoid being accused of dumping.

This Panel is a case in point. I shall focus my submission on the subjects we consider the most important, without necessarily following the same order as the other parties.

Captive production

The captive production provision in United States law is, in our view, entirely contrary to the provisions of the Anti-Dumping Agreement, which require that the determination of injury should be made on the basis of "total" domestic production, whatever its destination.

Irrespective of whether the application of the United States' domestic provision on captive production leads to an affirmative or negative determination of injury, what counts is that the relevant WTO provisions require the investigating authority to analyse injury with respect to total domestic production covering all of the domestic producers of like products, whether that production is sold or used for own consumption. In our view, Articles 3 and 4 of the Anti-Dumping Agreement, in particular Article 4, in no way permit that under certain conditions, the determination of injury should focus primarily on sales in the domestic market. The Agreement is very clear in this respect: it requires an examination of the domestic producers as a whole of like products.

To exclude captive production is to disregard an essential element: the rationality and behaviour of an industry in deciding to produce greater or lesser quantities for domestic sale or to produce goods with a higher value added, depending on market conditions. Failing to consider this element is tantamount to ignoring the effect of factors other than dumped imports on production decisions.

In our view, to give greater priority to production sold on the domestic market is contrary to Articles 3 and 4 of the Anti-Dumping Agreement.

Use of adverse facts available

In Chile's view, both the legislation and the practice of the United States with respect to the use of adverse facts available fall within the terms of reference of the Panel.

A first issue requiring clarification is whether or not there was any cooperation on the part of the respondent exporting enterprises, and more specifically, whether in this specific case there could truly have been cooperation, given the particular circumstance that there were two related enterprises which were opposed to each other (petitioner and respondent).

Irrespective of a company's percentage share in, or level of control over another company (Kawasaki had a 50 per cent stake in the affiliate), if one is the petitioner and the other is the respondent, there is a clear conflict of interest, and just because one company controls the other does not mean it can require it to supply information. As a matter of principle, companies with a conflict

Determination of critical circumstances

Regardless of the fact that the early determination of special circumstances by the DOC may not have affected Japan's exports, a view which Chile does not share since any determination, including an initiation determination, negatively affects exports, what is important is to determine whether the DOC properly considered the existence of dumping causing injury to the domestic

ANNEX D-7

Oral Statement of the European Communities as a Third Party

(23 August 2000)

1. On behalf of the EC, let me express first our appreciation for the opportunity to submit our views in this dispute.

2. In our Oral Statement, we will address four issues of legal interpretation raised by this dispute which, for systemic reasons, are of particular interest to the EC:

- first, the use of "adverse" inferences in applying the "facts available" provisions of Article 6.8 and Annex II;
- second, the consistency with Article 9.4 of the US practice to include only those dumping margins which are "entirely" based on "facts available" when calculating the dumping margin for non-investigated exporters;
- third, the consistency with Article 2 of the "99.5 per cent test" applied by the US authorities in order to determine whether domestic sales between related parties are "in the ordinary course of trade"; and
- finally, the treatment of "captive production" in injury determinations.

A. Choice of "facts available"

3. Japan contends that, when resorting to "facts available" in accordance with Article 6.8, the investigative authorities may not draw "adverse inferences".[1] According to Japan, "facts available" may be used only as "neutral gap fillers".[2]

4. The EC disagrees. Japan's contention has no basis on the Anti-dumping Agreement and, if upheld, would encourage systematic non-cooperation and, ultimately, render impossible the conduct of anti-dumping investigations.

5. Usually, when resorting to Article 6.8, investigative authorities are required to make a choice between different sets of "facts available". In doing so, they have a large measure of discretion. Of course, the facts must be pertinent and, to the extent possible, verified.[3] There is, however, no requirement in the Anti-dumping Agreement to the effect that the investigative authorities must choose always "facts available" which yield a "neutral" result, let alone those facts which lead to the lowest dumping margin.

6. To the contrary, Paragraph 7 of Annex II contemplates expressly that the use of "facts available" may lead to "a less favourable result". Furthermore, as demonstrated by the detailed

[1] Japan's First Written Submission, para. 57.
[2] Ibid., para. 58.
[3] Cf. Annex II, paragraph 7, second sentence.

exporter's margin based on facts available[8] is clearly unfounded and should be rejected by the Panel. As argued by the US, that piecemeal approach would be unworkable and open to manipulation.[9]

C. The "99.5 per cent" test

13. Japan does not seem to dispute that sales between related parties may be disregarded as not

relationship.[14] But a mere 0.5 percentage point average price differential is simply too small to reach

ANNEX D-8

Oral Statement of Korea as a Third Party

(23 August 2000)

On behalf of the Republic of Korea, I would like to thank the panel for this opportunity to make an oral statement. As a third party to this case, we would like to briefly address certain issues before the panel, which supplements the written submission made by Korea on 31 July 2000.

(Fair Comparison)

We would like to begin by drawing the panel's attention to the issue of the fair comparison requirement in the Anti-Dumping Agreement. As a preliminary matter, Korea wishes to respond to a point made by the EC in its oral statement at the first substantive meeting. EC referred to Korea's written submission and argued that the first sentence of Article 2.4 does not impose a general fairness requirement, since that sentence applies only with respect to the comparison between the export price and the normal value. Korea is of the view that fairness is a general principle of law, and the first sentence of Article 2.4 is a reflection of such a general principle. In this connection, Japan argued in its first written submission that administering authority should implement the Anti-Dumping Agreement in good faith, which is again a general principle of law as embodied in Article X.3 of the GATT of 1994.

Thus, Korea believes that fair comparison is an overarching, free-standing obligation which must be met and which governs all aspects of the determination of dumping. Article 2.4 of the Anti-Dumping Agreement states that "a fair comparison shall be made between the export price and the normal value." The requirement is unconditional, not limited to certain circumstances, and is fundamental to the Anti-Dumping Agreement. Any methodology for anti-dumping calculations and comparisons must respect this fundamental principle which has been set out as an independent, free-standing requirement of the Anti-Dumping Agreement. The question is whether the methodology

documented and reported to the Commerce Department. Given the situation, it was not "fair" to penalize KSC, while it was CSI which withheld the necessary information.

In this context, Korea wishes to refer to a point made by both Canada and the EC through their oral statements. Canada and the EC argued that Japan is wrong in interpreting Article 6.8 that the investigative authorities may not draw adverse inferences. Korea wishes to put aside for a moment the question of interpretation of Article 6.8. The more immediate question is the factual circumstance in which the DOC applied 'facts available' rule to the KSC's sales to the CSI. It was CSI, and not KSC, that withheld necessary information. Given such a factual circumstance, it was not fair to impose punitive dumping margin on KSC. This point is not affected by any difference in interpretation of Article 6.8. Korea wishes to make the same point for the following example as well, which is DOC's application of 'facts available' rule to the conversion factor.

The Commerce Department also applied adverse "facts available" to certain transactions by NKK Corporation and Nippon Steel Corporation on the ground that information on a minor adjustment factor was not provided. That minor deficiency, which was later corrected in time, was the basis for applying a very high margin from another sale by these companies to the sales with the alleged deficiency. The Commerce Department is very clear about the reason that it selected this margin. It had nothing to do with the comparability of these sales nor with any other efforts to assure a "fair comparison." The Commerce Department selected that margin to obtain a punitive result.

The Commerce Department's actions were particularly unfair in view of the fact that both NKK and NSC submitted necessary information on the conversion factor after the Commerce Department's preliminary decision but well within the specified period before verification. The Commerce Department simply refused to verify the additional information. Instead, it imposed punitive margins on relevant sales by NKK and NSC by unfairly applying "facts available". Given the situation, it was not fair to penalize NKK and NSC irrespective of their best efforts.

Furthermore, the US "arm's-length test," which it used for sales to affiliated parties, is fundamentally unfair. It is biased , because it includes only higher priced sales in the domestic market. According to the particular methodology employed by the US, the Commerce Department includes only the sales to an affiliated party if their weighted-average price is equal to 99.5 per cent or greater than the weighted-average price of sales to non-affiliated customers. The gap between the minimum price included and the weighted-average price of sales to non-affiliated customers is only 0.5 per cent. This level is below the *de minimis* level established to determine whether dumping is occurring. On the other hand, there is no maximum price over which transactions would not be included in the calculation of margin. This means that only higher priced sales, which are more likely to result in dumping margins, are included for comparison purposes. Thus, the US arm's-length test is arbitrary, biased and cannot be sustained as a "fair comparison".

(New US policy on critical circumstances)

Apart from Korea's general concern about "fairness" as a fundamental element of anti-dumping measures, there is one methodology employed by the US about which Korea is particularly concerned. That is with respect to the US decision on critical circumstances. The US improperly based a critical circumstances finding in this case on a mere threat of injury finding despite the fact that present injury is required by Article 10.

The Anti-Dumping Agreement provides for very limited circumstances under which duties can be applied retroactively. Article 10.2 and Article 10.6 provide those limited circumstances. In the case of Article 10.2, duties can be applied only back to the provisional duty period if a present injury determination has been made. In case of determination of threat to injury, duty can be imposed only from the date of the threat of injury as provided in Article 10.4. Article 10.6 allows the duties to

be applied during the provisional period **and** 90 days prior to that period in certain limited circumstances as defined in Article 10.6. In other words, the Article 10.6 remedy is additional to the provisional remedy as defined in Article 10.2. Thus, Article 10.2 and Article 10.6 must be read together in context to require that there must be an affirmative determination of actual present injury in order to make a critical circumstances finding.

The plain language of Article 10.6 also leads to such an interpretation. The only way for an importer to "know" that dumping is occurring and that it would cause injury is for injury to actually exist. This is not only what Korea believes but also used to be the view of the ITC of the US as well. Furthermore, the requirement for present injury is the only interpretation which comports with the limited object and purpose of additional retroactive duties as defined by Article 10.6 -- *i.e.*, to assure that the remedial effect of the final dumping duty is not undermined. When there is only a threat of injury, there is no question that final dumping duties alone will suffice to provide a remedial effect to prevent injury. The need for additional remedy as defined in Article 10.6 arises only in a present injury context when the final duties may be too late to serve their full remedial purpose.

From the above, it is clear that the Commerce Department issued critical circumstances determination in gross violation of the Anti-Dumping Agreement. The Commerce Department determination was also at variance with the International Trade Commission's decision, which found only threat of injury in the instant case. Furthermore, Commerce's action had the very real and intended effect of chilling trade, as was well described in the first submission of Japan.

The US Government recently announced, as part of its Steel Action Plan, that it intends to continue its new critical circumstances policy -- at least insofar as steel cases are concerned. Such a policy, if not properly sanctioned, would have a serious chilling effect upon the proper functioning of the rule-based multilateral trading system. The purpose of the Anti-Dumping Agreement is not to halt trade -- it is to investigate whether trade in question has been fair or not. For this reason, the problems raised by the critical circumstances decision of the US should be fully addressed by this Panel.

Thank you.

ANNEX D-9

Opening Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

The US practice has no textual basis and must stop. The United States improperly interprets Article 6.8 and Annex II, particularly Paragraph 7 of Annex II, to allow an authority to create incentives—quite strong incentives, in fact—to force a respondent to do exactly what the authority tells it to do, just like a bad boss commanding a faithful secretary. But, Paragraph 7 significantly restricts an authority's use of secondary data. Although the third sentence of Paragraph 7, in and of itself, may result in an incentive, it does not permit an authority to create its own incentives to force a respondent to comply with its instructions.

7. The Agreement contemplates that an authority will tailor its choice of facts available to the specific circumstances surrounding the missing information. USDOC makes no effort whatsoever to do this. Instead, USDOC purposefully homes in on an extremely high margin as the gap filler; the United States admits that USDOC does so to give respondents an incentive to cooperate.

8. In addition, Paragraph 7 does not permit an authority to punish a respondent with adverse facts available even to achieve a goal that is not related to the investigation. The US has confessed that it punished KSC, NSC and NKK with adverse facts available to create an incentive for future respondents to comply with US demands. Japan recognizes the difficulties faced by authorities in administering anti-dumping investigations, but Article 6.8 and Annex II do not permit the United States to sacrifice accurate margins, a basic goal of the A-D Agreement, by ignoring record evidence and drawing unreasonable inferences merely to send a warning to future respondents. In short, the US interpretation is impermissible; it is not supported by the text, object and context of the c)5 -12.2D /F0 11.25 Tf 0 Tc -0.1275 Tw ( ) Tj 9.75 0 23D /F4 11.25 Tf -0.1391 Tc043 Tw (8.) Tj 8 an5.2

disadvantageous data as the United States suggests. Rather, USDOC did not satisfy the Article 6.13 requirement to provide assistance.

13. Third, the selection of facts available was neither reasonable nor logical. The only interest for USDOC was to select a margin "that is sufficiently adverse so as to effectuate the statutory purposes of the facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner". In spite of the requirement of special circumspection stipulated in Paragraph 7 of Annex II, USDOC demonstrated no concern for using an estimate as close to reality as possible.

14. It is true that USDOC also mentioned in its final determination that it sought a margin "that is indicative of NSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." But this case shows how meaningless and hollow this standard formula is. In this case, USDOC had only to look at the data submitted by the companies to get the real dumping margin.

15. Indeed, NSC and NKK's situation is perhaps the best example of how USDOC's approach to adverse facts available is punitive. Even though USDOC had the companies' information, it chose to expunge it from the record and apply a rate that had no relevance to the transactions for which facts available were deemed necessary. USDOC did not apply an inference here, adverse or otherwise: when USDOC chose a margin or price that was as adverse as possible for NSC and NKK, it was not making an inference based on the companies' alleged non-cooperation, but rather punishing the companies for not turning over the information sooner.

