ANNEX E

Questions and Answers

ANNEX E-1

Japan's Answers to Questions from the Panel

(6 September 2000)

Question 1: **What is Japan's view of "in conformity with appropriate domestic procedures" – if the US concluded that the evidence was not appropriately received under its procedures, on**

- **Exhibit JP-29(d)** contains the public redacted version of NSC's 23 February 1999 submission of the weight conversion factor and explanation of why the factor had not been submitted previously. This version was supplied after USDOC requested NSC to remove the weight conversion factor from the letter.

- **Exhibit JP-29(e)** contains the public redacted version of NSC's 2 March 1999 submission of backup data to its weight conversion factor. Again, this version was filed after USDOC demanded that NSC remove certain information from the letter, including the actual weight data used to derive the conversion factor.

- **Exhibit JP-45(g)** contains the public version of NKK's 23 February 1999 submission of the weight conversion factor, including an explanation of how the factor was calculated. Although this is the original version filed, before USDOC demanded exclusion of the conversion factor information, the public version of the submission does not contain the conversion factor that was ultimately excluded.

result *might* be less favourable due to an authority's application of facts available in this instance; it does not give license for an authority to purposefully punish a respondent for lack of cooperation. Rather, the authority must assess whether the facts available chosen are logical and reasonable within the requirements of Article 6.8 and Annex II, as explained in paragraph 15 above.

18. Importantly, in the hot-rolled steel investigation, USDOC did not face the situation where respondents were uncooperative and withheld information. Rather, in the case of NSC and NKK, the

USDOC official did not explain that a better estimate of the weight of the affected sales would suffice.[5]

22. Importantly, providing notice to the authority of a party's difficulties in supplying the requested information is all that is required under Article 6.13 to invoke an authority's responsibility to provide assistance. Article 6.13 places the burden on authorities to "take due account of any difficulties experienced by interested parties" and "provide any assistance practicable." These obligations are not dependent on a party's request for assistance. Each of the companies made it clear to USDOC that they were experiencing difficulties. It is USDOC that failed to respond.

23. Furthermore, with respect to NKK and NSC, both companies implicitly requested USDOC's assistance (*i.e.*, accommodation) in permitting it extra time to provide the requested factor. *See* **Exh. JP-29(d)-(e); JP-45(g)** (providing the requested conversion factors).

Question 6: Could Japan please clarify what, if any, it considers to be the difference between "adverse inferences" or use of "adverse facts available" and a "less favourable result" as referred to in Paragraph 7 of Annex II of the AD Agreement?

Answer

24. There is effectively no difference between the US nomenclature "adverse inferences" and use of "adverse facts available." "Adverse facts available" is simply a common short-hand expression for the application of facts available using inferences that are adverse to the affected party. According to the US statute, the authorities first determine that facts available are necessary. *See* 19 U.S.C. § 1677e(a) (**Exh. JP-4(k)**). Then, if a party "has failed to cooperate by not acting to the best of its ability," the authority "may use an adverse inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b) (**Exh. JP-4(k)**).

25. Read on their own, these words as set forth in the statute appear reasonable enough. As discussed in response to Question 4 above and Question 7 below, there may be instances when an authority must make inferences to respond to missing information. The words in the statute alone, however, do not fully explain what USDOC means when it makes adverse inferences. As explained in Japan's First Submission, the United States does not look for credible information; rather, it chooses facts "sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information." No effort at all is made by USDOC to discern whether its choice of facts available is logical or reasonable.

26. Therefore, there is a big difference between the manner in which the United States uses of the words "adverse inference" or "adverse facts available" and the words "less favourable" in Paragraph 7 of Annex II. As Japan explained in its First Submission, the last sentence of Paragraph 7 of Annex II mentions only the possibility of "less favourable" results, simply stating that failure to cooperate "*could* lead to a result which is less favourable to the party." (Emphasis added.) The United States reads this sentence as giving it carte blanche to use any facts available it chooses. But, nothing about this sentence removes an authority's obligation under the first and second sentences of Paragraph 7 to use special circumspection in choosing facts available. The facts chosen and inference based thereupon must be logical and reasonable given the circumstances, the result may turn out to be less favourable, but the facts themselves must be proper.

27. The difference, then, between "adverse inference" and a "less favourable result" is that the former -- at least the way in which the United States applies it -- authorizes punishment of a

[5] This issue is not relevant to NSC. The nature of the difficulty faced by NSC was a misunderstanding

cannot be the intention of Paragraph 7. Primary information is that which is specifically requested. Any other information – even other information supplied by the party – is secondary. To interpret Paragraph 7 otherwise would limit unduly the authority's obligation to use special circumspection in selecting facts available and to corroborate those facts.

31. Paragraph 7's use of the phrase "special circumspection" emphasizes the exceptional exercise of care authorities must observe in relying on secondary information. The purpose of using such a high level of care when relying on secondary information is to ensure that the information used is reliable and as close to reality as possible. The US interpretation of Paragraph 7 defeats this purpose by creating a huge loophole.

32. Moreover, this US interpretation actually undercuts the US argument. If secondary sources means only information not provided by the affected party, the entire paragraph is limited to instances in which the authority uses information from other sources as facts available.[7] Yet, the United States relies on the last sentence of Paragraph 7 to support its application of adverse facts available in this case. According to the United States, the reference to "less favourable" results implies that authorities can select facts that are adverse if a party is uncooperative. If Paragraph 7 does not apply to the use of information from the respondent, then the "less favourable" language does not apply and cannot be used to defend the use of adverse facts available. The United States cannot have it both ways.

Question 9: Japan states that the United States, when negotiating the AD Agreement, proposed language similar to its interpretation that only margins based "entirely" on facts available must be excluded from the calculation of the rate under Article 9.4. Could Japan please provide the relevant references, and copies of relevant documents, to support its contention.

Answer

33. Japan has located an official transmission from Japan's Mission in Geneva summarizing oral discussions held during a "Group of 8" meeting on 23 October 1991. A message sent on 5 November 1991 reports that the US negotiator argued for inserting the word "solely" after the word

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Question 10: **Assume, for purposes of argument, that the use of facts available was proper in this case. All three margins for investigated respondents were based, in part, on facts available. In such a situation, how does Japan suggest that a margin for uninvestigated producers should be calculated? If the response is that the margins of investigated producers should be recalculated to exclude the "portions" based on facts available, could Japan indicate what provision of the AD Agreement authorizes such recalculations?**

Answer

35.

that the imports in question be "dumped" effectively prevents the determination referred to in Article 10.7 from being made until a preliminary determination that dumping has in fact occurred.

39. Second, it is difficult to imagine how an authority could determine that "massive dumped imports of a product in a relatively short time … is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied," as required by Article 10.6(ii), before conducting any investigation itself.

40. The third reason relates to the sufficiency of the evidence of importer knowledge of dumping. It is logically impossible to find "sufficient evidence" for importer knowledge of dumping, because USDOC made this finding before any preliminary finding of dumping and even before the USDOC asked respondents to submit questionnaire responses. USDOC concluded that importers should have been aware that they were dealing in dumped merchandise solely because the petitioners *alleged* that dumping margins for NKK and NSC exceeded 25 per cent.[11] This alone cannot constitute sufficient evidence, because petitioners' alleged dumping margins are self-serving estimates made without the benefit of the respondent's internal sales data or any external analysis by the authorities. This deficiency in petitioners' data is demonstrated by the ultimate dumping determination with respect to NKK and NSC once their information was placed on the record and evaluated by USDOC. Ironically, USDOC then concluded that NKK and NSC -- the two companies whose estimated margins formed the basis of the "25 per cent test" -- specifically did *not* dump by margins exceeding 25 per cent.[12]

(Part 2) In paragraph 34 of its oral statement, Japan argued that "with low standards for <u>both</u> initiation <u>and</u> preliminary critical circumstances determinations, the authority can effectively block imports well before the truth comes out". Does Japan consider that the two standards are identical? Could Japan please explain in what respect, if any, "sufficient evidence" under Article 10.7 differs from "sufficient evidence" under Article 5.3?

<u>Answer</u>

41. Japan does not consider the two standards to be identical. "Sufficient evidence to justify the initiation of an investigation" under Article 5.3 must be a *lower* standard than "sufficient evidence that the conditions set forth in {Article 10.6 } are satisfied," as required by Article 10.7. It is well established that

> the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.[13]

Conversely, what might be sufficient to justify initiation of the investigation under the lower evidentiary standard is not sufficient to support a preliminary determination of critical circumstances. The USDOC, in this investigation, made its preliminary determination of critical circumstances based

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[11] *See* US First Submission, para. 269.

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

[13] Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, adopted 24 Feb. 2000, WT/DS132/R, at para. 7.94 (quoting Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico, 19 June 1998, WT/DS60/R, at para. 7.57 and citing United States—Measures Affecting Imports of Softwood Lumber From Canada, adopted 27-28 Oct. 1993, SCM/162, BISD 40S/358, at para. 332 ("Mexico—High Fructose Corn Syrup").

virtually all other verbs in Article 10 relevant to the factual predicate for what the United States terms "critical circumstances."

50. The United States also attempts to import Footnote 9 of Article 3 into Article 10, so that it can claim an affirmative finding of threat of injury is an affirmative finding of injury pursuant to which retroactive duties may be assessed.[17] As Japan established in its First Submission, Footnote 9 cannot apply to "injury" as that term is used in Article 10 generally, and Article 10.6 particularly. Article 10 consistently distinguishes between threat and injury, and Article 10.6 in particular speaks of injury in the present tense. The US position neglects the remedial purpose of critical circumstances. How can one retroactively redress that which was not yet occurred? This overall remedial purpose is confirmed by other provisions of Article 10. If the authority's final determination is that the US industry is threatened with material injury, then Article 10.4 requires the refund of provisional measures. The same concept applies to retroactive provisional measures when the preliminary injury determination is based only on the threat of material injury.

Question 15: In paragraph 29 of its oral statement, the US argues that "[T]he 700 pages of exhibits in the petition contain very substantial information on all of the relevant points". Would Japan admit that the exhibits in the petition contained information, in the sense of evidence, on all the points of relevance to a determination under Article 10.7 of the

dumped imports of (b) hot-rolled steel from (c) Japan as (d) injuring US mills during (e) the period in which USDOC concluded importers should have known this.

Question 16: In this case, the final injury determination was of current material injury. Therefore, and assuming the other conditions were satisfied, retroactive duties could have been imposed. However, it is argued that without an earlier action, taken under Article 10.7, to secure the potential for imposition of retroactive duties, collection of retroactive duties would, for many Members, be impossible. Does Japan recognize any difference between the decision under Article 10.7 to preserve the possibility of retroactive duties, and the decision to actually apply duties retroactively under Article 10.6?

Answer

55. Japan believes that the strict standards of consistency with the obligations of the AD Agreement must be met at each stage in the process, not just at the end of the process. A Member may act pursuant to Article 10.7 when it has met those requirements. Article 10.7 should not be read loosely early in an investigation in order to facilitate relief under Article 10.6 later in the investigation.

56. Moreover, this argument is particularly inappropriate in a US context. Under US practice,

respondent's stock), as well as sales to "unaffiliated" customers. Japan contends that USDOC should have used all these ordinary-course sales – including sales to companies that did not survive the 99.5 per cent test – in its calculation of normal value. Then there would be no need to reach the alternatives specified in Article 2.2; Article 2.1 would be sufficient.

58. The alternatives specified in Article 2.2 become relevant in only one situation: if USDOC concludes that there are *no* sales in the home market in the ordinary course of trade. Then, its only choices are to use third-country sales or constructed value. Japan does not argue that authorities must resort to third country sales or constructed value whenever *any* home market sales are found to be outside the ordinary course of trade.

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trends pertaining to volume, price and impact of the subject imports on the domestic industry over the entire period of investigation. In this case, however, the USITC focused its impact analysis on the final two years of the three-year period of investigation. The USITC unquestionably possessed information covering the entire period, identified market share and price trends over the entire period in its analysis of volume and price,[23] and even briefly cited market share and capacity utilization trends over the entire period at the beginning of its impact analysis.[24] Yet the USITC expressly refused to analyze the industry's performance between 1996 and 1998,[25] rejecting respondents' objection to its use of 1997 as the baseline of its analysis:

> {W}e disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which US consumption reached record levels, and the US industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry.[26]

Even accepting this justification, the USITC had an obligation under Articles 3.4 and 3.5 to analyze industry performance, and the impact of subject imports and alternative causes of injury, over the entire three year period. The USITC's determination that certain relevant factors -- including trends -- are less probative than others does not relieve it of the responsibility to make its analysis of such factors explicit in its determination. To the contrary, trends over the entire three year period of investigation were especially relevant as they conflicted with trends over the last two years of the period.

68. Just as the USITC was obligated to relate trends over the last two years of the period to trends over the entire period, it was also obligated to relate trends in the merchant market segment to trends for producers as a whole. In light of this overarching requirement, the Panel in *Mexico—High Fructose Corn Syrup* considered the manner in which authorities may analyze an industry segment as a relevant economic factor under Article 3.4. As a preliminary matter, the Panel expressly held:

> {W}hile an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from making the determination required by that Agreement — whether dumped imports injure of threaten injury to the domestic industry as a whole.[27]

The Panel further held that two Safeguards Panel reports, *Argentina—Footwear* and *Korea—Dairy*, were applicable to an authority's analysis of an industry segment in the antidumping context. Both Panel reports concluded that "the failure of the investigating authorities to either consider all sectors,

substantial captive production was shielded from import competition, or how direct import competition in the merchant market segment impacted the industry's captive segment. In this regard, the USITC essentially double-counted the impact of merchant market segment performance on producers as a whole: once directly, in merchant market segment data, and again indirectly, in overall industry data embodying the merchant market segment.

70. To fully appreciate the impact of the merchant market segment on producers as a whole, the USITC should have analyzed the merchant market *and* captive segments separately, and then considered how both related to the industry as a whole. Captive segment performance is no less of a relevant economic factor than merchant market segment performance.

Question 20: Could Japan please clarify its apparent view that a change in policy applicable to all subsequent cases demonstrates biased administration of the Member's laws, in violation of Article X of the GATT 1994? Is Japan of the view that the application of a longstanding and consistently applied policy in one case can demonstrate failure to impartially administer that policy? If so, could Japan please explain?

Answer

71. Contrary to the Panel's assumption, Japan is not arguing that a change in policy applicable to subsequent cases automatically demonstrates biased administration of the Member's laws in violation of Article X. It is not the change in practice or non-application of a longstanding policy *per se* that results in an Article X violation, but rather the manner in which those changes or decisions not to apply existing policies are made. In this case, the United States anti-dumping authority changed its policy or refused to carry out longstanding rules and practices in a non-transparent and biased manner in at least four ways.

72. The first way pertains to USDOC's unprecedented acceleration of the case. The acceleration prejudiced respondents by effectively shortening the amount of time they had to prepare for the initial questionnaire and by curtailing the authorities' time for analysis, thereby resulting in error-ridden determinations.

73. The second way pertains to NKK's specific request for a correction of a substantial ministerial error that inflated its margin by 12 percentage points. USDOC's own regulations instruct USDOC officials to correct such errors upon request within thirty days.[29] In this case, however, USDOC officials chose not to do so. While the failure to apply a long-standing policy might not always rise to the level of an Article X violation, the factual circumstances surrounding this particular administration of USDOC rules illustrate a non-transparent, non-uniform, and impartial administration of USDOC's practice of correcting ministerial errors. Here, USDOC ignored a 4-page written request from NKK detailing USDOC's error and specifically asking USDOC to make a ministerial correction.[30] Moreover, the US authority then used this incorrect, inflated margin as part of its basis for a preliminary finding of critical circumstances. That finding was, not surprisingly, later overturned.

74. The third instance pertains to USDOC's change in its critical circumstances policy. This change did not apply only to "subsequent" cases. Rather, USDOC applied it *retroactively* to the hot-rolled steel investigation. A fundamental element of due process is notice. Here, USDOC's issuance of a policy bulletin was intended to serve that purpose. Yet, USDOC acted in bad faith when it applied that new policy retroactively to specific WTO Members in a specific investigation that had already been initiated.

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[29] 19 C.F.R. 351.224(e) **(Exh. JP-5)**

[30] *See* NKK Letter to USDOC of 18 Feb. 1999 **(Exh. JP-70)**

Question 22: With reference to paragraph 12 of Japan's oral statement – if a Member's regulations provide for a procedural action not required by the AD Agreement, on what basis would Japan argue that a change in policy in this regard, or a failure to effectuate that action in a particular case, is a violation under the AD Agreement?

Answer

82. In paragraph 12 of its opening statement, Japan was making points in connection with its Article X claim. Japan has never argued that the failure to correct the NKK clerical error itself created any *violation* of the AD Agreement. Japan does believe, however, that the failure to correct the NKK clerical error provides important context for whether the USDOC was properly establishing facts, and evaluating those facts in an objective and unbiased manner.

83. GATT Article X requires that Members promptly publish "laws, regulations, judicial decisions and administrative rulings of general application" (hereinafter "laws") in such a manner as to enable governments and traders to become acquainted with them. Article X also requires Members not to enforce such laws before they have been officially published; and, it requires a Member to administer its laws in a "uniform, impartial and reasonable manner." These obligations are not limited to laws specified by the Anti-Dumping Agreement (or another WTO agreement). They extend to all laws "pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . .." Here, the US failed to comply with GATT Article X. Its published a regulation that provides for correcting clerical errors. But, in contrast to its practice in other cases, it failed to follow its regulation and correct the error, and thereby treated NKK unfairly in the process.

QUESTIONS TO BOTH PARTIES

Question 39: Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

Answer

QUEcorrding US law?

Answer

86. All exhibits relevant to Japan's GATT 1994 Article X claims are admissible and indeed must be considered by the Panel. In its preliminary objections, the United States relied on only Article 17.5(ii) of the AD Agreement to challenge evidence submitted by Japan in support of its Article X claims. This is not an appropriate legal basis for two important reasons. First and foremost, the AD Agreement does not apply to challenges made under the GATT 1994. Article 17.5 establishes dispute settlement procedures *only for* disputes involving the AD Agreement. It cannot be read to apply to claims raised under other international agreements.

87. Second, and as importantly, the Panel is obligated to consider the proffered evidence because of the nature of GATT 1994 Article X claims. Japan's main claim under Article X is that the United States did not administer its anti-dumping law in a uniform manner. The examination of this claim requires a comparison of the application of the US law in this case with the application of the same US law in other cases. The Article X claim therefore necessarily involves facts that could not possibly have been made available during this specific anti-dumping investigation. Therefore Article 17.5(ii) cannot logically extend to Japan's Article X claim.

88. The Panel must examine the behaviour of the US Government in administering its laws within this investigation, or as between investigations, which requires facts that may or may not have been part of the record. For example, in the hot-rolled steel investigation, the background behind USDOC's acceleration of this case is important because it shows the non-uniform, partial, and unreasonable nature of the investigation. The Panel must hear all the evidence and then determine the probative weigbBphave35 evi, butclaim State29XT not he theau342 ence andnel mann

selected by the US to administer its anti-dumping law cannot excuse the US from its obligations, whether they are substantive or procedural. A Member cannot be permitted to use a structural artefact as an excuse allowing a branch or division of its government to disregard evidence submitted to another branch or division.[34] The language used in Article 17.5 (ii) also does not spell out any special consideration for governmental structure within each Member. The key here is that the Japanese respondent companies submitted the evidence to the Member, in this case, the United States government.

92. Moreover, in fact the ITC does share information with DOC, and did so in this case. US law requires the ITC, within five days of its preliminary determination of injury or threat, to "transmit to the administering authority {*i.e.*, DOC} the facts and conclusions on which its determination is based."[35] As is evident from the internal memorandum issued by USDOC in making its preliminary critical circumstances determination,[36] USDOC had full knowledge of USITC's negative preliminary determination with regard to current injury.

Question 42: Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

Answer

93.

Answer

94. This question was answered in response to Questions 4 and 7 above.

Question 44: Was information submitted to and accepted by the USITC after applicable deadlines?