16. At the very least, in order to be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The arbitrary application of adverse facts available in cases such as these must not be permitted.

2. All Others Rate

17. With respect to the all others rate, Article 9.4 prohibits their calculation based on margins tainted with facts available. Nothing in the provision suggests that this prohibition is limited to margins based on total facts available. The United States has failed to even respond to the fact that its proposal to so limit the provision was rejected during Uruguay Round negotiations. It also fails to explain why there should be any difference between a margin based entirely on facts available versus one based 90 per cent on facts available. Either way, the same policy considerations inherent in Article 9.4 apply: non-investigated exporters should not be affected by the behaviour of investigated companies during the course of an investigation.

18. The Panel should take note of the new argument on this issue set forth in the US Second

the United States decides that such sales are outside the ordinary course of trade. Japan has further argued that the Agreement does not permit the replacement of such sales with an affiliates' resales.

20. In its second submission, the United States attempts to portray its 99.5 per cent test as benign. It says that the test must be fair because when sales to an affiliated customer fail the test, all of those sales are disregarded, not merely the low-priced ones. What the United States fails to mention is that the sales that pass the test are, on average, higher than the sales to all other customers. No effort is made by USDOC to discern whether these higher-priced sales are unreliable because of the relationship between seller and buyer. The United States says that it would exclude such sales if respondents were to prove that they were "aberrationally high." But, this just proves our point: low-priced sales are automatically excluded for being low priced; high-priced sales are excluded only if specifically requested and only if they are priced really high. The United States has not explained how it can justify such a low standard for excluding low-priced sales—a standard well below the two per cent de minimis standard--but such a high standard for excluding high-priced sales. Absent such an explanation, we are left to interpret that the motivation behind this lopsided policy is to exclude as many low-priced sales as possible in order to drive up the dumping margin. This does not comply with the fair comparison requirement of Article 2.4.

21. The United States also claims that it has the discretion under Article 2.1 to replace sales to affiliates with the affiliates' downstream sales. There is no such authority in the Agreement. Even if there were support for this practice, the United States now appears to admit that its use of downstream sales in the home market is different from its use of downstream sales in the export market. In the home market, the United States merely assumes downstream sales prices will be higher and therefore inflate the dumping margin; but in the US market -- when calculating constructed export price -- the United States goes to great lengths to make sure the price is as low as possible by deducting as much cost and profit as possible. The United States wants the Panel to believe that the Agreement permits the use of downstream sales in both markets, but that the adjustments made to those downstream prices can be lopsided in favor of higher dumping margins. Article 2.4 requires a fair comparison. This means symmetry on both sides of the equation. The United States has blatantly ignored this requirement.

22. The bottom line is this: if sales are going to be excluded for being outside the ordinary course of trade, then there must be a rational reason for doing so. The fact that sales are made between affiliates at relatively low prices is insufficient. Further, once the sales are excluded, there is no authority to replace them with the affiliates' resales. Even if there were, there is certainly no support for making adjustments on the export side that are not also made on the home market side. The US approach disregards the goal of Article 2 to ensure a fair comparison between export and home market prices.

4. Critical Circumstances

23. As for critical circumstances, Japan has demonstrated that US law and policy, both on their face and as applied in this case, are inconsistent with the AD Agreement. The United States has developed various excuses for its actions in this case, but its post hoc rationalizations cannot fix what is already damaged. What is clear from this case is:

- Article 10.6 requires that imports be dumped before applying retroactive provisional measures. No finding of dumping was made when the preliminary critical circumstances decision was made. The United States claims that no such determination is required. The United States apparently wants the Panel to believe that the word "dumped" in the chapeau to Article 10.6 and in Article 10.6(ii) is meaningless.

- Article 10.6 also requires a finding of injury. USITC had preliminarily found that imports posed only a threat of injury. Japan has explained in its written submissions that the

29. Third, the United States argues the US statute somehow still permits proper evaluation of the industry as a whole, since there is other language that follows the analytic framework of considering the industry as a whole, as set forth in the A-D Agreement. This argument, however, ignores the history and structure of the US statute, that makes the primary focus on the merchant market, set out in subsection (iv) of the statute, take precedent over other statutory language. The United States cannot cite old and more general statutory language and overlook the newer and more specific

authority. It is precisely the kind of bias in the administration of domestic law that Article X:3 prohibits.

44. USDOC's failure to correct the error made in calculating NKK's preliminary dumping margin is another violation of Article X:3. USDOC failed to follow its own regulation for making corrections, thus subjecting NKK's shipments to inflated provisional measures upon which USDOC wrongly justified continuing critical circumstances. In responding to Japan's Question 30, the United States begs to be excused from this non-uniform application of a domestic law because USDOC merely made a mistake.

45. The irony is astounding. The United States asks the Panel both to accept USDOC's use of adverse facts available to punish NKK and NSC, and to treat USDOC's mistakes as mere oversights. The US position, therefore, is that mistakes made by the US Government and US producers must be tolerated; but mistakes made by foreign producers must not be tolerated.

46. These violations stem from USDOC's adversarial treatment of respondents. As Japan has demonstrated, the adversarial approach USDOC takes in its investigations violates GATT Article X:3. Unless the Panel takes firm action to address the US violations, the US abuses will multiply.

CONCLUSION

47. The United States hopes the Panel is too busy to focus on the texts of the Agreements and the US response to Japan's prima facie case. But, Japan is confident that, once the Panel focuses on the text of the Agreements, the specifics of Japan's claims and the inadequacies of the US replies, it will find that the US interpretations are impermissible. It will find that the US anti-dumping regime, on its face and as applied, violates the A- Agreement and Article X of GATT 1994.

48. As the Panel deliberates, we urge you to bear in mind Article 1 of the A-D Agreement. Article 1 explains clearly that anti-dumping measures shall only be applied when the investigation has been "conducted in accordance with the provisions of this Agreement." Japan has identified numerous ways in which the United States did not act "in accordance" with the A-D Agreement, and the Panel should not permit the US violations.

ANNEX D-10

Closing Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

49. At the outset, Japan takes issue with the US claim that we have abandoned or changed our position during the proceeding. Japan is confident that, by reviewing all of Japan's submissions in this proceeding, the Panel will clearly see the thrust of Japan's argument. Moreover, contrary to the US claim, it is Japan, and not the United States, that is respecting the results of the Uruguay Round negotiations, as expressed in the texts of the provisions relevant to this proceeding.

50. Japan is impressed with the level of attention the United States devoted this morning to injury and causation. Japan is not surprised; given the weakness of the US presentations to date, it needed to devote some time to USITC's misconduct. However, the US effort to rebut Japan's presentation is unsuccessful.

51. Japan asks the Panel also to note that the United States continues to repeat the mantras that:

(a) the AD Agreement contains only unclear provisions that admit many meanings—see for example the new US argument regarding Article 3.5 (para. 13); indeed the United States apparently has yet to find a clear provision in the Agreement

(b) due to the efforts of the US negotiators, the US law was enshrined in the A-D Agreement; and

(c) US law is consistent with the A-D Agreement simply because the US Congress says that it is.

52. So, in the view of the United States, this whole process has been unnecessary, because US law inherently complies with US WTO obligations. This cannot possibly be true. In addition to the violations shown by Japan, the DSB already has found the US anti-dumping law to be inconsistent with US WTO obligations in two separate proceedings—*US - Anti-Dumping Measure on Korean DRAMs* and *US Anti-Dumping Act of 1916*.

53. Turning now to the US assertions this morning, we note first that the US still has not rebutted Japan's *prima facie* case. Accordingly, I will address only some of the US points—causation, captive production, facts available and Article X of GATT 1994.

54. At the outset, we would like to remind the Panel that we are not here to decide whether or not to overturn *Wheat Gluten*. The United States would like to practice its arguments for *Wheat Gluten*. But, the Panel's focus, of course, is what the United States did in this case. The United States seems to think Japan's argument depends entirely on *Wheat Gluten*. It does not. Japan's argument stands whether or not the Panel agrees with *Wheat Gluten*, and whether or not the Appellate Body reverses *Wheat Gluten*. The USITC in this case was too quick to ignore unfavourable facts, too willing to gloss over contrary arguments, and too outcome driven in dismissing alternative causes. The United States assumes that a large USITC staff, a thick report, and some conclusory language insulates it from challenge. But the United States is wrong. The USITC may collect extensive data, but it is the way the USITC determination addresses that data that controls this issue.

55. To illustrate the defects of the USITC approach, we can find no better example than profits levels. The United States argues that it "examined" profit levels. First, the obligation at Article 3.4, is to "evaluate" the factors, not merely to examine them. Evaluating a factor means more than selecting favourable facts and ignoring unfavourable facts. At the outset of its investigation, the USITC decided that three years of data should be examined. Yet, once it collected the data, the USITC found that the data for 1997 and 1998 alone supported its desired conclusion, and that the data for 1996 could not logically be reconciled with its desired conclusion. So what did the USITC do? It simply ignored the data for 1996. Japan cannot imagine how any neutral decision maker could consider such selective consideration of facts to be "evaluation."

56. We note that the United States devoted more space to the captive production provision than any other single issue in its opening statement. The United States made this issue seem complicated because they had to do so. The US statute explicitly mandates an analytically impermissible approach. The statute forces the USITC to undertake an unbalanced and biased analysis that focuses primarily on one segment at the expense of others. The United States protests that other parts of the statute call for a WTO-consistent approach of considering the industry as a whole. But when one reads the US statute as a whole, the captive production provision trumps those other provisions. In normal cases, the statute might allow the proper approach. But in those cases where the special captive production provision applies, the flawed, unbalanced approach takes legal precedence and the USITC has no choice but to violate Articles 3 and 4.

57. I turn now to facts available. The US opening statement describes the US policy on facts available as benign and reasonable. But it is neither. The USDOC uses facts available as punishment – punishment to those companies involved in the current case—and as warning--to respondents in future cases--about the fate that awaits them.

58. Consider the three companies involved in this case. All three were punished. Why? KSC was not able to supply data from a petitioner, a company that was affirmatively attacking KSC in this proceeding. Not surprisingly, the United States ignored this crucial fact this morning. With respect to NSC and NKK, the United States protests that USDOC could not possibly know the motivation for the companies not providing the information in a timely manner. This claim is absurd. These two companies did everything USDOC asked. When the USDOC said jump, the companies asked "how high?" They did provide the information, and did so within the statutory deadlines. Yet USDOC looked at these facts and still inferred bad motives and applied adverse facts available. The United States argues that motives cannot be determined, but USDOC has no trouble assuming bad intentions; this is not surprising given the USDOC premise that all respondents are bad secretaries.

59. The United States has failed to rebut Japan's claim under Article X of GATT 1994, a claim which is quite important and which is independent from Japan's other claims. The United States tries to hide behind its bifurcated structure for administering its laws, and the different functions involved. But this rationalization does not work. A bifurcated structure does not allow a Member to administer its laws in biased and inconsistent ways. We agree that the USITC applies the law consistently to both US and non-US parties. If only the USDOC did the same. If USDOC adopted the USITC approach, KSC would not have been punished for not providing a petitioner's data. The Commissioners worked to get the information the USITC needed from the recalcitrant US producers, yet USDOC officials did nothing to get the information from CSI. Also, in contrast to USDOC's treatment of respondents NSC and NKK, the USITC accepted late data from the petitioners. In each instance, the different treatment, and the violation of Article X, could not be more obvious.

60. In closing, Japan urges the Panel to attend closely to the texts, identify the permissible interpretation of the relevant provisions and recognize the provisions for what they are—limitations on the discretion of authorities. Thank you for your attention to this most important matter.

ANNEX D-11

Opening Statement of the United States at the Second Meeting of the Panel

(27 September 2000)

1. ***Mr. Hirsh.*** Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. Again for the record, my name is Bruce Hirsh. I am a Legal Advisor with the Office of the US Trade Representative in Geneva. With me from my office in Washington is Associate General Counsel Dan Mullaney, who will begin our presentation today with a discussion of two procedural issues. James Toupin, Deputy General Counsel of the US International Trade Commission, will then present the issues concerning injury. Finally, John McInerney, Acting Chief Counsel for Import Administration at the US Department of Commerce, will present the issues concerning the anti-dumping calculations and critical circumstances.

2. ***Mr. Mullaney.*** Thank you, Mr. Chairman, and members of the Panel. With respect to the US **preliminary objection** to extra-record evidence, Japan argues that DSU Article 11 and Article 17.6(i) of the Anti-Dumping Agreement, taken together, require the panel to consider facts outside of the administrative records. This position is directly contrary to Article 17.5(ii) of the Anti-Dumping Agreement, which requires the Panel's examination to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." It is also contrary to several panel decisions under the Safeguards Agreement, which, in applying Article 11 of the DSU, specifically limited the panels' review to facts placed before the authorities.

3. Japan also claims that the Panel should take account of the statisticians' affidavit and attorneys' affidavits concerning alternate margin calculations because they are based on information on the record. This is incorrect. The calculation of a margin of dumping, for example, is a very complicated process that involves numerous decisions. Simply presenting an alternate dumping margin and asserting that it is based on a recalculation of record information is equivalent to submitting new information. The affidavit form of the information underscores this deficiency: in effect, the affiant is saying "you can't see this number in the record, but you should accept it as true, because I am swearing that it is true." The statisticians' affidavit is itself new evidence. If it is important evidence, the Japanese respondents should have submitted it for the record.

4. We will not repeat points we have already made on the special deferential **standard of review** specifically adopted by the negotiators for the Anti-Dumping Agreement. However, we note that Japan persists in suggesting that somehow Articles 31 and 32 of the Vienna Convention override the specific text of Article 17.6(ii). That article, however, reflects the negotiators' understanding that they had left enough issues ambiguous that they needed to make special provision for cases in which customary rules of treaty interpretation would not provide an unequivocal result. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. Thus, Japan's contention that the Convention requires, or even permits, a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation, would nullify the second sentence of Article 17.6(ii) of the Agreement.