Answer

95. The USITC accepted corrected questionnaire responses submitted by domestic producers over two months after the applicable deadlines, after failing to compel the more timely correction of questionnaire responses that were grossly and flagrantly distorted. This is not to say that the USITC lacked advance notice of these irregularities: a mere four days after the USITC had released its public prehearing staff report, Japanese and Brazilian respondents filed a submission enumerating the irregularities in meticulous detail.[37] While domestic producers had been instructed to provide the results of operations for merchant market and captive shipments, valuing internal transfers at fair market value, most valued internal transfers at anything but fair market value.[38] Respondents demonstrated that these distortions were calculated to depress industry performance, and manufacture the appearance of injury. Further, domestic producers had allocated most all SG&A (sales general & accounting) expenses to merchant market sales, and none to internal transfers, thereby depressing merchant market profits and contriving the appearance of injury in the merchant market segment.[39]

96. The Japanese and Brazilian respondents strongly urged the USITC to apply "facts otherwise available" to draw inferences that would allow the USITC to plug the holes in the offending domestic producers' questionnaire responses.[40] At the very least, Japanese and Brazilian respondents requested an opportunity to comment on any submission of revised data,[41] and an opportunity to address the distortions and omission at an in camera session of the USITC's hearing, where confidential information could be discussed.[42] The games domestic producers were playing with the record could not have been clearer, and the seriousness of the Japanese and Brazilian respondents' accusations certainly demanded immediate action.

97. Immediate action, however, was not forthcoming. As of the date of the hearing, on 4 May, no revised questionnaire responses had been submitted. In fact, both Chairman Bragg and Vice Chairman Miller were motivated to take the highly unusual step of publicly admonishing petitioners for their lack of cooperation.[43] Vice Chairman Miller stated:

> Let me begin on not such an easy note, however. Chairman Bragg mentioned in her opening statement some problems and difficulties we've had with basically

[37] The USITC released its prehearing staff report on 22 April 1999. Japanese and Brazilian respondents filed their submission on 26 April 1999.

[38] Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 3-4 (excerpts attached as **Exh. JP-85**). While the staff attempted to correct these distortions where it could, several companies had to be omitted from the staff report, pending confirmation of their financial information. *Certain Hot-Rolled Steel Products From Brazil, Japan, Russia: Prehearing Report to the USITC of Investigation Nos. 701-TA-384 and 731-TA-806-808 (Final),* at VI-7 (22 Apr. 1999) (excerpts in **Exh. JP-72**).

[39] Submission by Japanese and Brazilian Respondents to USITC of 26 Apr. 1999, at 5-7 (excerpts attached as **Exh. JP-85**).

[40] *Id*. at 8-9 (excerpts attached as **Exh. JP-85**).

[41] *Id*. at 11-12 (excerpts attached as **Exh. JP-85**).

[42] *Id*. at 12-13 (excerpts attached as **Exh. JP-85**).

[43] USITC Hearing Transcript (4 May 1999), at 9 (Chairman Bragg in her opening stated, "I would like to emphasize to all counsel that responses to Commission questionnaires are mandatory, and I request your assistance in ensuring that your clients respond to Commission requests for information fully and within the time frame specified."), 65-66 (Vice Chairman Miller.) (excerpts provided in **Exh. JP-73**).

> companies that are part of the petitioners' group on getting certain data that we've requested, and I have to just say that I find it very troubling and I'm disappointed that we're having the problem in getting the industry to submit certain information that we need for the purpose of our analysis . . . And I guess in particular I've been very troubled by the fact that it's essentially most, if not all, of the petitioning companies that chose not to provide the information that we needed with respect to internal transfers while other companies were able to do so. So I guess I want to emphasize to you as the chairmen of your companies the difficulty that I think this poses for the Commission, and that I don't really understand why it's worth the risk to your case of posing this problem to the Commission at this point.[44]

98. Still, rather than drawing the inferences, as urged by respondents, the USITC patiently awaited domestic producers' clarifications, and received revised questionnaire responses from eight domestic producers in time for their inclusion in the final staff report, issued 28 May 1999.[45] Domestic producers had succeeded in distorting the record concerning industry profitability until the bitter end of the investigation, when respondents literally had less than a week to comment on the corrected figures, and then only briefly, as final comments are strictly limited to fifteen pages in length per respondent country.[46]

99. Thus, domestic producers only submitted corrected domestic producers' questionnaire responses in time for the 28 May final staff report -- over two months after the domestic producers' questionnaires had been due, on 22 March. By then, the damage wrought on respondents' rights and the USITC's analysis by the distorted record was arguably irreversible.

Question 45: Is the captive production provision relevant to the USITC's analysis of causation?

Answer

100. Japan argues that the captive production provision distorts the USITC's consideration of causation in violation of Article 3.5. Specifically, Article 3.5 provides that "it must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement . . . based on an examination of all relevant evidence before the authorities." In light of footnote 9 and Article 4.1, Article 3.5 requires an authority to demonstrate causation between imports and injury to domestic producers as a whole of the like product, and not merely an industry segment.

101. The captive production provision forces the USITC largely to ignore the attenuated nature of competition in the captive market, and accentuate injury indices from the merchant market segment, where import competition is most acute. It would be logically inconsistent for USITC to both recognize that captive production shields a significant portion of domestic production from import competition while at the same time "primarily focusing" on merchant market data that amplifies import penetration. This is the only explanation for why USITC omitted any mention of the shielding effect of captive production in its decision in this case,[47] which is otherwise a time-honoured fixture of its anti-dumping determinations.[48] By contrast, both Commissioners Crawford and Askey, who did

[44] *Id*. at 65-66 (excerpts provided in **Exh. JP-73**).

[45] *USITC Final Injury Determination*, USITC Pub. 3202 at VI-1 (**Exh. JP-14**) ("USX's verification and LTV's and six other producers' revised financial data were incorporated in this final report. The financial data were changed to revise the sales values, costs, and SG&A expenses of the transfers for these eight producers.").

[46] 19 C.F.R. § 207.30(b) (to be provided in Japan's Second Submission).

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

[48] *See, e.g*., *1993 Flat-Rolled Steel Case*, at 22 (excerpts in **Exh. JP-59**).

not apply the captive production provision or endorse the majority opinion as did Commissioner Bragg, expressly noted that substantial captive production attenuated subject import competition.[49]

102. The significance of this condition of competition has been demonstrated in numerous other cases. USITC recognized the shielding effect of captive production in its contemporaneous cold-rolled steel determination, in which it found a similar degree of captive production, but did not apply the captive production provision.[50] The 1993 hot-rolled steel case hinged on the degree to which substantial captive production mitigated causation between subject imports and the domestic industry's widening financial losses.[51] By forestalling such a finding, the captive production provision prevents USITC from complying with Article 3.5.

Question 46: Could the parties please comment on the relevance of the Panel's decision in *US-Wheat Gluten* for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

Answer

103. The recent Panel report in *US—Wheat Gluten* held that authorities must ensure that when injury caused by alternative factors is subtracted, the remaining injury caused by imports rises to the level of "serious injury." Specifically, the Panel considered whether USITC's consideration of each alternative cause of injury satisfied Article 4.2(b), which "prohibits the attribution to increased imports of injury caused by other factors."[52] It found that the USITC "weighed each other factor individually against imports to determine whether such factor was 'a more important cause of injury', and then excluded such other factor as a 'cause of injury' when it did not. . . ."[53] After dismissing all other alternative causes, USITC only presumed that the injury caused by imports alone remained "serious."[54] The Panel held this approach to be inconsistent with the Safeguards Agreement:

> In our view, under USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause "*serious* injury" to the domestic industry. We consider that USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.[55]

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[49] USITC Final Injury Determination, at 44, 51 (**Exh. JP-14**).

[50] *Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (Mar. 2000), at 19 (excerpts attached as **Exh. JP-86**) ("{T}he extent of competition between domestic production and subject imports is somewhat limited, given the domestic producers' large volume of internal transfers and contractual sales.") ("*Cold-Rolled Steel Case*").

[51] USITC begins its determination with a four-page section devoted to considering and rejecting petitioners' request that captive production be excluded from the Commission's analysis. *1993 Flat-Rolled Case* at 15-18 (excerpts in **Exh. JP-59**). The Conditions of Competition section contains an entire paragraph devoted to the shielding effect of captive production. *Id.* at 21 (excerpts in **Exh. JP-59**). In the heart of its analysis of impact, USITC devotes over a paragraph to the shielding effect of captive production. *Id.* at 53 (excerpts in **Exh. JP-59**).

[52]

This echoes and amplifies the Panel Report in

"Lead time" was defined in the importers' questionnaires as the number of days between order placement with the importer and receipt of the shipment by the customer.[62] Alluding to these three to four month lead times, Japanese respondents observed that although Japanese imports peaked in October and November of 1998, these imports would have been ordered sometime in July and August, long before the antidumping petition's filing on 30 September.[63]

108. Typical shipment times from Japan to the United States is one month to the west coast and one and one half months to the east coast.

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[61] *USITC Final Injury Determination*, at II-11 (**Exh. JP-14**); Japanese Respondents' USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**).

[62] USITC Importers' Questionnaire, *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808, at 15 (excerpts attached as **Exh. JP-88**).

[63] Japanese Respondents USITC Prehearing Brief, at 25 (excerpts attached as **Exh. JP-87**); *USITC Final Injury Determination*, at I-1 (**Exh. JP-14**) (Petition filed on 30 September 1998.).

ANNEX E-2

Japan's Answers to Questions from the United States

(6 September 2000)

Question 1: Does Japan claim that, even if it prevails on all of the facts available issues and the Department's 99.5 per cent test, that KSC, NKK and NSC will not, nevertheless, have dumping margins over 15 per cent?

Answer

1. Japan believes this question is legally irrelevant. The issue in this dispute is not the level of alleged Japanese dumping. The issue is whether the US Government adhered to its WTO obligations

Answer

8. The US hypothetical is a far cry from the actual operation of the captive production provision.

9. Japan agrees that the authorities are to consider all relevant economic factors, and that the distinction between the merchant market and the captive market could be one of those relevant economic factors. For this analysis to be consistent with the AD Agreement, it would need to have

and Blouses from India (*United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30; *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities*, WT/DS166/R, Report of the Panel (July 31, 2000), para. 8.6.

5. That this Panel should disregard extra-record evidence in examining Japan's Article X claim is underscored by the particular claim at issue here. It would defy law and logic for this Panel to find that the authorities' decision was "unbiased and objective", based on the standards of the Anti-Dumping Agreement, but not "impartial" under Article X. This could not have been the intention of those who negotiated the specific provisions applicable to the review of antidumping investigations, Articles 17.5 and 17.6 of the Antidumping Agreement. To the contrary, it would suggest that there is a conflict, with respect to this issue, between the Anti-Dumping Agreement and Article X. In the event of such a conflict, the Anti-Dumping Agreement prevails to the extent of the conflict, under the general interpretive headnote to Annex 1A. Therefore, this Panel should not consider, for purposes of Article X, evidence that could have been presented to the administering authorities during the investigation, but was not.