5. I will now turn to my colleague, Mr. Toupin, of the US International Trade Commission, to present the injury issues.

6. ***Mr. Toupin.*** Thank you, Mr. Chairman and members of the Panel.

The Causation Standard under Article 3.5

7. At the outset, I would like to address the arguments that Japan now makes concerning the examination under Article 3.5 of other factors injuring the industry. The United States has demonstrated how the USITC's findings satisfy the standards for such an examination articulated by the panel in the *Atlantic Salmon* decision. I will not reiterate those arguments here, and invite any further questions that the Panel may have about those factual issues. Here, I will extend our remarks eoncerning twhy0 Toral2 Tcn 1.7414 Tw (duTj -jura003c 0.2681 Tw (Atlanti,ing twhy0 Toral2 0 TD /F0 11.25 8 -0

sentence of Article 3.5, like footnote 5 in the prior Code, does not instruct an authority how to conduct the examination, but rather lists exemplary factors which may, but need not be, relevant.

12. Certainly, the documents underlying United States' implementation of the Agreement show that the United States, in agreeing to Article 3.5, reasonably understood it as adopting a requirement consistent with *Atlantic Salmon*. We attach as an exhibit the passage from the United States' Statement of Administrative Action that sets forth the United States' understanding.[2]

13. Finally, unlike the Safeguards Agreement, with which the *Wheat Gluten* panel was concerned, the Anti-Dumping Agreement provides that, when a provision admits of more than one interpretation, a panel is not to compel adoption of one of those interpretations. Article 17.6(ii) reflects that the negotiators of the Anti-Dumping Agreement knew that they were adopting provisions that did not in every case mandate one approach. Since the negotiators adopted language so close to that used in *Atlantic Salmon*, the United States must be regarded as choosing a permissible interpretation pursuant to Article 17.6(ii) when it construes Article 3.5 in accord with *Atlantic Salmon*.

14. The *Wheat Gluten* panel acknowledges that its requirement to determine what injury is due to imports alone might be impracticable, and explicitly declines to explain how its test might be met. This should have indicated to the *Wheat Gluten* panel that it was adopting an interpretation of the Safeguards Agreement that the negotiators of that Agreement could not have intended. Certainly the negotiators of the Anti-Dumping Agreement did not intend to impose such an impracticable test.

Examination of Relevant Factors and Evidence

15. As for Japan's argument that the USITC should have relied on certain data from 1996 to 1998, the USITC's determination reflects that it examined the relevant factors and evidence as required by the Agreement. Japan makes much of the fact that the USITC did not make an explicit finding stating that the industry's profits rose from 1996 to 1998, when the USITC relied on the decline in profits from 1997 to 1998. Japan, however, points to no requirement of the Agreement requiring such a finding. Article 3.4 requires the authority to conduct an "examination" of profits, but requires no particular finding. The USITC plainly examined profits. Article 3.5 requires an "examination of all relevant evidence", but does not state how that examination shall be reflected. Here, the USITC plainly examined the data from 1996 to 1998, since it explained why it rejected arguments that it should rely on a broader period than 1997 to 1998. Indeed, in doing so, it explained why, in the context of the economic conditions from 1996 to 1998, it did not regard 1997 as a banner year. There is no basis in the Agreement to find that the USITC was required to do more.

16. Japan argues -- concerning both the Anti-Dumping Agreement and Article X of the GATT -- that the USITC somehow impermissibly departed from a "rule" that it would rely on data over the entire period of its investigation. As our submissions demonstrate, there is no such rule. The USITC has in fact in numerous determinations -- reaching both affirmative and negative results -- relied on recent trends rather than on trends over the entire period. If it could not do so, the USITC would, when economic circumstances have changed over the period investigated, be forced to violate the requirement of Article 3.4 that it examine "all relevant economic factors".

17. These points are illustrated by the USITC's decision in *Elastic Rubber Thread from India*[3], on which Japan relies. In *Rubber Thread*, the USITC did indeed give weight to trends over the three-year period investigated rather than to trends in the final year. Its opinion, however, shows that it did not do so on the basis of any rule requiring reliance on three-year trends. It relied on those

[2] Statement of Administrative Action to Uruguay Round Trade Agreements Implementing Bill, H.R. 83-211, at 181-182, *attached as* **Exh. US/C-31**.

[3] USITC Inv. No. 731-TA-805 (Final).

trends only after finding that the downward trends in the last year were an "anomaly due to unanticipated high volumes in 1997, followed by a corresponding drop in 1998."[4] The USITC's reasoning, therefore, depended on its findings concerning the relevant economic factors. Here, the USITC found the relevant economic factors differed from those in *Rubber Thread.* Here, the USITC found the rise in demand and consumption not to be an anomaly, but rather to represent a persistent development in the relevant factors having a bearing on the state of the industry.

The captive production provision and analysis of market segments

18. Both the US law concerning captive production and the USITC's determination in this case accord with the Agreement's requirement to make a determination as to injury to the producers as a whole of the domestic like product. Japan has moved in its second written submission far from its original position in its arguments about the consistency of the US captive production provision, in itself, with the Anti-Dumping Agreement. Although the United States does not agree with much of Japan's characterization of that provision, even under Japan's portrayal of it, Japan cannot establish that the US statute violates the requirement that Members assure that their laws conform with their obligations under the Agreement.

19. In its first written submission, Japan stated that it was improper to consider, either primarily or secondarily, data for the merchant market sector.[5] Japan has now abandoned this position. Japan now acknowledges that "an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the Anti-Dumping Agreement."[6] Japan likewise agrees that the merchant market sector is the sector in which competition between the domestic industry and dumped imports is most direct.[7]

20. Similarly, Japan's First Written Submission stated that under the captive production provision "the USITC now *must* ignore the shielding effect of captive production," and the provision "makes it *impossible* for USITC to consider all relevant evidence."[8] Japan's position has become more nuanced, and the nuance is fundamental. In its Second Written Submission, Japan acknowledges that it is permissible for an authority to focus on the merchant market sector, but it argues that such an analysis must be explicitly related back to the industry as a whole and that the US provision "*requires* no such relating back." Likewise, rather than asserting that the USITC under the captive production provision must ignore other evidence, Japan now simply states that the provision "encourages USITC impermissibly to accentuate merchant market data in its determination."[9]

21. The United States disagrees with this interpretation of the captive production provision. However, even if Japan were correct in its statutory construction, its allegations would not establish that the US law on its face should be deemed to violate the Agreement. Japan admits that the provision does not *preclude* the USITC from relating back its findings on the merchant market sector to the whole industry. Moreover, if the statute only *encourages* the US authority to accentuate certain data, the statute cannot be said to *require* the USITC to ignore any evidence. Such a showing does not meet the traditional standard for finding legislation on its face to violate an Agreement. Under that standard, only "legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual

[4] *Rubber Thread*, at 14 & n.104.
[5] Japan First Written Submission at ¶ 45.
[6] Japan Second Written Submission at ¶ 219.
[7] Japan Second Written Submission at ¶ 186.
[8] Japan First Written Submission at ¶¶ 238-239 (emphases added).
[9] Japan Second Written Submission at ¶ 186.

application of such legislation ... could be challenged."[10] Japan is wrong in claiming that this established principle is no longer applicable or only relevant when a statute has not been applied.[11] The Appellate Body in *US – 1916 Act* specifically denied that the panel there made such a finding.[12] Similarly, the panel in the *Section 301* dispute stressed that it was not overturning the jurisprudence on the mandatory/discretionary distinction.[13]

22. In fact, as the United States has indicated, its anti-dumping statute does require that the authority make its determination with respect to the industry as a whole, and the captive production provision does not alter this requirement. Many aspects of the statute support this conclusion. The statute requires the USITC to make its determination as to the industry, which it defines as producers as a whole of the domestic like product. The requirement to "focus primarily" on the merchant market for certain factors assumes that, even for those factors, the USITC's analysis will proceed further. Moreover, the Statement of Administrative Action makes clear that, when the USITC considers those factors to which the captive production provision applies, it may "focus" on other evidence in addition to the merchant market sector. Likewise, the statute requires the USITC to consider other factors to which the provision does not apply. Further, the statute requires the USITC to consider "all relevant economic factors" and no one factor can "necessarily give decisive guidance." Thus the statute as a whole provides the USITC with discretion to consider all evidence and factors, and requires it to make a determination as to the industry as a whole.

23. Even if the US statute did not clearly mandate a determination as to the industry as a whole, when a statute that an authority administers is ambiguous, US courts defer to an authority's considered interpretation if that interpretation is reasonable. The Statement of Administrative Action expresses Congress' intent that the captive production provision would be consistent with the Anti-Dumping Agreement. Consequently, the authority applying that provision properly under US law resolves any ambiguities in the captive production provision and its relation to the statute in a manner consistent with the United States' obligation under the Agreement.

24. Indeed, it is Japan, not the United States, that forgets that the necessary inquiry pertains to the industry as a whole. Japan claims that the USITC should have made findings about a fall in the demand by pipe and tube manufacturers for hot rolled steel because two steel producers particularly depended on that demand.[14] The USITC, however, found that overall demand increased substantially and that the industry as a whole should have been able to take advantage of that growth in demand. The USITC concluded that imports prevented the industry as a whole from doing so. Japan has not shown how, in view of the overall growth in demand, the fact, if true, that two firms faced a fall in demand in a particular submarket is relevant to the assessment of injury to the industry as a whole.

25. Japan is reduced to arguing that this Panel should hold that the US Congress repealed the other provisions of the US statute that call on the USITC to make a determination as to the industry as a whole when it enacted the captive production provision -- even though Congress didn't say so.[15] Frankly, this argument demonstrates the implausibility of Japan's position. Japan is effectively asking this Panel to rewrite the US statute in order to make it violate the Anti-Dumping Agreement.

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[10] United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco, Panel Report, adopted 4 October 1994, BISD 41S/131, at 118, quoted in United States -- Antidumping Act of 1916, AB-2000-5, AB-20006, at ¶ 88.

[11] Japan Second Written Submission at ¶ ¶ 175, 177.

[12] United States -- Antidumping Act of 1916, AB-2000-5, AB-2000-6, at ¶ 93.

[13] United States - Sections 301-310 of the Trade Act of 1974, adopted 27 Jan. 2000, WT/DS152/R at ¶ 6.9.

[14] Japan Second Written Submission at ¶ 267.

[15] Japan Second Written Submission at ¶ 193.

26. The sources concerning United States law that Japan cites, support, rather than conflict with, the United States' position here. As the US Supreme Court stated in the *Watt* case that Japan cites, "repeals by implication are not favoured ... The intention of the legislature to repeal must be 'clear and manifest.'"[16] Japan presents sections of a treatise on statutory construction as an exhibit[17] but pointedly omits the preceding section of the treatise that makes clear that US courts seek to read statutes as a whole to avoid finding different statutory provisions to be in conflict.[18] We attach that prior section as an exhibit. It is clear that a court would uphold the USITC in resolving any ambiguities to construe the captive production provision to accord with the statutory requirement to make a determination as to the industry as a whole.

27. The USITC's consideration in this case of the merchant market was consistent with the Agreement. As both Japan and the United States have advised the Panel, under US law only three Commissioners 16

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necessarily reflected the impact on the industry as a whole of trends in the sector as to which the authority did not make separate findings.

31. The USITC here further made specific findings demonstrating the consequences for the industry as a whole of developments in the merchant market sector. For example, the USITC found that most performance indicators for the US industry as a whole declined because the US industry was prevented from participating in the growth of demand and consumption. The USITC found that the growth of the dumped imports' share of the merchant market sector at the expense of the domestic industry's share caused the US industry not to participate in the growth in demand. It also found that, as a result, capacity that the US industry brought on line to meet the growth in demand immediately became excess capacity.[22] Moreover, the USITC found that the decline in the industry's operating income at the end of the investigation coincided with the decline in its capacity utilization rates.[23] Through these and other findings, the USITC demonstrated the causal relationship between the effects of dumped imports on the industry's merchant market performance and injury to the industry as a whole.

32. In sum, the USITC's findings amply satisfy the standard that Japan has espoused. Japan itself quotes and approves prior panel authority stating that an analysis of the sector most exposed to import competition can sustain an injury determination if an authority *either* analyses all other sectors *or* demonstrates the relationship between events in the one segment and the industry as a whole.[24] Japan's contention that the USITC's determination was flawed unless it made specific findings concerning developments in the captive production sector has no basis in prior decisions or in the Agreement.

33. Finally, Japan complains at length that the USITC did not make findings in this case about the captive production sector in the same way as it did in its *1993 Flat Rolled Steel* determination. Suffice it to say here that the USITC in 1999 specifically recognized the effects of captive production.[25] The sole differences between the 1993 and 1999 determinations on this point seem to be that in 1999, the USITC spoke about relative "sensitivity" to imports rather than using the word "shielded"; in 1999, the USITC made its findings about the amount of captive production and the applicability of the provision in the section labelled captive production and made its finding on "sensitivity" in the next section of its opinion; and, as the facts had changed between 1993 and 1999, the USITC reached a different conclusion. With due respect to our Japanese colleagues, such differences cannot even plausibly suggest a violation.

34. Mr. McInerney will now address Japan's contentions about the United States' dumping calculations and critical circumstances.