Question 24. The USDOC has a system for the disclosure of confidential information under administrative protective order. Under that system, are the questionnaire responses of one respondent made available to other respondents in the investigation? If the answer is yes, was such disclosure made in this case, and, if so, when was this disclosure made?

6. Under Commerce's procedure for disclosure of confidential information under administrative protective order ("APO"), the questionnaire responses of one *respondent* are not made available to other *respondents* in the investigation. However, the questionnaire responses of a respondent are made available to other respondents' *representatives* (generally, legal counsel) that are authorized under the APO to receive such information. *See* 19 C.F.R. §§ 351.103, 351.105, 351.304-351.306, and 354.19; *see also* www.ia.ita.doc.gov/apo/index.html. In this case, the representatives for all three Japanese respondents (NSC, NKK, and KSC) were covered by the APO and, therefore, were entitled to receive any questionnaire responses that were filed. For example, the representatives for NKK were entitled to and did receive the confidential versions of the questionnaire responses of KSC and NSC. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version); Certificate of Service for NSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (21 Dec. 1998) (APO Version).[1] Disclosure of the questionnaire responses was made at the time that the information was filed with Commerce. The USDOC's regulations require that when a respondent files a document, such as a response to a questionnaire, with the Department, it must simultaneously serve that document on all persons on the service list for the proceeding, and must include a certificate to this effect. 19 C.F.R. § 351.303(f).

Question 25. Could the US list the exhibits of Japan it considers should not be accepted by the Panel and mention for each of those exhibits the reason why it should not be accepted?

7. *Affidavit of Daniel L. Porter, Counsel to NKK* (**Exh. JP-28**): The Panel should not accept this sworn testimony by Mr. Porter because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its

[1] It should be noted that KSC's representatives opted not to receive the confidential versions of the responses of NSC or NKK. *See* Letter from Howrey & Simon to USDOC (18 Nov. 1998) at 1 (Public Document). In addition, it is the United States' understanding that the representatives for NSC requested not to receive the confidential versions of KSC's questionnaire responses. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (APO Version).

domestic procedures. The affidavit includes Mr. Porter's testimony about undocumented, alleged conversations with Commerce officials. It is impossible for the Panel to establish the veracity of these allegations without conducting a mini-trial *de novo* before the Panel, calling the persons involved before it for examination and cross-examination. If these conversations had been important to NKK, it could have submitted evidence of them to the Department during the investigation, so that they could have been analyzed, addressed by the other parties, and made part of the administrative record. Mr. Porter's affidavit also includes testimony about his firm's judgment of the impact on NKK's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Moreover, Mr. Porter has not even clearly stated what changes were made to the Department's computer program to calculate these values. Finally, the remainder of Mr. Porter's affidavit constitutes an indiscriminate blend of factual information already on the record with argument, most of which has already been set forth in Japan's first submission.

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation and in at least three other cases. *See Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China*, 64 Fed. Reg. 61835 (15 Nov. 1999) (prelim. crit. cir. determ.); *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422 (5 Nov. 1999) (prelim. crit. cir. determ.); *Certain Cut-to-Length Carbon-Quality Steel Plate From Japan*, 64 Fed. Reg. 20251 (26 Apr. 1999) (prelim. crit. cir. determ.); *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan and the Russian Federation*, 63 Fed. Reg. 65750, 65751 (30 Nov. 1998) (prelim. crit. cir. determ.).

15. Policy Bulletins are official documents which define or explain the Department's interpretation of law, or method of analysis, of a topic under the antidumping or countervailing duty law. Policy bulletins are publicly available statements of policy, which may be found at the Department's website. *See* www.ia.ita.doc.gov/policy/iapolicy/htm. Under US law, Commerce has the authority to change its policies, either before or during an investigation, as long as it clearly explains the reasoning for the change in position, parties have the opportunity to comment on the new position within the context of specific proceedings, and the new position is consistent with the anti-dumping laws. *See Association Colombiana de Exportadores de Flores v. United States*, 19 F. Supp.2d 1116 (20 July 1998); *Hoogovens Staal BV v. United States*, 4 F. Supp.2d 1213 (13 Mar. 1998). Policy Bulletins are particularly useful for providing the public with notice of *general*

directs the investigating authority to use facts otherwise available where certain circumstances apply, such as whether the party has withheld information, failed timely to provide it, or significantly impeded an investigation.

20. As expressly set forth in Article 3, footnote 9 of the AD Agreement, unless otherwise specified, the term "injury" means both current material injury and threat thereof . The term "*would cause* injury" in Article 10.6(i) is no exception. Because the term "injury" in Article 10.6(i) is not qualified or limited, it must be read to mean "material injury or threat of material injury." Thus, irrespective of the words "would cause," Article 10.6(i) refers to both "injury" and "threat thereof." A contrary reading would be proper only if the provision stated, "would cause injury (but not threat thereof," as it does in Article 10.2.

21. The use of the words "*would cause* injury" clarifies the question to be resolved under Article 10.6(i) and further establishes that the term "injury" in that provision includes threat of material injury. Article 10.6(i) does not impose a general requirement that there be injury to the domestic industry (or a finding of such). Rather, Article 10.6(i) inquires into whether importers had knowledge (or should have had knowledge) that dumping existed and that such dumping "would cause injury." Because the question under Article 10.6(i) relates to knowledge by importers (an

suspect . . . below-cost sales . . . . Moreover, {the statutory provisions} define what constitutes sufficient evidence with which to form a reasonable suspicion, and there is not evidence in the Final Results that Commerce relied on the type of information required to form the 'reasonable grounds to believe or suspect' that below-cost sales existed before it initiated the investigation."[8] *RHP Bearings Ltd. v. United States*, 2000 Ct. Intl. Trade LEXIS 95, at 35 (Aug. 3, 2000). In other words, both the Department and the CIT have recognized that where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition.

25. It is important to note that, the fact that the phrase "reasonable basis to believe or suspect" is utilized in US law for both initiations of certain types of investigations and preliminary critical circumstances determinations does not mean that the type of evidence for the two types of inquiries is the same. Rather, it merely indicates that, consistent with Article 10.7, the determination may be made at an early stage, prior to the receipt of all potential evidence. In other words, a finding that there is a "reasonable basis to believe or suspect" that certain conditions exist must be based upon sufficient evidence of those conditions for purposes of the particular type of determination at issue. Thus, consistent with Article 10.7, the US statute utilizes the phrase "reasonable basis to believe or suspect" to indicate that preliminary critical circumstances determinations made be made at any time after initiation (*i.e.*, once there is sufficient evidence, but potentially prior to the receipt of all record evidence).

Question 32. On page 10 of its oral statement, Japan quotes from the US first submission that the US acknowledges that "it is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party". Does the US believe that such "likely adverse" information may constitute the sufficient evidence necessary for a determination under Article 10.7 of the AD Agreement? Please explain.

26. Yes. The information contained in a petition *may* constitute sufficient evidence to establish that withholding of appraisement or assessment (or other necessary measures as described by Article 10.7) is necessary. The US agrees that information submitted in a request for initiation is likely, in many cases, to be adverse to the interests of the responding party. It is impossible, however, at initiation, for an investigating authority to know whether the data in the petition are more adverse or more favorable to the respondents than their own data. In fact, in this case, the dumping margins calculated in the petition were actually less than the final dumping margin calculated by the Department for KSC. *Compare Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (6 May 1999) (final determ.) *with* Petition for the Imposition of Anti-Dumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan (30 Sept. 1998) at 21, 21-22 n.33 (Public Version). Nevertheless, although a petition may contain data that are adverse to the interests of the responding party, the data must be based on and supported by the available evidence. Indeed, the petition often reflects *actual* data that are *within the range* of margins for exporters and producers, albeit potentially in the top of the range. As such, the information in a petition may constitute the sufficient evidence necessary for a determination under Article 10.7.

27. It is also important to take note of the purpose and instruction of Article 10.7. In making a determination under Article 10.7, an administering authority is not making a precise finding of

[8] Note that, the relevant statutory provision (relating to below-cost allegations) details the facts that must be considered for that analysis, but does not discuss the meaning of sufficient evidence in general, nor does it describe the type of evidence to be relied upon. The Statement of Administrative Action ("SAA"), however, does provide guidance on what constitutes "sufficient evidence" for purposes of the COP inquiry. The SAA states, **"{r}easonable grounds" will exist when an interested party provides *specific factual information*** on costs and prices, observed or constructed indicating that sales in the foreign market in question are at below-cost prices." SAA at 163.

dumping and consequent injury. Rather, an administering authority is determining whether there exists sufficient evidence of critical circumstances (i.e., knowledge by importers of the existence of dumping and that such dumping would cause injury, and massive dumped imports within a relatively short period of time) to warrant immediate action - withholding of appraisement or assessment, or other necessary measures. The US would not propose that a final margin of dumping (an extremely precise calculation containing many variables) be calculated based solely upon facts contained in a petition without first providing the respondents with an opportunity to provide their own data. The Agreement does not provide for such. However, Article 10.7 does provide that measures may be necessary after initiation in order to preserve the ultimate anti-dumping remedy. Thus, a petition containing sufficient evidence establishing importer awareness and massive dumped imports over a short period of time that has been scrutinized for accuracy, as was the case here, may properly provide a basis for a preliminary critical circumstances determination under Article 10.7.

disregarded in the determination of normal value, while sales to the unaffiliated customer having the same weighted average price would not be disregarded, if the weighted average price of all sales to all unaffiliated customers were more than 0.5 per cent higher than the weighted average price to the affiliated customer. Is this a correct understanding of the implications of the 99.5 per cent test in operation? If so, please explain how the US can conclude that sales that are, on average, identically priced may be considered as having been made in the ordinary course of trade when they are made to an unaffiliated customer and outside the ordinary course of trade when made to an affiliated customer?

31. The Panel is correct that, when it applies the 99.5 per cent test in the above-described situation, the Department would disregard sales to an affiliated customer whose sales were made at the same weighted average prices as those to an unaffiliated customer which purchased at prices which were more than 0.5 per cent below the weighted average for the group of all unaffiliated customers.[9]

32. As an initial matter, it should be noted that the margin calculation, which is prescribed by the Agreement, operates in the same fashion. Just as affiliated customer sales fail the arm's length test when their prices fall below the weighted-average sales price to all unaffiliated customers, export

Thus, when an affiliate does not pass the test, we simply choose not to deviate from our preference for using downstream sales to unaffiliated customers to avoid possible distortions. Given the inherent concern with respect to the influence affiliation has on pricing, Commerce's interpretation of Article 2.2, through the use of the 99.5 per cent test, is a permissible interpretation.

Question 35. Could the US explain whether, when sales are found to be outside the ordinary course of trade for having failed the 99.5 per cent test, the US will in all cases replace those sales to affiliated customers with re-sales by those affiliated customers? If not, what other methodologies may be applied according to the US?

36. In most, but not all, cases, when home market sales are found to be outside the ordinary course of trade because they have failed the 99.5 per cent test, the Department will rely on sales to downstream unaffiliated customers, or to downstream affiliated customers that pass the 99.5 per cent test. In addition, the Department's regulations, at 19 C.F.R. § 351.403(d), permit it to exclude downstream sales from the normal value calculation if sales to affiliated parties are less than five per cent of the total value of the exporter or producer's home market sales. During the investigation, the Department granted requests from both NSC and KSC that they be excused, pursuant to this provision, from reporting small amounts of home market downstream sales. *See Preliminary Determination*, at 64 Fed. Reg. 8296 and *Final Determination* at Comment 12. We also make exceptions when respondents can demonstrate that they are unable to obtain downstream sales information by allowing them to avoid having to report downstream sales.

Question 36. The US argues that if sales to an affiliated customer pass the 99.5 per cent test, the prices of all sales to that customer will be used in the determination of normal value. Can the US explain how the fact that the prices of all sales to that affiliated customer are used in the determination of normal value demonstrates the reasonableness of the 99.5 per cent test under the AD Agreement?

37. The fact that we use all sales to an affiliate that passes the test demonstrates that the 99.5 per cent test has no predictable or necessary effect on the calculated dumping margin. For any given affiliate that passes, there typically will be some products sold to that affiliate at prices less than the average price to unaffiliated customers as well as other products sold at prices higher than the unaffiliated average. The products actually used for comparison purposes – to determine normal value for exported subject merchandise – may in fact be those products sold to the affiliate at lower than average prices. Conversely, when sales to an affiliate are disregarded because the affiliate did not pass the test, the sales disregarded may include some sales of products at higher than average prices that would otherwise have been used for comparison purposes. Thus, application of the 99.5 per cent test may increase or decrease normal value. The test does not bias the analysis; it may in fact benefit certain respondents.

38. The fact that all sales to a customer which passes the arm's length test are used in the margin calculation is a natural consequence of the fact that the Department' s arm's length test is based on an average which is customer-specific, *i.e.*, it is based on the pricing policies that are the result of relationships between customers. The alternative test proposed during the investigation, on the other hand, was sale-specific; some sales would be deemed affected by the affiliation and others not. Because affiliation is a relationship between customers and not between products, the focus on a customer

Tobacco[10] the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*[11] found that "the mere existence" of the anti

Question 40. Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted

51. Under the "appropriate domestic procedures" in US antidumping duty investigations, there are two separate administrative records: one for the investigation of dumping by the Commerce Department and one for the investigation of injury by the US International Trade Commission. With very limited exceptions, information is not shared between the agencies. *See* sections 334 and 777(b) of the Tariff Act of 1930. In conducting its investigation and making its determinations, the Commerce Department relies exclusively on the information presented to it and placed on its administrative record; the same is true of the International Trade Commission. Under US procedures, these administrative records are separate, and are not shared between the two agencies. Therefore, when examining this matter "based upon . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", this Panel should disregard documents that are submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record. This is so even if those documents were put on the International Trade Commission administrative record. To do otherwise would be to examine a decision of the Commerce Department based on facts that were not made available to the Commerce Department under its procedures. This would be contrary to Article 17.5(ii).

Question 42. Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent

54. Neither Article 6.8 nor Annex II of the AD Agreement addresses the matter of *degree* of cooperation, nor whether that cooperation may be with regard to some or all of the requested information. In fact, the word "cooperate" appears only at the end of paragraph 7 of Annex II, which provides that "if an interested party does not *cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable than if the party did *cooperate*." (Emphasis added.) As we explained in response to question 27 above, the US statute breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). With regard to the second part of the statute -- deciding whether to take an adverse inference against a party -- the investigating authority will consider whether the party has failed to cooperate by not acting to the best of its ability to provide the requested information. *Id*. § 1677e(b). This determination of cooperation will depend upon an analysis of all the facts and circumstances of the case. For example, in this case, all three Japanese respondents – NSC, NKK, and KSC – cooperated by timely producing large amounts of information. It was only with regard to part of the requested information that Commerce determined they did not cooperate by not acting to the best of their ability, such that an adverse inference was warranted as to the facts available for that information.

Question 44. What information was submitted to and accepted by the USITC after applicable deadlines?

55. No information was submitted to and accepted by the USITC after applicable deadlines in the investigation. The deadline for submission of factual information was 3 June 1999, the deadline for parties' final comments was 7 June 1999.[14]

Question 45. Is the captive production provision relevant to the USITC's analysis of causation?

56. Article 3.5 of the Antidumping Agreement provides that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury within the meaning of this Agreement" (emphasis added). As a result, all elements of Article 3.2 (volume and effect of prices) and Article 3.4 (impact of dumped imports on the domestic industry) are relevant to an analysis of causation. The captive production provision pertains to the analysis of Article 3.4 factors. When the captive production provision applies, certain of the factors in Article 3.4 (*i.e.*, those considered in determining market share and those affecting financial performance) are considered as they relate to the merchant market as well as to the industry as a whole. The captive production provision therefore is relevant to the USITC's analysis of causation.

57. The captive production provision, itself, however, does not have any special effect on the causation analysis. It is merely a tool used in analyzing some of the factors listed in Article 3.4 to obtain a more complete picture of the affects of dumped imports on the domestic industry as a whole. Using a segmented analysis in this way does not have any particular affect on the causation requirement listed in Article 3.5.

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[14] *See* Transcript of 4 May 1999 Hearing at 334 (Statement of Chairman Bragg). (**Exh. US/C-20**) The Proposed Work Schedule (**Exh. US/C-21**) identifies 3 June 1999, as the "[c]losing of the record and final release of data to Parties," and 7 June 1999 as the date "[f]inal comments of Parties due." The USITC notice, pursuant to § 207.21 of its regulations (19 C.F.R. § 207.21, **Exh. US/C-22(a)**), scheduling the final phase of the investigation similarly explained that, "[o]n 3 June 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment [and] [p]arties may submit final comments on this information on or before 7 June 1999." 64 Fed. Reg. 10723 (5 March 1999) (included as Appendix A of USITC Views, **Exh. US/C-1**). *See also* 19 C.F.R. § 207.30 (closing of record to parties submissions) (**Exh. US/C-22(b)**), 19 C.F.R. § 207.25 (posthearing brief to include information adduced at or after hearing and answers to Commissioner questions) (**Exh. US/C-22(c)**).

62. Moreover, *Atlantic Salmon* and not *Wheat Gluten* is instructive in the current case because, as the *Wheat Gluten* panel itself noted, price is not listed as a relevant factor required to be considered in an injury determination under the Safeguards Agreement.[19]

provision,[24] this sentence, through its cross-reference to the articles setting forth specific factors, requires a specific form of analysis for demonstrating causation.

67. Second, the second sentence of Article 3.5 of the Antidumping Agreement characterizes the required demonstration as establishing "a causal relationship between the dumped imports and the injury to the domestic industry." Thus, the necessary demonstration need not establish that other factors do not also have a causal relationship to the injury.

68. Third, the third sentence of Article 3.5 states that "the authorities shall also examine any known factors other than the dumped imports which at the same time are injury the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." This provision differs from the Tokyo Round Code only in making explicit what the *Atlantic Salmon* panel stated, namely, that such an examination is required. Article 3.5 does not, any more than the Tokyo Round Code equivalent, specify how such an examination shall be conducted. Rather, it is entirely consistent with the *Atlantic Salmon* panel's conclusion that, in conducting the required analysis of causation factors, an authority must examine other known causes of injury to assure that it has not attributed to dumped imports effects that were due to other causes. Had the negotiators of the Anti-dumping Agreement intended to require the "isolation" of the various causes of injury, and thus a more exacting "standard" for the examination of other causes, they could have done so. Instead, they adopted a provision that was consistent with prior precedent expressly rejecting such a requirement.

69. The United States believes that the *Wheat Gluten* panel should have reached a similar conclusion in its construction of the Safeguards Agreement. The non-attribution provision of that agreement was drawn virtually verbatim from the Tokyo Round Anti-Dumping Code. Accordingly, the United States believes that, properly interpreted, the non-attribution requirements of the Safeguards and Anti-Dumping Agreements are consistent. However, even if the *Wheat Gluten* panel was correct in its interpretation of the Safeguards Agreement, the terms and history of the Anti-Dumping Agreement are so different from those of the Safeguards Agreement, as construed by the *Wheat Gluten* panel, that that panel's analysis cannot be properly applied to determinations under the Anti-Dumping Agreement.

Question 47. When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipments times for steel exports from Japan to the US?

70. Neither annual nor monthly data show Japanese steel exiting the US market over the period of investigation. Dumped imports from Japan were highest in the final quarter of the period of investigation, the fourth quarter of 1998. Thereafter they declined significantly.[25] Lead times for

[24] Atlantic Salmon, ¶¶ 549

Japanese product, including shipment times, "averaged 122 days from Japan in 1996-97 and 113 days in 1998.[26]

ANNEX E-4

Responses of the United States to Questions from Japan

(6 September 2000)

Question 1. Does the USG believe an authority would ever knowingly leave evidence of bias on the administrative record? If not, does not this mean that evidence of bias will in most cases need to come from extra record evidence?

1. Yes, under US law an authority must leave evidence of bias, or alleged bias, on the record, so

We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue.[1] However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all

6. Amicus briefs are not "by definition facts that were not considered by the authorities". Japan confuses the appropriateness of considering amicus briefs with the consideration of new facts that were not presented to the authorities during the antidumping investigation. An amicus brief, like the submission of a party, may well present legal and factual analysis based entirely on the facts made available to the authorities during the antidumping investigation. It is not itself a new "fact" any more than Japan's first written submission is a new "fact". Taking into account an amicus brief, therefore, is different from asking this panel to consider new facts that could have been put on the authorities' administrative records, but were not.