35. ***Mr. McInerney.*** Thank you Mr. Chairman. With respect to the Department's **use of facts available,** Japan's second written submission emphasizes two points that are both wrong. First, Japan claims that adverse inferences are "punitive," and, therefore, improper. (Japan's 2d Sub. , ¶¶ 28 & 30.) This ignores the fact that, where a party has not submitted necessary information, adverse inferences are, in fact, the most reasonable and logical conclusion to be drawn about that missing information. This is precisely why it was recognized by the Appellate Body in the *Canada - Civilian Aircraft* case. Japan's attempt to distinguish that case's use of an adverse inference during the course

necessary and reasonable by the non-cooperation of the responding parties. In addition, Japan has yet to explain why its own authorities applied exactly this rationale in Japan's anti-dumping investigation of cotton yarn from Pakistan.

36. Second, Japan claims that, because the Japanese respondents were generally cooperative, this licensed them to refuse to cooperate with regard to certain selected categories of information. (Japan's 2d Sub., ¶ 24.) This position finds no support in the Agreement. It would amount to a 70 per cent or 80 per cent cooperation rule, under which respondents would have to cooperate only up to the threshold of "general cooperation," after which they would be free to withhold information. This would license respondents to manipulate the results of anti-dumping investigations by withholding selected categories of adverse information.

37. With regard to the **application of facts available to KSC**, Japan now tries to rationalize KSC's refusal to exercise its powers, as a fifty per cent owner of CSI, to obtain the necessary information by itemizing the ways in which KSC, CVRD, and CSI regularly ignored the CSI shareholders' agreement (Japan's second submission at ¶ 47). But the fact that KSC regularly ignored the shareholders' agreement does not prove that it had no power under that agreement - - only that KSC did not always choose to exercise that power. As the minutes of the CSI board meetings make clear (Exh. US/B–23/bis), the parties to the joint venture repeatedly raised, discussed, and made decisions on business matters, as provided for in the agreement. In this light, the fact that KSC never even *discussed* with CVRD the need to provide the requested CSI data, and never *challenged* the actions of CSI's president and CEO (who served at the pleasure of the board members representing KSC and CVRD) is glaring. *(See* US 1st submission, ¶ 90).

38. Finally, Japan's belated claim that CSI was *unable* to supply the requested information is based on one sentence in one letter from CSI. This new claim is not supported by the weight of the record evidence. Indeed, KSC itself characterized this statement by CSI as a refusal, not an inability, to provide the requested information. (US 2nd submission, ¶ 18; Exh. JP-93(a) and (c)). Accordingly, Commerce properly found that KSC failed to cooperate in providing the requested CSI data.

39. As facts available for the sales through CSI, Commerce reasonably chose a dumping margin calculated by comparing KSC's own sales to unaffiliated US customers to its sales of that same product in Japan. This selection of a dumping margin based upon KSC's product-specific, verified data represents a reasonable choice of adverse facts available. Yielding to KSC's attempt to force Commerce into using its transfer prices to CSI as a "plug" for facts available would give every respondent *carte blanche* to shelter dumped sales through its overseas affiliates.

40. With regard to **Commerce's application of facts available to NSC and NKK**, the Department was simply exercising its clear right under the Agreement to enforce reasonable deadlines. Japan's curious theory that any firm limits on the time in which information must be submitted, even after repeated extensions, are inimical to a "reasonable" understanding of "timeliness" has no support in the Agreement. Similarly baseless is Japan's theory that untimely information must be accepted if it is otherwise in compliance with the requirements of the Agreement. Paragraph 3 of Annex II requires that parties meet *all four* of the basic criteria listed in that paragraph in order for their information to be considered. One of these four conditions is that the information be "supplied in a timely fashion."

41. The weight conversion factors untimely submitted by NSC and NKK were not, as Japan claims, "corrections" (Japan' s 2d Sub., ¶ 93). They were categories of information that NSC and NKK had repeatedly claimed were not necessary and were impossible to submit, *at all*. Therefore, Commerce's rejection of this new information was perfectly consistent with its acceptance of various corrections of previously-submitted data very late in the investigation (Japan's 2d Sub., ¶ 94, fn.91). Nor did NSC and NKK's protestations of "good faith" compel the acceptance of their conversion

factors. It is impossible for investigating authorities to know a party's motivation for not submitting data when it is due, and the Agreement does not require the authorities to attempt to discern its motivation.

42.

47. Japan's arguments against the **use of downstream sales in the home market** are also invalid. Article 2.1 defines dumping as selling at less than "the *comparable price, in the ordinary course of trade*, for the like product when destined *for consumption in the exporting country*" (emphasis supplied). A sale through a related party to an independent purchaser in the home market is just such a sale - - a sale of the like product, in the ordinary course of trade, destined for consumption in the exporting country. Accordingly, such sales are an appropriate basis for normal value. Article 2.2 calls for authorities to base normal value on constructed value or third country prices only "[w]hen there are **no** sales of the like product in the ordinary course of trade in the domestic market of the exporting country." (emphasis supplied).

48. By challenging the Department's practice of using perfectly valid home market downstream sales to unaffiliated parties, Japan is seeking to require investigating authorities to use either the prices of sales to related parties in the home market, which could easily be manipulated, or sources other than prices in Japan. This is not speculative - - NKK, for example, sold 93 per cent of its merchandise through affiliated trading companies at the time of the investigation (64 Fed. Reg. at 24339). If the Department were precluded from using such sales, it would be forced to base normal value either on constructed value or Japan's sales to third countries.

49. Finally, the United States disagrees with Japan's claim that the use of downstream sales violates the fair comparison requirement because the Department's level of trade adjustment does not address differences in price comparability due to resellers' costs and profits. First, the United States notes that this Panel's terms of reference do not include any challenge to Commerce's practice with regard to level of trade adjustments, either generally or in this investigation. Thus, Japan cannot now raise this issue. In any event, when the Department compares export sales to downstream home market sales at a different level of trade, the US statute (19 U.S.C. § 1677b(a)(7)) provides that "the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined." Such "price differences" would include the effects of both cost and profit.

50. With regard to Commerce's **Preliminary Determination of Critical Circumstances**, acceptance of Japan's claims would render Article 10.7 meaningless. Japan completely ignores the fact that the "sufficient evidence" required by Article 10.7 may be found at any time "after initiation." Japan provides no explanation for the lack of any other temporal restriction, but instead simply insists that the decision cannot, "as a practical matter," be made prior to a preliminary determination of

dumping and consequent threat. The critical circumstances provisions were intended to address precisely such surges in dumped imports.

53. Finally, Japan suggests that the United States is asking the Panel to look only at decisions made at the *end* of the investigation. This is not true. We ask that the Panel look at *this preliminary* decision. You will find ample supporting evidence to satisfy the requirements of Articles 10.6 and 10.7. Indeed, it is curious that, to support its arguments, Japan continuously refers the Panel to the *final* dumping margins - not the preliminary margins. It is *Japan* that would like the Panel to focus upon the decisions made at the *end* of the investigation.

54. With respect to **Article X**, Japan's claims are curious. Although couching its argument in terms of "due process" and "fairness," Japan is really trying to have Article X override provisions of the Anti-Dumping Agreement. Japan's claim is not about due process, in the sense of the *Shrimp-Turtle* decision it cites. There is no denying that the US investigation was open and transparent and allowed full opportunities for the submission of facts, views, and rebuttals. Rather, this dispute is about specific decisions fully consistent with and authorized by the Anti-Dumping Agreement that Japan does not like, and hopes to attack collaterally through Article X:3. The Panel should not permit such a collateral attack.

55. The differences between the Commerce Department and the US International Trade Commission with respect to information gathering and facts available are attributable to the different functions of these two agencies, not to any partiality, lack of uniformity, or unreasonableness. Indeed, the Commission's approach applies equally to information from all parties before it, whether they be US or non-US parties.

56. In deciding to accelerate the investigation, Commerce was reacting to an unprecedented surge in imports which more than justified its modest acceleration of the investigation. Japan has failed utterly to show that the acceleration prejudiced any of the Japanese respondents. Agencies must have the flexibility to respond to such special circumstances. The same may be said of Commerce's recent policy on critical circumstances. "Fundamental fairness" does not require that Commerce adhere rigidly to past approaches in the face of an unprecedented import surge.

57. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-12

Closing Statement of the United States at the Second Meeting of the Panel

(27 September 2000)

1. ***Mr. Toupin.*** Japan's contentions in this case as to injury are characterized by two trends. First, its legal theories have proved to be completely flexible.

2. In its first written submission, as to other factors causing injury, its claims concerned entirely whether the USITC's findings were sufficiently thorough, not whether the standard that the USITC stated in doing so was adequate. Beginning with its first oral statement, following the *Wheat Gluten* decision, Japan's argument now concerns entirely whether the USITC isolated injury due to imports and found that injury in itself material. The total absence of such a theory in Japan's original submission suggests that it, too, did not understand the Anti-Dumping Agreement as imposing such an analysis.

3. Similarly, in its original submission, Japan took the position that no analysis of segments was appropriate. Now, Japan has abandoned that position.

4. In brief, Japan has changed its position throughout this case, indicating that its positions here do not seek to vindicate a principled view of the Agreement. Rather, Japan evidently is prepared to take any position to seek to overturn the US action in this case. We are confident, however, that the Panel will not be misguided by Japan's opportunistic argumentation and will instead appreciate that it must base its decision on a principled interpretation of the provisions of the Agreement.

5. The second theme that underlies Japan's arguments is that the USITC did not make findings on issues on which the USITC did, in fact, make findings. The Panel should not be misguided by such arguments either.

6. Article 3, on which Japan relies, provides no specific form in which an examination should be reflected. Japan's real purpose on each point is not to establish that the USITC's determination violates any provision of the Agreement, but that the Panel should regard particular evidence as entitled to greater weight than the USITC gave it. Such is not the purpose of panel review under the standard of review.

7. We thank the Panel for its patience and attention to the detailed factual and legal arguments that have been made and look forward to the results of its deliberations.

8. ***Mr. McInerney.*** Japan has long opposed the application of any antidumping measures. Its announced position is that its producers should be able to dump in the US market and other foreign markets at will, with impunity.

9. In the Uruguay Round, Japan tried to obtain many changes to the Anti-Dumping Agreement which, collectively, would have made the application of antidumping measures impossible. But Japan did not succeed in this effort. The Uruguay Round Agreements made a number of important changes

in the Anti-Dumping Agreement, but these changes were not intended to, *and did not*, render the application of antidumping remedies impossible.

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exporters would be in the enviable position of being able to make all of their export sales through related distributors, forcing investigating authorities to accept meaningless transfer prices as valid.

17. This strategy is complimented by a similar strategy on the home market side. Here Japan seeks to force investigating authorities to accept home market transfer prices or, in the alternative, skip over legitimate resales in the home market in favor of constructed value or third country prices. Put these two elements together, and Japan effectively could prevent investigating authorities from comparing a meaningful price in the export market to a meaningful price in Japan. Instead, exporters would be able to dictate which transactions must be used on both halves of the dumping equation. This would enable Japanese exporters to control the outcome of investigations, and therefore avoid the imposition of any antidumping remedies.

18. Now put it all together. Japan is trying to give to respondents control over what information must be submitted, when that information must be submitted, and how the entire dumping calculation must be set up. If Japan cannot obtain this all at once, it will try to get it in instalments from successive panels.

19. Japan should not be allowed either to demolish antidumping measures or to begin their piecemeal disassembly. Therefore, we trust that the Panel will consider each of Japan's arguments on its individual merits, and uphold each US practice that is based on a permissible interpretation of the language to which the Members agreed, as required by Article 17 of the Agreement.

20. Thank you for your careful attention to our arguments today and for your consideration in this proceeding.

ANNEX D-4

Closing Statement of the United States

(23 August 2000)

Thank you Mr. Chairman. This is Mr. McInerney from the Department of Commerce.

I would note at the outset that, in its closing statement, Japan has chosen not to address any of the specific substantive issues in this case, but instead has returned to its efforts to persuade the Panel that all of the Department's actions should be viewed as part of a conspiracy to treat Japan unfairly. Japan wants this Panel to regard the United States' repeated resort to its legitimate remedies under the WTO Agreement to redress repeated dumping by Japan as an abuse of antidumping measures. But it is no abuse to resort repeatedly to antidumping remedies in the face of repeated dumping. Every time that Japan has trouble in its own market, it seeks to export the problem to the United States. Repeated resort to WTO remedies in the face of such repeated dumping is perfectly legitimate and exactly what the Agreement provides for. This case does not involve a conspiracy. As Japan has acknowledged, it involves substantial dumping in massive quantities.

The AD Agreement is a set of agreed limitations on the exercise of AD remedies. The question before this Panel is whether any of the Department's specific methodologies or applications of which Japan complains in fact exceed those agreed limitations. I will now briefly turn to those specific issues.

First, with regard to facts available, we will await further submissions from Japan to see

high-priced sales in the home market are, in fact, ordinary. Discarding such sales as aberrations would mask dumping.

The simple fact is that Japan does not want the United States to use its home-market sales, presumably because it has a protected home market that ensures high-prices in that market. This is what is behind Japan's desperate attempt to argue that related-party resales in the home market do not fall within Article 2.1's requirement for "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Japan would like to have all of its dumping margins in the United States calculated by comparing its export prices to the United States to its export prices to Canada - - an approach calculated to find no dumping.

Acceptance of Japan's argument that related-party resales in the home market may not be used to determine normal value would encourage foreign producers to manipulate normal value by making *all* their home-market sales through related parties. This would be easy to arrange, and would force investigating authorities to use third-country sales or constructed value in every case - - a result plainly not intended by the Agreement.

So, in reviewing this issue, I would urge the Panel to keep in mind not only the individual pieces of Japan's argument, but the overall design of that argument - - to force the Department to base normal value on prices to third countries or on constructed value, rather than on prices in Japan.

Finally, with regard to critical circumstances, I would like to point out that, during the course of this hearing, we seem to have heard in great depth and detail about every provision in Article 10 *except* Article 10.7, which is the provision pursuant to which the Department acted in making its preliminary determination of critical circumstances. This case is not about whether the United States could have collected final duties retroactively, for the simple reason that the United States did not collect such duties, and agrees that it cannot do so. It is about what effectively were preliminary measures taken to preserve the *option* of collecting such retroactive duties, if all of the conditions of Article 10.6 were met in the final determination.

I would like to thank the Panel again for its consideration. My colleague from the US International Trade Commission will now present the closing statement for the United States on the issues relating to injury.

I will now pick up on Mr. McInerney's issue-by-issue approach. I will look at two issues: whether the captive production provision is consistent with the Antidumping Agreement and whether the USITC's determination in this case was based on objective evidence.

The captive production provision permits a better understanding of the effects of dumped imports on the domestic industry because it directs the USITC to primarily focus on the merchant market, where competition occurs. This provision, despite Japan's argument to the contrary, requires the USITC to consider both the merchant market and the entire industry when making this assessment.

In this case, the captive production provision was not outcome-determinative because there was a 3-3 split among the Commissioners as to whether the provision applied, but all the Commissioners made an affirmative determination. In any event, those Commissioners that applied the provision properly analyzed the merchant market data because they looked at it in addition to the data for the industry as a whole. Looking at the market in this way, the USITC objectively considered the volume, price, and impact of those imports on the domestic industry over the period of investigation, ensuring not to attribute injury from other causes to those imports.

ANNEX D-5

Oral Statement of Canada as a Third Party

(23 August 2000)

IV. INTRODUCTION

1 The Government of Canada appreciates this opportunity to provide its views to the panel on certain issues in this dispute. Canada reserved its right to participate as a third party in this proceeding because of our substantial systemic interest in the proper interpretation of the Anti-Dumping Agreement. In this regard, Canada will confine its submissions to two issues: (i) the drawing of "adverse inferences" when recourse is had to the "facts available" provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement; and (ii**)** the appropriate treatment to be accorded captive production in injury investigations.

V. LEGAL ARGUMENT: ISSUES ADDRESSED BY CANADA

(i) "Facts Available"

2. Turning to the issue of the United States' general practice regarding "facts available", Canada first wishes to clarify that it takes no position on the jurisdictional question of whether the Japanese claim is properly before this Panel. Canada's submissions are made in the event that the Panel decides that it does have jurisdiction over the claim.

3. As set out clearly in our written submission, Canada cannot support Japan's claim that the US "practice of applying adverse facts available in certain situations to punish respondents" is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement because neither Article 6.8 nor Annex II use the word "adverse".

4. In Canada's view, the wording of Article 6.8 makes clear that an investigating authority may have resort to the "facts available" provisions of the Anti-Dumping Agreement in circumstances where "any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation". There is a direct link between the factual circumstances of non-co-operation or impediment by the interested party and the use of "facts available". This direct link, Canada submits, means that the use of "facts available" is, to a large degree, predicated on actions by interested parties that are intended to hamper or have the effect of hampering an investigation by an investigating authority. Thus, Japan's interpretation of Article 6.8, which would encourage an interested party not to co-operate with investigating authorities, is clearly at odds with the wording of Article 6.8.

5. Canada further submits that Article 9.3 of the Anti-Dumping Agreement provides that anti-dumping duties may be imposed in an amount equal to the margin of dumping. Where an investigating authority has recourse to "facts available" as a result of an interested party's refusal to co-operate or its efforts to impede the investigation, the drawing of adverse inferences is appropriate so as to ensure that the imposition of duties under Article 9.3 is not frustrated by the non-co-operating

6. Canada submits that its view is reinforced by a number of provisions in Annex II to the Anti-Dumping Agreement, including, in particular, paragraph 7 of Annex II. As the Panel knows, paragraph 7 provides, in part, that "[i]t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, the situation could lead

for different end uses than like product sold into the merchant market is clearly a relevant economic factor for purposes of Article 3.4 of the Anti-Dumping Agreement.

13. Canada also submits that the Japanese position blurs the distinction between the concepts of "domestic industry" and "domestic market(s)". This distinction is clearly recognized in Article 3.1 of the Anti-Dumping Agreement that provides that a determination of injury shall include "… an objective examination of the effect of the dumped imports on prices in the domestic market for like product …".

14. Thus, in the very first provision of Article 3 of the Anti-Dumping Agreement, investigating authorities are expressly directed to examine the impact of dumped imports on sales of like products "in the domestic market for like products", i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, such as with hot-rolled steel, this will be the merchant market.

15. Canada further submits that in addition to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the price effects described in Article 3.2, which investigating authorities are required to consider, again necessarily focus on competition between dumped imports and domestic like product. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the merchant market should be included in an injury analysis because it is in the merchant market that the price effects of the dumped imports will be reflected.

16. Accordingly, for these reasons, failure to allow investigating authorities to differentiate between production that is internally transferred and production that is sold into the domestic market in competition with dumped imports, in appropriate circumstances, would deprive Article 3 of the Anti-Dumping Agreement its proper application and result in investigating authorities being unable to accurately determine whether a domestic industry had been injured, or threatened with injury.

VI. CONCLUSION

17. For these reasons, Canada respectfully submits that, in appropriate circumstances, the drawing of adverse inferences in dealing with "facts available" and the ability of investigating authorities to focus on the merchant market in injury investigations, are both fully consistent with the Anti-Dumping Agreement.

Use of adverse facts available

In Chile's view, both the legislation and the practice of the United States with respect to the use of adverse facts available fall within the terms of reference of the Panel.

A first issue requiring clarification is whether or not there was any cooperation on the part of the respondent exporting enterprises, and more specifically, whether in this specific case there could truly have been cooperation, given the particular circumstance that there were two related enterprises which were opposed to each other (petitioner and respondent).

Irrespective of a company's percentage share in, or level of control over another company (Kawasaki had a 50 per cent stake in the affiliate), if one is the petitioner and the other is the respondent, there is a clear conflict of interest, and just because one company controls the other does not mean it can require it to supply information. As a matter of principle, companies with a conflict of interests can hardly be expected to cooperate. Thus, one cannot, in an investigation, accuse the respondent enterprise of failing to cooperate.

The analysis memorandum submitted by the United States as exhibit US/B-22 recognizes the conflict of interest between the two related companies (Kawasaki Steel Corporation and California Steel Industries), and points out that the way to avoid a conflict of interest between petitioners and respondents that are related would be for the related producer not to join the petition. However, in the case at issue this was not possible. The situation already existed, and the conflict of interest was no longer avoidable. Nor does it seem appropriate that the DOC should prescribe, as the only viable

Determination of critical circumstances

Regardless of the fact that the early determination of special circumstances by the DOC may not have affected Japan's exports, a view which Chile does not share since any determination, including an initiation determination, negatively affects exports, what is important is to determine whether the DOC properly considered the existence of dumping causing injury to the domestic industry, in conformity with the WTO. In this connection, we continue to believe that the DOC did not have sufficient evidence under Article 10.6 and 10.7 of the Anti-Dumping Agreement. The information from the petitioner or from press clippings does not, in our view, meet the standards established by the Agreement for reaching a conclusion that there was damage caused by dumping, since such information can hardly be considered as "positive evidence" or as representing an "objective examination" under Article 3.1 of the Anti-Dumping Agreement.

ANNEX D-7

Oral Statement of the European Communities as a Third Party

(23 August 2000)

1. On behalf of the EC, let me express first our appreciation for the opportunity to submit our views in this dispute.

2. In our Oral Statement, we will address four issues of legal interpretation raised by this dispute which, for systemic reasons, are of particular interest to the EC:

- first, the use of "adverse" inferences in applying the "facts available" provisions of Article 6.8 and Annex II;
- second, the consistency with Article 9.4 of the US practice to include only those dumping margins which are "entirely" based on "facts available" when calculating the dumping margin for non-investigated exporters;
- third, the consistency with Article 2 of the "99.5 per cent test" applied by the US authorities in order to determine whether domestic sales between related parties are "in the ordinary course of trade"; and
- finally, the treatment of "captive production" in injury determinations.

A. Choice of "facts available"

3. Japan contends that, when resorting to "facts available" in accordance with Article 6.8, the investigative authorities may not draw "adverse inferences".[1] According to Japan, "facts available" may be used only as "neutral gap fillers".[2]

4. The EC disagrees. Japan's contention has no basis on the Anti-dumping Agreement and, if upheld, would encourage systematic non-cooperation and, ultimately, render impossible the conduct of anti-dumping investigations.

5. Usually, when resorting to Article 6.8, investigative authorities are required to make a choice between different sets of "facts available". In doing so, they have a large measure of discretion. Of course, the facts must be pertinent and, to the extent possible, verified.[3] There is, however, no requirement in the Anti-dumping Agreement to the effect that the investigative authorities must choose always "facts available" which yield a "neutral" result, let alone those facts which lead to the lowest dumping margin.

6. To the contrary, Paragraph 7 of Annex II contemplates expressly that the use of "facts available" may lead to "a less favourable result". Furthermore, as demonstrated by the detailed

[1] Japan's First Written Submission, para. 57.
[2] Ibid., para. 58.
[3] Cf. Annex II, paragraph 7, second sentence.

textual analysis of Annex II made in the US submission[4], many of the other provisions in that Annex are premised on the notion that "facts available" may be "adverse" to the party concerned.

7. When selecting "facts available" the investigative authorities may take into account, among other circumstances, the degree of cooperation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive".[5] Indeed, strictly speaking, they are not even "adverse". They are just logical inferences, based on the assumed rationality of the exporter's behaviour: a rational exporter would cooperate, if it could expect to obtain a better result by doing so than on the basis of "facts available".

B. Use of dumping margins based "partially" on facts available in the "all- others" rate

8. Article 9.4 prohibits the use of any dumping margin "established under the circumstances referred to in paragraph 8 of Article 6", whether "entirely" or "partially". Thus, the EC agrees with Japan that, by excluding from the "all-others rate" only those dumping margins which are based "entirely" on facts available, US law is inconsistent with Article 9.4.

9. The US attempts to justify its practice by arguing that facts available "plugs" with a negligible impact on the dumping margin are used in many investigations.[6] The US definition of what constitutes a margin "partially" based on facts available, however, is by no means confined to such cases. The measures at issue show that the US authorities do not hesitate to include in the "all-others rate" margins which are based to a significant extent on facts available. Indeed, it seems that, under US law, a dumping margin which was 99 per cent based on facts available would still have to be included in the "all-others rate". In the EC's view, that would be clearly prohibited by Article 9.4.

10. The EC would agree, nevertheless, that Article 9.4 does not require to disregard the dumping margin in every instance where facts available have been used. Such a formalistic interpretation of Article 9.4 would often lead to a situation where no margins can be used in order to calculate the "all-others rate" in accordance with the method set out in that provision That result would be detrimental to the non-investigated exporters and contrary to the objective sought by Article 9.4.

11. The purpose of excluding the margins based on facts available is to avoid that non-investigated exporters may be affected adversely by the lack of cooperation of those exporters which have been given the opportunity to be investigated. That rationale, however, does not apply in those cases where, to borrow US terminology, the investigative authority limits itself to use a non-adverse "plug" in order to fill a gap in the information provided by a cooperative exporter. The EC, therefore, considers that Article 9.4, when read in light of its object and purpose, does not prevent the inclusion in the "all-others rate" of margins based on facts available, where resort to such facts is limited and no adverse inferences have been drawn.

12. While the EC is of the view that US law is inconsistent with Article 9.4, it concurs with the US that in Article 9.4 the term "margin" refers to each exporter's overall dumping margin, and not to the margins for individual transactions, models or sales channels.[7] Therefore, Japan's claim that the US authorities should have excluded from the "all-others rate" only those "portions" of each

[4] US First Written Submission, paras. 60-68.
[5] Japan's First Written Submission, paras. 58-59.
[6] US First Written Submission, para. 200.
[7] US First Written Submission, para. 191.

exporter's margin based on facts available[8] is clearly unfounded and should be rejected by the Panel. As argued by the US, that piecemeal approach would be unworkable and open to manipulation.[9]

C. The "99.5 per cent" test

13. Japan does not seem to dispute that sales between related parties may be disregarded as not being "in the ordinary course of trade" where they are not made at arm's length. Instead, Japan's complaint is directed against the "99.5 per cent" test applied by the US authorities in order to determine whether sales are at arm's length

14. In contrast, Korea has pu

relationship.[14] But a mere 0.5 percentage point average price differential is simply too small to reach any definitive conclusion. The EC considers that it is unreasonable, and contrary to Article 2.1, for the US authorities to treat in all instances such a small differential as irrefutable evidence that sales are not made in the ordinary course of trade. This does not rule out the possibility, however, that in the case at hand the price differentials between related and unrelated customers may be large enough to justify the conclusion that sales to unrelated customers were not "in the ordinary course of trade" .

D. Treatment of Captive Production

22. We will conclude our Oral Statement by addressing briefly Japan's claim against the captive production provision in US law. In answering this claim, the US has provided a description of the EC practice.[15] That description is not entirely accurate. The EC, therefore, would request the Panel to

ANNEX D-8

Oral Statement of Korea as a Third Party

(23 August 2000)

On behalf of the Republic of Korea, I would like to thank the panel for this opportunity to make an oral statement. As a third party to this case, we would like to briefly address certain issues before the panel, which supplements the written submission made by Korea on 31 July 2000.

(Fair Comparison)

We would like to begin by drawing the panel's attention to the issue of the fair comparison requirement in the Anti-Dumping Agreement. As a preliminary matter, Korea wishes to respond to a point made by the EC in its oral statement at the first substantive meeting. EC referred to Korea's written submission and argued that the first sentence of Article 2.4 does not impose a general fairness requirement, since that sentence applies only with respect to the comparison between the export price and the normal value. Korea is of the view that fairness is a general principle of law, and the first sentence of Article 2.4 is a reflection of such a general principle. In this connection, Japan argued in its first written submission that administering authority should implement the Anti-Dumping Agreement in good faith, which is again a general principle of law as embodied in Article X.3 of the GATT of 1994.