Question 5. In its closing statement, the US claims it does not know whether particular "facts available" is adverse or not. Yet in this case, the US determination shows the US believed its choice of "facts available" was sufficiently adverse to teach respondents a lesson. Did the US believe that its choice of "facts available" in this case was adverse or not?

7. As the US explained in its closing statement, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. This uncertainty is reflected in paragraph 7 of Annex II, which refers to the fact that use of adverse facts available "could," rather than "would" lead to a result which is less favorable to the party than if it did cooperate. Nevertheless, in this case, Commerce's choice of facts available for KSC, NSC, and NKK was presumed to be sufficiently adverse, based on a judgment involving all the facts and circumstances of the case, as to be likely to prevent respondents from obtaining a more favorable result by failing to cooperate.

Question 6. The US statute refers to two types of "facts available" --- with adverse inferences and without adverse inferences. Under the US practices, is it not true that either type of "facts available" could lead to results "less favorable" than the actual information? For "facts available" without adverse inferences, what steps does the USDOC take to ensure that such information is not "less favourable?"

8. As we explained in response to question 5 above, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. Thus, it is theoretically possible that either type of facts available (neutral or adverse) could lead to results less favorable than the unknown, actual information, just as it is theoretically possible that either type could lead to results more favorable. Nevertheless, an examination of all the facts of record can usually give Commerce a fair idea of whether its choice of information is likely to be adverse or neutral.

Question 7. If the information about KSC sales to CSI was so crucial to the investigation, why did USDOC not ask CSI for the information?

9. Commerce did not ask CSI directly for the information, because Commerce properly concluded that KSC had ample means to provide the information from its 50 per cent-owned affiliate and because KSC repeatedly told Commerce that CSI would not provide the information and that KSC wished to be excused from providing it. KSC simply failed to employ the means available to it to obtain the information requested by Commerce, and Commerce applied adverse facts available for that failure in a manner consistent with Article 6.8 and Annex II of the Agreement. The administrative record does reflect consideration of the idea that Commerce obtain the CSI information under separate protective order, so that KSC would not have access to it. However, KSC officials advised Commerce at verification that CSI had rejected this idea. *See* Verification Report at 23, **Exh.** US/B-21/bis.

Question 8. What is the difference between "logical inferences" and "adverse inferences" in the context of determinations about "facts available?"

10. The US statute and practice do not make a distinction regarding these terms and, in fact, do not talk about "logical inferences." Neither does the Anti-Dumping Agreement. Japan may be recalling the Oral Statement by the European Communities, delivered before the Panel at the Third Party Session on August 23, 2000. At paragraph 7 of its statement, the EC said:

> When selecting "facts available" the investigating authorities may take into account, among other circumstances, the degree of co-operation 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". (Footnote omitted.) 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 co-operate, if it could expect to obtain a better result by doing so than on the basis of "facts available". (Emphasis added.)

See also the Appellate Body's recent decision in the Canadian Aircraft case, cited at the US First Submission, paragraphs 70 of Part B, as well as US discussion at paragraph 79 of Part B, regarding that case and the taking of a logical inference.

Question 9. Why does USDOC believe the information on NSC/NKK conversion factors was too burdensome to include in the determination once it was provided? Why was this information different from the other types of corrections/clarifications routinely submitted pursuant to the special regulation allowing such submissions seven days prior to verification?

11. Japan's question is based on several misconceptions with respect to the facts of this case.

12. First, the Department did not reject the NSC and NKK conversion factor data because it was "too burdensome to include," but rather because it was first presented long after the reasonable deadlines established for providing this information. If administering agencies were compelled to accept any information, no matter when provided, unless they could demonstrate, on an item-by-item basis, that it was "too burdensome" to incorporate particular data elements into their analysis at that time, the right of such agencies to establish and enforce reasonable deadlines for submission of information requested in questionnaires would be entirely gutted and the law would not be administrable.

13. Second, there is no regulation "allowing such submissions seven days prior to verification." The so-called "Seven-Day Rule," codified at 19 C.F.R § 351.301(b)(1), does not govern the submission of data requested in questionnaires, as the conversion factor data were. Instead, section 351.301(c)(2), regarding questionnaire responses and other submissions made on request, requires that data requested in questionnaires be submitted by the questionnaire deadline.

14. Third, the conversion factors and their supporting data did not constitute "corrections/clarifications" to information previously timely submitted in response to a questionnaire. Instead, they were entirely new databases that both NSC and NKK had previously maintained were both unnecessary and impossible to provide.

Question 10. Why does USG believe "neutral gap filler" will be information favorable to respondents? Since respondents don't know what information will be used, how could

database (unless they are shown to be outside the ordinary course of trade for some other reason) in order to lessen the need to resort to a greater extent to downstream sales.

Question 19. Could the USG identify specifically the ways in which it "relied on" or in any way addressed the preliminary USITC assessment of whether there was any <u>current</u> injury?

26. The US assumes that this question pertains to the Department of Commerce's preliminary determination of critical circumstances. The USITC preliminarily found that the US industry was being threatened with material injury by reason of the dumped imports from Japan. The USITC did *not* discuss current injury, nor did they make a finding of such.[3] *See Certain Hot-Rolled Steel Products From Brazil, Japan and Russia - Written Views and Report of USITC Preliminary Determination* (Nov. 1998) *("USITC Views")* **(Exh. JP-8).** In order to determine whether importers knew or should have known that dumping existed and would cause injury, the Department relied, in part, upon the USITC's affirmative finding of threat to the US industry.[4] As the US explained in its First Submission (paragraph 459 of Part B), because Article 10.6 utilizes the term "injury" without qualification, it refers to both injury and threat of injury. Thus, the Department's reliance on the ITC's finding of threat of injury, and on other significant evidence (*see* US First Submission at paragraph 476 of Part B), for purposes of determining importer awareness, was consistent with the Agreement.

Question 20. Does the USG believe that the standard "sufficient evidence" for initiating a case is the same as "sufficient evidence" to justify the extraordinary remedy of critical circumstances?

27. As the US explained in its First Submission (paragraphs 467-470 of Part B), the "sufficient evidence" standard must be viewed within the context in which it is applied. The type of evidence that is sufficient for purposes of initiation of an anti-dumping investigation may or may not be sufficient for purposes of a preliminary critical circumstances determination. In this case, in making its preliminary critical circumstances determination, the Department of Commerce looked to additional evidence outside of that presented at the time of initiation of the anti-dumping investigation.

Question 21. Beyond the general statement of purpose in the Policy Bulletin, where did USDOC make specific factual findings about the remedial effect of imposing antidumping duties?

28. Because the finding is apparent in the Department's analysis and in the record evidence, a separate, delineated finding was not necessary. Article 10.6(ii) states, "the injury is caused by massive dumped imports of a product in a relatively short time *which in light of the timing and the volume of the dumped imports and other circumstances* (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping

a short time following the time when importers and exporters became aware that a dumping case was likely, and that the producers accounting for the majority of the imports were dumping. Additionally, the record contained significant information indicating that the surge of dumped imports contributed, or caused, threat to the US industry. For example, the USITC preliminary determination states, "[w]e recognize that petitioners have not specifically alleged that the volume of subject imports during 1995-97 was injurious. However, we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future. . . . In our view, these increases in volume and market penetration indicate a likelihood of substantially increased subject imports in the imminent future." *USITC Views*, at 15. Additionally, numerous exhibits in the petition demonstrated that the *surge*

42. The USITC examined the effects of nonsubject imports. It noted that "[i]mports from nonsubject countries maintained a stable presence in the US market throughout the period examined."[12] It thus satisfied the requirement to examine any known factors injuring the domestic industry. With an "essentially flat" market share, at a time when subject imports were rising sharply, nonsubject imports were not responsible for the decreasing market share of the domestic industry.[13] If the price effects attributed to the dumped imports were in actuality from the nonsubject imports, thenects of nonsubje

ANNEX E-5

Responses of Chile to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to use in the determination of normal value?

Reply

There are no regulations in this respect. In practice, there is no particular treatment for sales to affiliated companies, but only the "in the ordinary course of trade by reason of price" test, i.e. the analysis of below-cost sales, for any sale. Regardless of whether or not the domestic sale is made by a related company, an analysis is made to determine whether sales are below total cost in accordance with Article 2.2 of the Anti-Dumping Agreement. Below-cost sales are not excluded from the calculation of normal value. If, as a result of the below-cost sales, the sales used to determine the normal value are not sufficient in terms of footnote 2 to Article 2.2, either the third country sale price or the constructed value is used. No substitute prices are used for below-cost sales. There is no other methodology.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

No. In no way and under no circumstances does the Anti-Dumping Agreement permit the use of "adverse" facts available. The objective and spirit of the provisions of the Anti-Dumping Agreement (Article 6.8 and Annex II) pertaining to cases when a party does not cooperate call for use of the information available. But not the worst information. The Agreement reads "… on the basis of the facts available", and not "on the basis of the **adverse** facts available". The Agreement does not qualify the information.

ANNEX E-6

European Communities' Answers to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, a\ substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The EC practice depends on the extent of the relationship between the related parties. Whereare made in the

Reply

The point made by the EC was that an interpretation of Article 9.4(i) which required to exclude a dumping margin whenever facts available have been used would often lead to the result that the method set out in Article 9.4(i) could not be applied. Indeed, almost every dumping calculation includes small elements of facts available. This is not necessarily because the exporters are uncooperative, but because small errors of a clerical nature have been made or because the information requested was simply beyond the reach of the exporters (for instance, in the case of transport costs).

The EC authorities have never encountered the situation described by the Panel. In the unlikely situation that significant adverse facts available were included in all the margins, there seems to be no alternative but to resort to facts available for the non-sampled exporters. However, in that case no adverse inferences should be drawn.

Question 51

In paragraph 22 of its oral statement, the EC notes that the US description of EC practice in the situation of captive production is incorrect. Could the EC specify in what respect that description is incorrect, and provide the Panel with a correct description.

Reply

The EC recalls that the present dispute is concerned exclusively with the US law and practice. The practice of other Members, therefore, is not directly relevant to this dispute.

The EC reiterates its position that the US description of the EC practice is not entirely accurate and, therefore, requests once again that the Panel disregard such description.