Thus, Korea believes that fair comparison is an overarching, free-standing obligation which must be met and which governs all aspects of the determination of dumping. Article 2.4 of the Anti-Dumping Agreement states that "a fair comparison shall be made between the export price and the normal value." The requirement is unconditional, not limited to certain circumstances, and is fundamental to the Anti-Dumping Agreement. Any methodology for anti-dumping calculations and comparisons must respect this fundamental principle which has been set out as an independent, free-standing requirement of the Anti-Dumping Agreement. The question is whether the methodology employed by the US meets this test of "fairness".

Unfortunately, the US actions in this case did not meet the "fairness" requirement in many important instances on top of the fact that they were inconsistent with various articles in the Anti-Dumping Agreement, including Articles 2, 6 and 9 as well as Annex II. Korea wishes to elaborate this point through several specific examples.

First, the Commerce Department applied "facts available" against certain US sales made by Kawasaki Steel Company ("KSC") even though the information which was allegedly not provided to the Commerce Department could not be obtained by KSC because it related to transactions with CSI, one of the petitioners.

Let's be perfectly clear here -- it was CSI which withheld the necessary information. CSI's interests as a petitioner were antithetical to the interests of KSC, as CSI made clear by bringing and pursuing the petition and refusing to cooperate with KSC and the Commerce Department. KSC, on its part, made repeated efforts to obtain the necessary information. All these efforts were well

documented and reported to the Commerce Department. Given the situation, it was not "fair" to penalize KSC, while it was CSI which withheld the necessary information.

In this context, Korea wishes to refer to a point made by both Canada and the EC through their oral statements. Canada and the EC argued that Japan is wrong in interpreting Article 6.8 that the investigative authorities may not draw adverse inferences. Korea wishes to put aside for a moment the question of interpretation of Article 6.8. The more immediate question is the factual circumstance in which the DOC applied 'facts available' rule to the KSC's sales to the CSI. It was CSI, and not KSC, that withheld necessary information. Given such a factual circumstance, it was not fair to impose punitive dumping margin on KSC. This point is not affected by any difference in interpretation of Article 6.8. Korea wishes to make the same point for the following example as well, which is DOC's application of 'facts available' rule to the conversion factor.

The Commerce Department also applied adverse "facts available" to certain transactions by NKK Corporation and Nippon Steel Corporation on the ground that information on a minor adjustment factor was not provided. That minor deficiency, which was later corrected in time, was the basis for applying a very high margin from another sale by these companies to the sales with the alleged deficiency. The Commerce Department is very clear about the reason that it selected this margin. It had nothing to do with the comparability of these sales nor with any other efforts to assure a "fair comparison." The Commerce Department selected that margin to obtain a punitive result.

The Commerce Department's actions were particularly unfair in view of the fact that both NKK and NSC submitted necessary information on the conversion factor after the Commerce Department's preliminary decision but well within the specified period before verification. The Commerce Department simply refused to verify the additional information. Instead, it imposed punitive margins on relevant sales by NKK and NSC by unfairly applying "facts available". Given the situation, it was not fair to penalize NKK and NSC irrespective of their best efforts.

Furthermore, the US "arm's-length test," which it used for sales to affiliated parties, is fundamentally unfair. It is biased , because it includes only higher priced sales in the domestic market. According to the particular methodology employed by the US, the Commerce Department includes only the sales to an affiliated party if their weighted-average price is equal to 99.5 per cent or greater than the weighted-average price of sales to non-affiliated customers. The gap between the minimum price included and the weighted-average price of sales to non-affiliated customers is only 0.5 per cent. This level is below the *de minimis* level established to determine whether dumping is occurring. On the other hand, there is no maximum price over which transactions would not be included in the calculation of margin. This means that only higher priced sales, which are more likely to result in dumping margins, are included for comparison purposes. Thus, the US arm's-length test is arbitrary, biased and cannot be sustained as a "fair comparison".

(New US policy on critical circumstances)

Apart from Korea's general concern about "fairness" as a fundamental element of anti-dumping measures, there is one methodology employed by the US about which Korea is particularly concerned. That is with respect to the US decision on critical circumstances. The US improperly based a critical circumstances finding in this case on a mere threat of injury finding despite the fact that present injury is required by Article 10.

The Anti-Dumping Agreement provides for very limited circumstances under which duties can be applied retroactively. Article 10.2 and Article 10.6 provide those limited circumstances. In the case of Article 10.2, duties can be applied only back to the provisional duty period if a present injury determination has been made. In case of determination of threat to injury, duty can be imposed only from the date of the threat of injury as provided in Article 10.4. Article 10.6 allows the duties to

be applied during the provisional period **and** 90 days prior to that period in certain limited circumstances as defined in Article 10.6. In other words, the Article 10.6 remedy is additional to the provisional remedy as defined in Article 10.2. Thus, Article 10.2 and Article 10.6 must be read together in context to require that there must be an affirmative determination of actual present injury in order to make a critical circumstances finding.

The plain language of Article 10.6 also leads to such an interpretation. The only way for an importer to "know" that dumping is occurring and that it would cause injury is for injury to actually exist. This is not only what Korea believes but also used to be the view of the ITC of the US as well. Furthermore, the requirement for present injury is the only interpretation which comports with the limited object and purpose of additional retroactive duties as defined by Article 10.6 -- *i.e.*, to assure that the remedial effect of the final dumping duty is not undermined. When there is only a threat of injury, there is no question that final dumping duties alone will suffice to provide a remedial effect to prevent injury. The need for additional remedy as defined in Article 10.6 arises only in a present injury context when the final duties may be too late to serve their full remedial purpose.

From the above, it is clear that the Commerce Department issued critical circumstances determination in gross violation of the Anti-Dumping Agreement. The Commerce Department determination was also at variance with the International Trade Commission's decision, which found only threat of injury in the instant case. Furthermore, Commerce's action had the very real and intended effect of chilling trade, as was well described in the first submission of Japan.

The US Government recently announced, as part of its Steel Action Plan, that it intends to continue its new critical circumstances policy -- at least insofar as steel cases are concerned. Such a policy, if not properly sanctioned, would have a serious chilling effect upon the proper functioning of the rule-based multilateral trading system. The purpose of the Anti-Dumping Agreement is not to halt trade -- it is to investigate whether trade in question has been fair or not. For this reason, the problems raised by the critical circumstances decision of the US should be fully addressed by this Panel.

Thank you.

ANNEX D-9

Opening Statement of Japan at the Second Meeting of the Panel

(27 September 2000)

INTRODUCTION

61. The right to impose anti-dumping measures is limited and does not allow a Member to run roughshod over its international obligations. The United States asks the Panel to convert the A-D Agreement from a set of international rules restricting imposition of anti-dumping measures into a weapon with which Authorities can penalize respondents. But, the Agreement is not a weapon to be wielded by Members. Rather, it is a carefully worded set of restrictions aimed at curbing domestic law abuses to the international trade system.

62. Here, the Panel first must ask whether the United States has respected the restrictions set forth in the treaty text. Second, the Panel must ask whether the United States has respected its obligation to interpret the treaty text in good faith. Analyzed appropriately, it is clear to us that United States has not respected its obligations.

I. SPECIFIC ANTI-DUMPING AGREEMENT CLAIMS

A. USDOC

1. Facts Available

63. Japan's claims against USDOC's use of adverse facts available involve not only the general practice itself, but also the manner in which that practice was applied in this case.

(a) USDOC Practice

64. I would like to clarify our position on the use of facts available. We have not asserted, as the United States claims, that the application of facts available can never turn out to be less favourable. Our claim is nothing more and nothing less than what a careful reading of Article 6.8, together with Annex II, yields.

65. What we have said is that facts available must be logical and reasonable. The most logical or reasonable facts available, in certain instances, may turn out to be adverse to a respondent. But, it is critically important to understand that Paragraph 7 of Annex II does not give the United States a license to punish. The goal of Paragraph 7 of Annex II is to find information that most closely approximates the truth to calculate the most accurate dumping margin given the information available. The many other detailed provisions in Annex II confirm this objective.

66. The United States tries to make its policy sound benign by suggesting that the adverse inferences they draw are always reasonable. Wishing to hide from the Panel the punitive nature of a policy whose stated purpose is to "provide an incentive to cooperate," the United States argues that it is always logical to speculate that any missing information is adverse to the respondent. We disagree.

The US practice has no textual basis and must stop. The United States improperly interprets Article 6.8 and Annex II, particularly Paragraph 7 of Annex II, to allow an authority to create incentives—quite strong incentives, in fact—to force a respondent to do exactly what the authority tells it to do, just like a bad boss commanding a faithful secretary. But, Paragraph 7 significantly restricts an authority's use of secondary data. Although the third sentence of Paragraph 7, in and of itself, may result in an incentive, it does not permit an authority to create its own incentives to force a respondent to comply with its instructions.

67. The Agreement contemplates that an authority will tailor its choice of facts available to the specific circumstances surrounding the missing information. USDOC makes no effort whatsoever to do this. Instead, USDOC purposefully homes in on an extremely high margin as the gap filler; the United States admits that USDOC does so to give respondents an incentive to cooperate.

68. In addition, Paragraph 7 does not permit an authority to punish a respondent with adverse facts available even to achieve a goal that is not related to the investigation. The US has confessed that it punished KSC, NSC and NKK with adverse facts available to create an incentive for future respondents to comply with US demands. Japan recognizes the difficulties faced by authorities in administering anti-dumping investigations, but Article 6.8 and Annex II do not permit the United States to sacrifice accurate margins, a basic goal of the A-D Agreement, by ignoring record evidence and drawing unreasonable inferences merely to send a warning to future respondents. In short, the US interpretation is impermissible; it is not supported by the text, object and context of the A-D Agreement.

(b) KSC

69. KSC's experience is a classic example of a facts available policy gone bad. First, USDOC did not demonstrate that the data it requested was necessary, as required by Article 6.8. CSI's resale data would have been necessary only if USDOC used constructed export price. But Article 2.3 does not require authorities to construct an export price; it only allows them to do so if the export price is "unreliable because of association or a compensatory arrangement." USDOC did not check the reliability of this sales data -- which is demonstrated by the fact that USDOC was unaware that KSC had provided the KSC-to-CSI sales data with its Section A response.

70. Second, USDOC did not establish that KSC withheld the requested data. USDOC ignored the fact that the company whose information USDOC demanded was a petitioner. As we explained in our second submission, USDOC has taken such peculiar facts into consideration in previous cases, but chose not to do so here. USDOC blindly treated KSC and CSI as a single company -- despite the two companies' obvious conflict of interest given that one was suing the other under the US anti-dumping law. The decision to apply an adverse inference is all the more inappropriate, as USDOC did not provide assistance to KSC in spite of the requirement of Article 6.13.

71. Third, even if USDOC had provided the requested guidance and still ultimately deemed KSC's situation to require the use of facts available, the selection of the second-highest dumping margin was neither reasonable nor logical. Such an adverse inference would assume that KSC was aware that CSI's resales would have led to a dumping margin as high as the one used by USDOC. This was clearly not the case, because KSC lacked access to CSI's data.

(c) NSC and NKK

72. USDOC's approach to NSC and NKK is just as troubling. First, it was clearly unnecessary to use facts available, because the data requested had already been provided for USDOC to verify. Second, the mistakes by the companies were unintentional. They did not malevolently withhold

disadvantageous data as the United States suggests. Rather, USDOC did not satisfy the Article 6.13 requirement to provide assistance.

73. Third, the selection of facts available was neither reasonable nor logical. The only interest for USDOC was to select a margin "that is sufficiently adverse so as to effectuate the statutory purposes of the facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner". In spite of the requirement of special circumspection stipulated in Paragraph 7 of Annex II, USDOC demonstrated no concern for using an estimate as close to reality as possible.

74. It is true that USDOC also mentioned in its final determination that it sought a margin "that is indicative of NSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied." But this case shows how meaningless and hollow this standard formula is. In this case, USDOC had only to look at the data submitted by the companies to get the real dumping margin.

75. Indeed, NSC and NKK's situation is perhaps the best example of how USDOC's approach to adverse facts available is punitive. Even though USDOC had the companies' information, it chose to expunge it from the record and apply a rate that had no relevance to the transactions for which facts available were deemed necessary. USDOC did not apply an inference here, adverse or otherwise: when USDOC chose a margin or price that was as adverse as possible for NSC and NKK, it was not making an inference based on the companies' alleged non-cooperation, but rather punishing the companies for not turning over the information sooner.

76. At the very least, in order to be consistent with its WTO obligations, the United States must distinguish between respondents who are truly recalcitrant and those who merely make a mistake but fix it in time for verification (like NSC and NKK), or who try very hard but still cannot provide the information (like KSC). The arbitrary application of adverse facts available in cases such as these must not be permitted.

2. All Others Rate

77. With respect to the all others rate, Article 9.4 prohibits their calculation based on margins tainted with facts available. Nothing in the provision suggests that this prohibition is limited to margins based on total facts available. The United States has failed to even respond to the fact that its proposal to so limit the provision was rejected during Uruguay Round negotiations. It also fails to explain why there should be any difference between a margin based entirely on facts available versus one based 90 per cent on facts available. Either way, the same policy considerations inherent in Article 9.4 apply: non-investigated exporters should not be affected by the behaviour of investigated companies during the course of an investigation.

78. The Panel should take note of the new argument on this issue set forth in the US Second Submission. They claim that because Article 9.4 is ambiguous, then multiple interpretations must apply. But, it is not for the United States to decide whether the Article is ambiguous. Further, it cannot be accepted that a proposal specifically rejected during negotiations is a permissible interpretation, simply because the Member that made the rejected proposal claims that the resulting provision is ambiguous. The European Commission agrees with Japan that the US law is inconsistent with Article 9.4. The United States is clearly taking its permissive interpretations theory too far.

3. Affiliated Sales In The Home Market

79. Japan has not argued that sales to affiliates can never be found to be outside the ordinary course of trade. Rather, Japan has argued that Article 2 of the Agreement does not permit the manner

in which the United States decides that such sales are outside the ordinary course of trade. Japan has further argued that the Agreement does not permit the replacement of such sales with an affiliates' resales.

80. In its second submission, the United States attempts to portray its 99.5 per cent test as benign. It says that the test must be fair because when sales to an affiliated customer fail the test, all of those sales are disregarded, not merely the low-priced ones. What the United States fails to mention is that the sales that pass the test are, on average, higher than the sales to all other customers. No effort is made by USDOC to discern whether these higher-priced sales are unreliable because of the

- Article 10.6 also requires a finding of injury. USITC had preliminarily found that imports posed only a threat of injury. Japan has explained in its written submissions that the concept of injury under Article 10 is limited to current injury -- not threat of injury, not material retardation.

- Article 10.6 requires a finding that importers knew or should have known that the domestic industry would be injured by the increase in imports. Ignoring again the threat determination made by USITC, USDOC relied on vague press articles accompanying the petition. Vague articles cited in a petition do not constitute sufficient evidence of importer knowledge of injury. The few additional press articles found independently by USDOC were no more specific: none of them mentioned either Japan or hot-rolled steel specifically.

84. According to the United States, what petitioners say is inherently reliable -- unless and until respondents can prove otherwise. In the United States, respondents are guilty until proven innocent. The United States fails to recognize that the AD Agreement exists precisely to curb such abuses. This is why Article 10.6 requires that findings of dumping and injury already be made; this is also why all other findings made under Article 10.6 must be supported by sufficient evidence, not merely biased petition information.

85. The United States wants the Panel to conclude that, because retroactive duties were never actually collected in this case, the issue is moot. In other words, USDOC should be permitted to continue to make e mu raefly to curb such abuseseun drcumstaseds ion. Vague aceFh.75 TD -0.190ia 0 Tc -0

96. Nor does the extensive discussion of the 1997 to 1998 decline in operating profits somehow remedy this glaring omission. In 1997, even after imports increased, the domestic industry made more money than in 1996. Remarkably, in 1998 this fact remained true -- even after another increase in imports, the domestic industry was still making more money than it did in 1996. USITC never addressed why consistent increases in operating profits justified a finding of material injury caused by imports.

97. This basic omission was compounded by USITC's inadequate consideration of alternative causes of any declines being experienced by the domestic industry. Having decided to make imports the scapegoat, USITC quickly brushed aside the alternative causes raised by respondents.

98. Under the Tokyo Round Antidumping Code, such casual treatment might have been permitted. But the A-D Agreement added new language that imposed higher obligations on authorities. The United States wants to overlook this new language, and thus clings to the old Atlantic Salmon panel report. But the new language in the AD Agreement plugs precisely the gap in the old treaty text identified by the Atlantic Salmon panel.

99. Moreover, the Wheat Gluten panel has already clarified what it viewed the language "not be attributed" as requiring. The United States tries to brush aside Wheat Gluten as a safeguards decision, but this key phrase is the same in both the anti-dumping and safeguards agreements. "Not be attributed" must be given meaning, and USITC did not do so in this case. Having found that each of these alternative causes did not entirely explain the problems, USITC then just assumed without serious analysis that imports must be the real problem. The AD Agreement requires more.

II. GATT ARTICLE X:3

100. The United States studiously has avoided responding to Japan's claim under Article X of GATT 1994. Thus, under established WTO rules, because Japan has made a prima facie demonstration of a US violation and the US has failed to respond adequately, the Panel should find in Japan's favour on this claim.

101. Article X:3 sets standards for the administration of domestic laws. Even when a domestic law is consistent with the A-D Agreement, an authority violates Article X:3 where, as here, it fails to administer the law in a uniform, impartial, or reasonable manner. As Japan has clarified, Japan's Article X:3 claims are independent of it's a-D Agreement claims and should be reviewed under Article 11 of the DSU.

102. The US answer to Panel Question 44 confirms Japan's claim. For example, the United States told the Panel: "No information was submitted to and accepted by the USITC after applicable deadlines in the investigation." However, the date the United States provides as the applicable deadline is the day the USITC closed the administrative record. The deadline for questionnaire responses was much earlier. The US answer, therefore, apart from being wrong, highlights the discriminatory manner in which the United States treats foreign versus domestic producers:

- For domestic producers, the deadline the US imposes is the closing of the administrative record.

- In contrast, for foreign producers, the day the administrative record closes is irrelevant. When NKK and NSC supplied data well before the closing of the factual record and in time for USDOC to verify and use it, USDOC nonetheless applied punitive adverse facts available.

103. In short, the US required respondents, but not petitioners, to meet questionnaire response deadlines. This is a clear example of non-uniform, partial and unreasonable action being taken by an authority. It is precisely the kind of bias in the administration of domestic law that Article X:3 prohibits.

104. USDOC's failure to correct the error made in calculating NKK's preliminary dumping margin is another violation of Article X:3. USDOC failed to follow its own regulation for making corrections, thus subjecting NKK's shipments to inflated provisional measures upon which USDOC wrongly justified continuing critical circumstances. In responding to Japan's Question 30, the United States begs to be excused from this non-uniform application of a domestic law because

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115. To illustrate the defects of the USITC approach, we can find no better example than profits levels. The United States argues that it "examined" profit levels. First, the obligation at Article 3.4, is to "evaluate" the factors, not merely to examine them. Evaluating a factor means more than selecting favourable facts and ignoring unfavourable facts. At the outset of its investigation, the USITC decided that three years of data should be examined. Yet, once it collected the data, the USITC found that the data for 1997 and 1998 alone supported its desired conclusion, and that the data for 1996 could not logically be reconciled with its desired conclusion. So what did the USITC do? It simply ignored the data for 1996. Japan cannot imagine how any neutral decision maker could consider such selective consideration of facts to be "evaluation."

116. We note that the United States devoted more space to the captive production provision than any other single issue in its opening statement. The United States made this issue seem complicated because they had to do so. The US statute explicitly mandates an analytically impermissible approach. The statute forces the USITC to undertake an unbalanced and biased analysis that focuses primarily on one segment at the expense of others. The United States protests that other parts of the statute call for a WTO-consistent approach of considering the industry as a whole. But when one reads the US statute as a whole, the captive production provision trumps those other provisions. In normal cases, the statute might allow the proper approach. But in those cases where the special captive production provision applies, the flawed, unbalanced approach takes legal precedence and the USITC has no choice but to violate Articles 3 and 4.

117. I turn now to facts available. The US opening statement describes the US policy on facts available as benign and reasonable. But it is neither. The USDOC uses facts available as punishment – punishment to those companies involved in the current case—and as warning--to respondents in future cases--about the fate that awaits them.

118. Consider the three companies involved in this case. All three were punished. Why? KSC

ANNEX D-11

Opening Statement of the United States at the Second Meeting of the Panel

(27 September 2000)

5. I will now

sentence of Article 3.5, like footnote 5 in the prior Code, does not instruct an authority how to conduct the examination, but rather lists exemplary factors which may, but need not be, relevant.

12. Certainly, the documents underlying United States' implementation of the Agreement show that the United States, in agreeing to Article 3.5, reasonably understood it as adopting a requirement consistent with *Atlantic Salmon*. We attach as an exhibit the passage from the United States' Statement of Administrative Action that sets forth the United States' understanding.[2]

13. Finally, unlike the Safeguards Agreement, with which the *Wheat Gluten* panel was concerned, the Anti-Dumping Agreement provides that, when a provision admits of more than one interpretation, a panel is not to compel adoption of one of those interpretations. Article 17.6(ii) reflects that the negotiators of the Anti-Dumping Agreement knew that they were adopting provisions that did not in every case mandate one approach. Since the negotiators adopted language so close to that used in *Atlantic Salmon*, the United States must be regarded as choosing a permissible interpretation pursuant to Article 17.6(ii) when it construes Article 3.5 in accord with *Atlantic Salmon*.

14. The *Wheat Gluten* panel acknowledges that its requirement to determine what injury is due to imports alone might be impracticable, and explicitly declines to explain how its test might be met. This should have indicated to the *Wheat Gluten* panel that it was adopting an interpretation of the Safeguards Agreement that the negotiators of that Agreement could not have intended. Certainly the negotiators of the Anti-Dumping Agreement did not intend to impose such an impracticable test.

Examination of Relevant Factors and Evidence

15. As for Japan's argument that the USITC should have relied on certain data from 1996 to 1998, the USITC's determination reflects that it examined the relevant factors and evidence as required by the Agreement. Japan makes much of the fact that the USITC did not make an explicit finding stating that the industry's profits rose from 1996 to 1998, when the USITC relied on the decline in profits from 1997 to 1998. Japan, however, points to no requirement of the Agreement requiring such a finding. Article 3.4 requires the authority to conduct an "examination" of profits, but requires no particular finding. The USITC plainly examined profits. Article 3.5 requires an "examination of all relevant evidence", but does not state how that examination shall be reflected. Here, the USITC plainly examined the data from 1996 to 1998, since it explained why it rejected arguments that it should rely on a broader period than 1997 to 1998. Indeed, in doing so, it explained why, in the context of the economic conditions from 1996 to 1998, it did not regard 1997 as a banner year. There is no basis in the Agreement to find that the USITC was required to do more.

16. Japan argues -- concerning both the Anti-Dumping Agreement and Article X of the GATT -- that the USITC somehow impermissibly departed from a "rule" that it would rely on data over the entire period of its investigation. As our submissions demonstrate, there is no such rule. The USITC has in fact in numerous determinations -- reaching both affirmative and negative results -- relied on recent trends rather than on trends over the entire period. If it could not do so, the USITC would, when economic circumstances have changed over the period investigated, be forced to violate the requirement of Article 3.4 that it examine "all relevant es have cuE9635 T* -0.14s from 19965Ang late the

trends only after finding that the downward trends in the last year were an "anomaly due to unanticipated high volumes in 1997, followed by a corresponding drop in 1998."[4] The USITC's reasoning, therefore, depended on its findings concerning the relevant economic factors. Here, the USITC found the relevant economic factors differed from those in *Rubber Thread.* Here, the USITC found the rise in demand and consumption not to be an anomaly, but rather to represent a persistent development in the relevant factors having a bearing on the state of the industry.

The captive production provision and analysis of market segments

18. Both the US law concerning captive production and the USITC's determination in this case accord with the Agreement's requirement to make a determination as to injury to the producers as a whole of the domestic like product. Japan has moved in its second written submission far from its original position in its arguments about the consistency of the US captive production provision, in itself, with the Anti-Dumping Agreement. Although the United States does not agree with much of Japan's characterization of that provision, even under Japan's portrayal of it, Japan cannot establish that the US statute violates the requirement that Members assure that their laws conform with their obligations under the Agreement.

19. In its first written submission, Japan stated that it was improper to consider, either primarily or secondarily, data for the merchant market sector.[5] Japan has now abandoned this position. Japan now acknowledges that "an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the Anti-Dumping Agreement."[6] Japan likewise agrees that the merchant market sector is the sector in which competition between the domestic industry and dumped imports is most direct.[7]

20. Similarly, Japan's First Written Submission stated that under the captive production provision "the USITC now *must* ignore the shielding effect of captive production," and the provision "makes it *impossible* for USITC to consider all relevant evidence (coe "makes ment torpdf -0.16.75 Tf 0.375 Tc (6)

application of such legislation ... could be challenged."[10] Japan is wrong in claiming that this established principle is no longer applicable or only relevant when a statute has not been applied.[11] The Appellate Body in *US – 1916 Act* specifically denied that the panel there made such a finding.[12] Similarly, the panel in the *Section 301* dispute stressed that it was not overturning the jurisprudence on the mandatory/discretionary distinction.[13]

22. In fact, as the United States has indicated, its anti-dumping statute does require that the authority make its determination with respect to the industry as a whole, and the captive production provision does not alter this requirement. Many aspects of the statute support this conclusion. The statute requires the USITC to make its determination as to the industry, which it defines as producers as a whole of the domestic like product. The requirement to "focus primarily" on the merchant market for certain factors assumes that, even for those factors, the USITC's analysis will proceed further. Moreover, the Statement of Administrative Action makes clear that, when the USITC considers those factors to which the captive production provision applies, it may "focus" on other evidence in addition to the merchant market sector. Likewise, the statute requires the USITC to consider other factors to which the provision does not apply. Further, the statute requires the USITC

26. The sources concerning United States law that Japan cites, support, rather than conflict with, the United States' position here. As the US Supreme Court stated in the *Watt* case that Japan cites, "repeals by implication are not favoured ... The intention of the legislature to repeal must be 'clear and manifest.'"[16]

necessarily reflected the impact on the industry as a whole of trends in the sector as to which the authority did not make separate findings.

31. The USITC here further made specific findings demonstrating the consequences for the industry as a whole of developments in the merchant market sector. For example, the USITC found that most performance indicators for the US industry as a whole declined because the US industry was prevented from participating in the growth of demand and consumption. The USITC found that the growth of the dumped imports' share of the merchant market sector at the expense of the domestic industry's share caused the US industry not to participate in the growth in demand. It also found that, as a result, capacity that the US industry brought on line to meet the growth in demand immediately became excess capacity.[22] Moreover, the USITC found that the decline in the industry's operating income at the end of the investigation coincided with the decline in its capacity utilization rates.[23] Through these and other findings, the USITC demonstrated the causal relationship between the effects of dumped imports on the industry's merchant market performance and injury to the industry as a whole.