ANNEX E-7

Korea's Responses to Questions to Third Parties

(6 September 2000)

Q48. Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value. How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or a third country sale price used, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Korea Trade Commission ("KTC"), as the organization responsible for conducting antidumping investigations, considers a set of related factors to determine whether particular sales are made in the ordinary course of trade. The relationship between the producer and the related party, the amount or portion of the affiliated party sales, and other factors relating to the affiliated party sales are considered together. The KTC applies a fairness standard to determine whether to use the affiliated party sales in the calculation of normal value. If the KTC determines that the affiliated party sales are an inappropriate basis for establishing normal value, then it considers constructed export price or third country sales price.

We would remind the Panel that Korea does not object to the application of a test for affiliated parties *per se*. We object to the application of a test which is arbitrary and creates an unfair comparison because it may or may not compare comparable sales. There is no attempt by the US to make sure that other factors affecting comparability are taken into account before the test is applied, and the test is biased as only higher priced affiliated party sales are included after the comparison.

Q.49 Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The object and purpose of Article VI of the GATT and the Anti-Dumping Agreement is to ensure that unfair trade practices in the form of dumping can be offset or prevented by anti-dumping duties. (See, e.g. , Articles VI:1 and VI:2 of the GATT and Article 1 of the Anti-Dumping Agreement. Hereinafter, "Agreement"). To that end, Article 2 of the Agreement provides numerous rules for how sales in both markets are to be determined, adjusted and compared. The Agreement also independently requires that there be a fair comparison between the export price and the normal value.

Article 6.8 of the Agreement recognizes that, in some circumstances, the evidentiary support for such determinations, adjustments or comparisons, may not be available or the interested party may refuse to supply it. Article 6.8 encompasses both deliberate acts ("refuses access to") and involuntary or negligent acts ("or otherwise does not provide"), resulting either in information remaining absent after a "reasonable period of time" or whose absence "significantly impedes the investigation." In either circumstance, Annex II is to be followed.

Nowhere does Annex II endorse the concept of a "punitive" facts available, e.g. , as applied by the US in this case against KSC as a result of CSI's actions. At most, Annex II contemplates that after an authority follows all the other requirements for checking and confirming the secondary information used, as provided for in Paragraph 7 of Annex II, it is permissible that the authority's use of such data produce a result which could be less favorable. The US, by its own admission, deliberately sought the information which was the least favorable and used it for that reason.

The concept of "adverse" versus "neutral" facts available is neither the starting point nor the end of the analysis. The issue is that the Agreement requires the authorities to use the most reliable secondary information available, a determination reached only after "special circumspection." "Circumspection" is defined as "Circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness." The Compact Edition of the Oxford English Dictionary (1971). In other words, the decisions regarding whether to use a secondary source and, if so, which source to use, should be made very, very carefully -- with "special circumspection."

Furthermore, once a secondary source is selected, it must be "checked" against other independent sources. This ensures that the information is reliable.

Most importantly, the Article 2.4 requirement of a "fair comparison" applies regardless of the source of the information used. Annex II provides no exception to the Article 2 requirements regarding the calculation of normal value, export price or a fair comparison.

For all these reasons, the US selection of adverse secondary information in order to penalize respondents is not consistent with the Agreement. As explained in our Third Party Written Submission, the selection of secondary information for the purpose of penalizing the respondent sidesteps the required analysis discussed above. The US cannot justify its selection of the secondary information on this basis as consistent with the Agreement.

Q.52 The first sentence of Article 2.4 requires that "A fair comparison shall be made between the export price and the normal value". There are rules for the determination of normal value set out in Article 2.2, and rules for the determination of export price in Article 2.3. Article 2.4 continues to set out specific rules for the comparison of export price and normal value. Could Korea clarify for the Panel how it interprets a requirement of fair comparison of export price and normal value to also require overall "fairness" in the determination of normal value?

Reply

In the substantive meeting on 23 August, the EC argued that the first sentence of Article 2.4 applies only with respect to the 'comparison' between the export price and the normal value, because the calculation of the normal value precedes that comparison and is not subject to any general 'fairness' requirement. On the other hand, it was Korea's view that 'fairness' should be interpreted in a broader sense, because fairness is a general principle of law. Such an interpretation of Korea is corroborated by the textual analysis of Article 2 of the Anti-Dumping Agreement as well.

Article 2.1 provides a basic guideline for determination of dumping. What the paragraph says is that there is dumping, if export price is less than normal value. Thus, the basic guideline and the key element of determination of dumping is comparison between export price and normal value. Article 2.2 and 2.3 provide for determination of normal value and export price in exceptional circumstances, where export price and normal value are not available in the ordinary course of trade. Article 2.4, after exceptional cases of export price and normal value have been brought into the purview of Article 2 through Art.2.2 and 2.3, gets back to the key element of dumping, which is comparison between export price and normal value. Here, the text says that comparison should be fair.

The title of Art.2 is 'determination of dumping'. Determination of dumping is to be done, as we saw in the preceding paragraph, through fair comparison of export price and normal value. In EC's view, fairness applies only to the comparison. In other words, calculation of normal value and export price does not have to be fair, because there is no fairness requirement in either Art.2.2 or Art.2.3.

Such an interpretation is not acceptable for Korea for the obvious reason. The determination of dumping cannot be fair, if only part of the process is fair. In other words, fair comparison of normal value and export price would not lead to fair determination, if normal value and export price were not established in a fair manner as well. Besides, it should be pointed out as well that Article 2.2 and 2.3 do not deal with determination of normal value and export price as such, but determination of those prices in exceptional circumstances.

Apart from the textual analysis as above, Korea's interpretation of fairness requirement is consistent with Article 2 in view of the object and purpose of the article. The object and purpose of Article 2 is to determine dumping margin, which , as was elaborated above, is to be done through fair comparison of normal value and export price. The object and purpose of the article would not be met, unless normal value and export price, which should be compared in fair manner, have been established in a fair manner.

Finally, even if the Agreement lacked the "fair comparison" requirement in Article 2.4, the requirement of fairness in the administration of anti-dumping laws nonetheless would exist and would bind all WTO Members. Absent such a requirement (often referred to in the reverse as *abus de droit*), none of the provisions would have any meaning whatsoever. Is it seriously to be contended that a party has a right to take actions which are "unfair" so long as the ac222s view, fhe texewhich a15 0 TD /F4 11.25 T

ANNEX E-8

Responses of Brazil to Questions from the Panel

(6 September 2000)

Question 48

Could Brazil, Chile, the EC and Korea explain their practice regarding affiliated party sales in determining normal value? How is it determined whether such sales are made in the ordinary course of trade? If it is concluded that such sales are not made in the ordinary course of trade, are they excluded from the determination of normal value? Is a constructed value calculated for these sales, or third country sale price uses, as a substitute for the sales price to the affiliated purchaser? Is there some other methodology applied to calculate a sales price for these transactions to be used in the determination of normal value?

Reply

The Brazilian experience involving sales to affiliated parties is quite limited. When this situation occurs, a comparison is made between sales to related parties and those to non-related parties. If a distinct pattern is detected and if the exporter cannot establish the existence of factors, other than company affiliation, that may justify the different patterns, all sales to affiliated parties are considered to be not in the ordinary course of trade and are consequently disregarded. Since the sales to non-affiliated parties were always sizeable and representative, only these sales were used to calculate the normal value. Exporters have not yet questioned this procedure.

Question 49

Assume a party refuses to cooperate, for instance by refusing to respond to a portion of the investigating authority's questionnaire, or significantly impedes the investigation. Do Brazil, Chile and Korea believe that in such a case, adverse facts available may be used? If not, is there any case in which these Members believe that adverse facts available may be used, or are they of the view that in all circumstances, only "neutral" facts available may be used?

Reply

The interpretation of Article 6.8 and its related Annex II *cannot* include the right to penalize respondents with adverse facts available, regardless of a respondent's behaviour. Reading in a right to punish respondents would (1) establish an impermissible interpretation of Article 6.8 and Annex II, and (2) broaden the rights of WTO Members in a manner inconsistent with Articles 3.2 and 19.2 of the DSU.

Article 6.8 does not distinguish between situations where a party deliberately tries to obstruct an investigation and where information simply is not otherwise provided. Rather, Article 6.8 treats those situations exactly the same, by calling for the authority to fill in the information with facts available. The first sentence of Article 6.8 effectively establishes an equal footing between a case

information. This plain language establishes that even when a party "refuses access" to information, the consequence of such action is simply the use of "the *facts* available".

Therefore, Article 6.8 is about filling in missing information, no matter what the cause. It does not treat uncooperative parties any differently from cooperative parties that simply do not have the required information. This equal treatment is no surprise given that it is often hard for an authority to determine, for example, whether a party does not have information at its disposal or whether the party is actually hiding information. Therefore, Article 6.8 operates upon a presumption of good faith and treats all parties equally.

According to the customary rules of treaty interpretation, Article 6.8 should first be read according to the ordinary meaning of its text. The primary meanings of the word "fact" in common dictionaries are "an event or thing known to have happened or existed" and "a truth verifiable from experience or observation". The concept of an "adverse fact" introduced by the US is, in this way, self-contradictory. One single *fact* cannot be chosen in a way that it may configure a less favourable result for a respondent.

Paragraph 7 of Annex II is entitled "Best Information Available", and it tries to ensure that along the course of an investigation *information* is used in such a way that it resembles the *facts* as closely as possible. It contains the only mention of "cooperation" as it applies to an authority's choice of "facts available" (i.e., paragraph 7 does not apply to the decision *whether to apply facts available, but only to the choice of "facts available").* Yet, even this provision does not permit use of facts available to punish non-cooperative respondents as argued by the United States. First, paragraph 7 uses the verb "could" when referring to unfavourable results, thereby removing any possibility that authorities can affirmatively seek out figures that will punish or have a deterrent effect on respondent behaviour. Second, paragraph 7 instructs the authority to use "careful circumspection" in selecting its choice of information available. This phrase is an expression of "good faith" as discussed in paragraph 10 of our Third Party Submission and reinforces the notion that the *information* selected should reflect the *facts* mentioned in Article 6.8. The concept of punishing respondents simply does not fit within this obligation to act in good faith and constrain oneself when choosing appropriate facts to fill in the holes.