32. In sum, the USITC's findings amply satisfy the standard that Japan has espoused. Japan itself quotes and approves prior panel authority stating that an analysis of the sector most exposed to import competition can sustain an injury determination if an authority *either* analyses all other sectors *or* demonstrates the relationship between events in the one segment and the industry as a whole.[24] Japan's contention that the USITC's determination was flawed unless it made specific findings concerning developments in the captive production sector has no basis in prior decisions or in the Agreement.

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necessary and reasonable by the non-cooperation of the responding parties. In addition, Japan has yet to explain why its own authorities applied exactly this rationale in Japan's anti-dumping investigation of cotton yarn from Pakistan.

36. Second, Japan claims that, because the Japanese respondents were generally cooperative, this licensed them to refuse to cooperate with regard to certain selected categories of information. (Japan's 2d Sub., ¶ 24.) This position finds no support in the Agreement. It would amount to a 70 per cent or 80 per cent cooperation rule, under which respondents would have to cooperate only up to the threshold of "general cooperation," after which they would be free to withhold information. This would license respondents to manipulate the results of anti-dumping investigations by withholding selected categories of adverse information.

37. With regard to the **application of facts available to KSC**, Japan now tries to rationalize KSC's refusal to exercise its powers, as a fifty per cent owner of CSI, to obtain the necessary information by itemizing the ways in which KSC, CVRD, and CSI regularly ignored the CSI shareholders' agreement (Japan's second submission at ¶ 47). But the fact that KSC regularly ignored the shareholders' agreement does not prove that it had no power under that agreement - - only that KSC did not always choose to exercise that power. As the minutes of the CSI board meetings make clear (Exh. US/B–23/bis), the parties to the joint venture repeatedly raised, discussed, and made decisions on business matters, as provided for in the agreement. In this light, the fact that KSC never even *discussed* with CVRD the need to provide the requested CSI data, and never *challenged* the actions of CSI's president and CEO (who served at the pleasure of the board members representing KSC and CVRD) is glaring. *(See* US 1st submission, ¶ 90).

38. Finally, Japan's belated claim that CSI was *unable* to supply the requested information is based on one sentence in one letter from CSI. This new claim is not supported by the weight of the record evidence. Indeed, KSC itself characterized this statement by CSI as a refusal, not an inability, to provide the requested information. (US 2nd submission, ¶ 18; Exh. JP-93(a) and (c)). Accordingly, Commerce properly found that KSC failed to cooperate in providing the requested CSI data.

39. As facts available for the sales through CSI, Commerce reasonably chose a dumping margin calculated by comparing KSC's own sales to unaffiliated US customers to its sales of that same product in Japan. This selection of a dumping margin based upon KSC's product-specific, verified data represents a reasonable choice of adverse facts available. Yielding to KSC's attempt to force Commerce into using its transfer prices to CSI as a "plug" for facts available would give every respondent *carte blanche* to shelter dumped sales through its overseas affiliates.

40. With regard to **Commerce's application of facts available to NSC and NKK**, the Department was simply exercising its clear right under the Agreement to enforce reasonable deadlines. Japan's curious theory that any firm limits on the time in which information must be submitted, even after repeated extensions, are inimical to a "reasonable" understanding of "timeliness" has no support in the Agreement. Similarly baseless is Japan's theory that untimely information must be accepted if it is otherwise in compliance with the requirements of the Agreement. Paragraph 3 of Annex II requires that parties meet *all four* of the basic criteria listed in that paragraph in order for their information to be considered. One of these four conditions is that the information be "supplied in a timely fashion."

41. The weight conversion factors untimely submitted by NSC and NKK were not, as Japan claims, "corrections" (Japan' s 2d Sub., ¶ 93). They were categories of information that NSC and NKK had repeatedly claimed were not necessary and were impossible to submit, *at all*. Therefore, Commerce's rejection of this new information was perfectly consistent with its acceptance of various corrections of previously-submitted data very late in the investigation (Japan's 2d Sub., ¶ 94, fn.91). Nor did NSC and NKK's protestations of "good faith" compel the acceptance of their conversion

47. Japan's arguments against the **use of downstream sales in the home market** are also invalid. Article 2.1 defines dumping as selling at less than "the *comparable price, in the ordinary course of trade*, for the like product when destined *for consumption in the exporting country*" (emphasis supplied). A sale through a related party to an independent purchaser in the home market is just such a sale - - a sale of the like product, in the ordinary course of trade, destined for consumption in the exporting country. Accordingly, such sales are an appropriate basis for normal value. Article 2.2 calls for authorities to base normal value on constructed value or third country prices only "[w]hen there are **no** sales of the like product in the ordinary course of trade in the domestic market of the exporting country." (emphasis supplied).

48. By challenging the Department's practice of using perfectly valid home market downstream sales to unaffiliated parties, Japan is seeking to require investigating authorities to use either the prices of sales to related parties in the home market, which could easily be manipulated, or sources other than prices in Japan. This is not speculative - - NKK, for example, sold 93 per cent of its merchandise through affiliated trading companies at the time of the investigation (64 Fed. Reg. at 24339). If the Department were precluded from using such sales, it would be forced to base normal value either on constructed value or Japan's sales to third countries.

49. Finally, the United States disagrees with Japan's claim that the use of downstream sales violates the fair comparison requirement because the Department's level of trade adjustment does not address differences in price comparability due to resellers' costs and profits. First, the United States notes that this Panel's terms of reference do not include any challenge to Commerce's practice with regard to level of trade adjustments, either generally or in this investigation. Thus, Japan cannot now raise this issue. In any event, when the Department compares export sales to downstream home 49ao5ne769 Tw (addre countries.) Tj 0 -25.525 Tw (FinsrBthe o Co to l vaducte) Tj 0 -1es in price cbetweartmenttv

dumping and consequent threat. The critical circumstances provisions were intended to address precisely such surges in dumped imports.

53. Finally, Japan suggests that the United States is asking the Panel to look only at decisions made at the *end* of the investigation. This is not true. We ask that the Panel look at *this preliminary* decision. You will find ample supporting evidence to satisfy the requirements of Articles 10.6 and 10.7. Indeed, it is curious that, to support its arguments, Japan continuously refers the Panel to the *final* dumping margins - not the preliminary margins. It is *Japan* that would like the Panel to focus upon the decisions made at the *end* of the investigation.

54. With respect to **Article X**, Japan's claims are curious. Although couching its argument in terms of "due process" and "fairness," Japan is really trying to have Article X override provisions of the Anti-Dumping Agreement. Japan's claim is not about due process, in the sense of the *Shrimp-Turtle* decision it cites. There is no denying that the US investigation was open and transparent and allowed full opportunities for the submission of facts, views, and rebuttals. Rather, this dispute is about specific decisions fully consistent with and authorized by the Anti-Dumping Agreement that Japan does not like, and hopes to attack collaterally through Article X:3. The Panel should not permit such a collateral attack.

55. The differences between the Commerce Department and the US International Trade Commission with respect to information gathering and facts available are attributable to the different functions of these two agencies, not to any partiality, lack of uniformity, or unreasonableness. Indeed, the Commission's approach applies equally to information from all parties before it, whether they be US or non-US parties.

56. In deciding to accelerate the investigation, Commerce was reacting to an unprecedented surge in imports which more than justified its modest acceleration of the investigation. Japan has failed utterly to show that the acceleration prejudiced any of the Japanese respondents. Agencies must have the flexibility to respond to such special circumstances. The same may be said of Commerce's recent policy on critical circumstances. "Fundamental fairness" does not require that Commerce adhere rigidly to past approaches in the face of an unprecedented import surge.

57. Thank you, Mr. Chairman and members of the Panel.

ANNEX D-12

Closing Statement of the United States at the Second Meeting of the Panel

(27 September 2000)

1. ***Mr. Toupin.*** Japan's contentions in this case as to injury are characterized by two trends. First, its legal theories have proved to be completely flexible.

2. In its first written submission, as to other factors causing injury, its claims concerned entirely whether the USITC's findings were sufficiently thorough, not whether the standard that the USITC stated in doing so was adequate. Beginning with its first oral statement, following the *Wheat Gluten* decision, Japan's argument now concerns entirely whether the USITC isolated injury due to imports and found that injury in itself material. The total absence of such a theory in Japan's original submission suggests that it, too, did not understand the Anti-Dumping Agreement as imposing such an analysis.

3. Similarly, in its original submission, Japan took the position that no analysis of segments was appropriate. Now, Japan has abandoned that position.

4. In brief, Japan has changed its position throughout this case, indicating that its positions here do not seek to vindicate a principled view of the Agreement. Rather, Japan evidently is prepared to take any position to seek to overturn the US action in this case. We are confident, however, that the Panel will not be misguided by Japan's opportunistic argumentation and will instead appreciate that it must base its decision on a principled interpretation of the provisions of the Agreement.

5. The second theme that underlies Japan's arguments is that the USITC did not make findings on issues on which the USITC did, in fact, make findings. The Panel should not be misguided by such arguments either.

6. Article 3, on which Japan relies, provides no specific form in which an examination should be reflected. Japan's real purpose on each point is not to establish that the USITC's determination violates any provision of the Agreement, but that the Panel should regard particular evidence as entitled to greater weight than the USITC gave it. Such is not the purpose of panel review under the standard of review.

7. We thank the Panel for its patience and attention to the detailed factual and legal arguments that have been made and look forward to the results of its deliberations.

8. ***Mr. McInerney.*** Japan has long opposed the application of any antidumping measures. Its announced position is that its producers should be able to dump in the US market and other foreign markets at will, with impunity.

9. In the Uruguay Round, Japan tried to obtain many changes to the Anti-Dumping Agreement which, collectively, would have made the application of antidumping measures impossible. But Japan did not succeed in this effort. The Uruguay Round Agreements made a number of important changes

in the Anti-Dumping Agreement, but these changes were not intended to, *and did not*, render the application of antidumping remedies impossible.

10. Japan is now pursuing a fall-back strategy - - of attempting to persuade dispute settlement panels to give Japan what it could not obtain from the Members through negotiation - - rendering the application of antidumping remedies impossible, by interpreting the Agreement as if the Members had agreed to that result.

11. In pursuit of this goal, Japan has made several claims before this Panel that strike at the heart of the process by which antidumping measures are implemented. The most prominent of these is Japan's wholesale attack on the facts available provisions, by proposing that an investigating authority may never make an adverse inference about information not submitted, even where that information has been deliberately withheld. Japan has admitted that this proposal is designed to strip Japanese respondents of any incentive to cooperate in antidumping investigations.

12. At this hearing, despite its position that the Agreement never permits an investigating authority to make an adverse inference, Japan has responded to a question from the panel by agreeing that an adverse inference could be reasonable in some circumstances. I don't know how an inference under the Agreement that can be reasonable in itself must nevertheless be based on an unreasonable interpretation of the Agreement.

13. As a fig leaf for this naked assault on the viability of antidumping remedies, Japan offers that, where a foreign producer has refused to supply an investigating authority with critical information, the investigating authority might, in attempting to reach a neutral result, use information that might coincidentally turn out to be adverse. The Panel is supposed to accept this absurd proposition as something to which the Members that actually employ antidumping remedies *conceivably* could have accepted in the Uruguay Round. The Members are alleged to have accepted that exporters would regard as a sufficient incentive to supply adverse information in an antidumping investigation the remote possibility that, in attempting to substitute purely neutral information for the missing data, an investigating authority might accidentally select some information that was unfavourable. This is just not credible.

14. But Japan has not "put all of its eggs in one basket," with respect to facts available. It has offered other arguments which are intended to look reasonable, when compared to its outright assault on the facts available rule. Such arguments should not be viewed in comparison to those that are more outrageous, but on their own merits. The seemingly small matter of NKK's weight conversion factor is a good example. This is a small adjustment that had a minuscule effect on NKK's margin. But by pressing this argument, along with the more outrageous claim, Japan hopes to carve some big holes in the facts available rules.

15. Japan has asked the Panel to rule that investigating authorities cannot enforce reasonable deadlines for the submission of information, and that non-cooperation confined to "small" matters must be excused. If the Panel goes along with this request, Japan will demand that these exceptions be applied to much larger quantities of information submitted late, or not at all, provided, of course, that the respondent companies have the sense to offer nominal cooperation.

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exporters would be in the enviable position of being able to make all of their export sales through related distributors, forcing investigating authorities to accept meaningless transfer prices as valid.

17. This strategy is complimented by a similar strategy on the home market side. Here Japan seeks to force investigating authorities to accept home market transfer prices or, in the alternative, skip over legitimate resales in the home market in favor of constructed value or third country prices. Put these two elements together, and Japan effectively could prevent investigating authorities from comparing a meaningful price in the export market to a meaningful price in Japan. Instead, exporters would be able to dictate which transactions must be used on both halves of the dumping equation. This would enable Japanese exporters to control the outcome of investigations, and therefore avoid the imposition of any antidumping remedies.

18. Now put it all together. Japan is trying to give to respondents control over what information must be submitted, when that information must be submitted, and how the entire dumping calculation must be set up. If Japan cannot obtain this all at once, it will try to get it in instalments from successive panels.

19. Japan should not be allowed either to demolish antidumping measures or to begin their piecemeal disassembly. Therefore, we trust that the Panel will consider each of Japan's arguments on its individual merits, and uphold each US practice that is based on a permissible interpretation of the language to which the Members agreed, as required by Article 17 of the Agreement.

20. Thank you for your careful attention to our arguments today and for your consideration in this proceeding.

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