If representative information is available, then the authority should use it. If representative information is not available - or perhaps unreliable - because a party significantly impeded the investigation or refused to provide certain information, then such a party runs the risk of the authority using information from the petition or other "secondary source". The point, though, is to search for the most reliable information, not to choose unrepresentative data for the sheer purpose of punishing a party with an adverse result. The language and spirit of Article 6.8 and of Annex II effectively preclude an investigating authority from selecting information available *in order to* achieve a pre-determined set of results, namely the one that is least favourable to a perceived non-cooperating party. Information selection criteria cannot be based on a result oriented approach. Such criteria should be based on the quality of the information available; in other words, which information available is best suited to reflect a given indicator or a given *fact.*

The use of available facts has the purpose of facilitating the conduct of an investigation that would otherwise be brought to a halt due to lack of essential information in sole possession of a particular party. This provision is not intended to punish a party that *may* not be cooperating. In brief, any interpretation of the AD Agreement that could grant an additional punitive power to the investigative authorities would effectively expand the rights of the WTO Members under that Agreement in violation of Articles 3.2 and 19.2 of the DSU.

Question 2: Paragraph 7 of Annex II of the AD Agreement provides that "special

the party in control of the necessary information, than to apply this term to KSC, which was trying to obtain the information from CSI.

9. Second, the United States assumes that USDOC had no duty even to try to obtain the information from CSI. Yet, USDOC held its own separate meeting with representatives of CSI and other petitioners to discuss the issue and also failed to obtain the requested information.[1] If the authority with the legal power to issue dumping margins in response to CSI's petition was not able to obtain the information from CSI, on what basis can it possibly punish KSC for being unable to do so?

10. Third, the United States is holding respondents to the standard of perfect knowledge. While it may be easy for USDOC to identify additional steps that in hindsight could have been taken, respondents struggling to comply with extensive and burdensome questionnaires on short notice may sometimes overlook a step that could have been tried. This is particularly true in this case. CSI first told KSC that CSI would help (according to Mr. Declusin), and only later did CSI change its position and refuse to assist (by order of CSI's President and CEO).

Question 4: The Panel understands that the USDOC and USITC have different rules and deadlines with respect to information gathering and application of facts available. The Panel understands the US to have asserted that each agency applied its own rules to the parties appearing before it in an impartial manner. Does Japan contend that the USDOC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the USITC failed to apply its own rules impartially to the parties appearing before it? Does Japan contend that the difference between the rules applied by the USDOC and the USITC demonstrates partiality or failure to uniformly administer the anti-dumping law?

Answer

11. With respect to the first question, the answer is yes. USDOC's rejection of NSC's and NKK's theoretical weight conversion factors was partial and non-uniform first because it deviated from USDOC's own normal practice. As the United States admits in its own Question 9 posed to Japan (see below), corrections are normally accepted as late as the first day of verification (although this deadline is normally reserved for minor corrections, while the seven-day rule typically applies to more significant corrections and other additions to the record). The lack of impartiality and uniformity of USDOC's actions in this instance is evident from the fact that USDOC refused to accept certain information from NKK and NSC before verification despite its established practice of doing so in previous cases and, for certain other information, in this very case. USDOC's practice shows that questionnaire deadlines are never the last chance an interested party has to submit information for the record.

12. As for the Panel's second question, the answer is no. Japan is not arguing that USITC's acceptance of petitioners' untimely-filed questionnaire responses in this case themselves violate

this case -- which was a clear departure from USDOC's established practice -- served to reject certain corrected information submitted by NSC's and NKK's after the questionnaire deadline. Meanwhile, the rule applied by USITC served to accept only petitioners' corrections to the record even though they were also submitted well after the questionnaire deadline. These disparate rules -- taken by the US anti-dumping authority -- favor petitioners over respondents. Article X:3 is specifically intended to prohibit such double standards.

Question 5: In light of the US statements at the second meeting concerning rules of statutory construction and interpretation of US law, does Japan still maintain, as it asserted in its second oral statement, that the captive production provisions "takes precedence" over the other provisions of US law regarding the analysis and determination of injury? If yes, please explain on what basis Japan maintains this position.

Answer

14. Nothing in the US statements at the Second Meeting changes Japan's position in its Second Submission that the captive production provision in 19 U.S.C. § 1677(7)(c)(iv) supersedes 19 U.S.C. § 1677(7)(c)(iii), when applicable. The United States grossly mischaracterizes Japan's arguments concerning statutory construction. [2] Japan nowhere argues that the captive production provision repeals 19 U.S.C. § 1677(7)(c)(iii), by implication or otherwise. This would be impossible, because the captive production provision only applies when certain conditions are met, and expressly refers to Section 1677(7)(c)(iii). Japan only argues that when the captive production provision applies, it supersedes those elements of 19 U.S.C. § 1677(7)(c)(iii) that conflict with its command to "focus

16. When the captive production provision applies, USITC cannot "focus primarily" on the market share and financial performance of both producers as a whole and the merchant market segment; in other words, Sections 1677(7)(c)(iii) and 1677(7)(c)(iv) are in conflict. Under the canon of statutory construction cited by Japan, such conflicts are resolved in favor of the more specific provision, in this case, the captive production provision.[6] The more general provision is not repealed by implication, but only disregarded in favor of the more specific provision, when it applies.

17.

primarily or secondarily, data for the merchant market *in this case* without distorting their judgment."[13] Far from abandoning this argument, Japan's Second Submission actually amplifies it, elaborating on how USITC cannot relate merchant market segment findings to the industry as a whole, as the AD Agreement requires, without also examining all other industry segments.[14]

[13] *Id.* at para. 245 (emphasis added).
[14] *See, e.g.*, Japan's Second Submission, para. 222.

Question 2: Where precisely in the exhibits Japan has cited did *KSC* inform *Commerce* that CSI was *unable* to supply the requested information? In addition to providing the cites, please quote actual statements by KSC.

Answer

3. KSC repeatedly informed USDOC that CSI was *unable* to supply the requested information, either by explicitly saying so in its letters to USDOC, or by referencing, or attaching to, CSI's Letter to KSC of 14 December 1998 (**Exh. JP-42(m)**) (in which CSI stated it was unable to supply the information requested in Question 1 of KSC's Letter of 8 December 1998).[3] We have provided below relevant quotes and references from Japan's exhibits.

- KSC Letter to USDOC of 18 Dec. 1998 (**Exh. JP-93(a)**): "Attached to this letter is the most recent written response of CSI {CSI's Letter to KSC of 14 Dec. 1998} to our requests for information. . . . CSI has declined to provide KSC with information necessary to respond to Sections C and E. . . ." The attached letter clearly indicated CSI's inability to provide the information.

- KSC's Section C Questionnaire Response, at 2 (21 Dec. 1998) (excerpts in **Exh. JP-42(p)**): "CSI responded to this request a week later, on December 14, 1998, and with multiple excuses indicated its *inability*/unwillingness to provide the necessary information, including (1) that its accounting system was *unable* to provide information regarding its sales of further manufactured products. . . ." (Emphasis added.)

- KSC Verification Exhibit 20 (Mar. 1999) (**Exh. JP-93(b)**): KSC again provided USDOC with {CSI's Letter to KSC of 14 Dec. 1998}, which contained CSI's statement that it was unable to provide the information requested in question 1 of KSC's Letter to CSI of 8 December 1998.

- KSC's USDOC Case Brief, at 16, Exhibit 2 (12 Apr. 1999) (**Exh. JP-93(c)**): In the text of its case brief on page 16, KSC quoted in its entirety CSI's Letter to KSC of 14 December 1998, which explicitly CSI's inability to provide the information requested in question 1 of KSC's Letter to CSI of 8 December 1998. Moreover, KSC again provided USDOC that letter in Exhibit 2.

4. As the evidence demonstrates, KSC repeatedly informed USDOC that CSI was unable to provide the information requested in Question 1 of KSC's Letter of 8 December 1998. Sometimes KSC said it directly, other times KSC quoted the words of CSI. Japan is alarmed that USDOC is not familiar with the record of its own investigation.

Question 3: Isn't it true that KSC told Commerce, in KSC's questionnaire response of December 21, 1998 (JP-42(p)), that CSI did not provide a reason for its claim that under its accounting system it was unable to provide sales information?

Answer

5. Yes. KSC noted in its questionnaire response the terse CSI comment, which included no explanation, to show that CSI was not at all forthcoming with KSC. Whether the statement was true or not is not something KSC was ever able to determine. If USDOC questioned the veracity of the

[3] *See* Japan's Second Submission, para. 46.

statement or wanted an explanation, it could have followed up with CSI directly after KSC informed USDOC of CSI's response. CSI was, after all, an interested party to the investigation.

10. In any event, the missing information was not critical for determining whether KSC-to-CSI prices were reliable. A test of reliability does not depend on a comparison of products using USDOC's CONNUMs. USDOC had the most important product characteristics in the data KSC provided in its Section A response. These were more than sufficient to determine the reliability of the gross unit prices at which KSC sold to CSI.

11. Furthermore, given the difficulties USDOC knew KSC was facing in obtaining downstream data from CSI, USDOC could have requested the other product characteristics from KSC in order to form a more reasonable basis for facts available if the KSC-to-CSI prices were, in fact, deemed unreliable.

18. CSI's incentive to sabotage KSC's questionnaire response was no different. CSI was a petitioner. Its primary interest was in domestic production, not importation, as evidenced by USITC's decision to not exclude any related parties from its preliminary investigation.[12]

ignore the related party sales and simply report the downstream sales – and then complain that by following such instructions the respondents did not provide the necessary information. The USDOC questionnaire is a further indication of the flawed USDOC policy.

ANNEX E-11

Answers of the United States to Questions from Japan at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO JAPAN'S QUESTIONS TO THE US

Question 1: Where does the USITC determination mention in any way the profit level for 1996? How can the USITC evaluate a crucial fact without mentioning that fact?

1. At the outset, we note that Japan seems to confuse the evaluation of factors required in Article 3.4 of the Anti-dumping Agreement with examination of evidence (facts). Articles 3.1 and 3.5 require that a determination of injury be based on "positive evidence" and an "examination of all relevant evidence." The United States maintains that it performed an objective examination of all the evidence, including the 1996 financial performance of the domestic industry, in its examination of the impact of imports on the domestic industry, as required by Article 3.4. Article 3.4 simply requires that the USITC provide "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[1]

2. A panel recently faced with this issue assessed whether Thai authorities had "failed to consider the factors listed in Article 3.4."[2] At the outset, we note that the panel characterized the obligation of the Thai authority as to "consider." Although the word "consider" does not appear in Article 3.4, "examine", which is the language in Article 3.4, is defined as "to consider or discuss critically."[3]

3. As the *Angles* panel found, an appropriate consideration does not require a finding or determination specifically about the factor considered. Although a panel may prefer such an explicit characterization, a reference to the factor need not be explicit on the face of the decision. All that is required is that the USITC demonstrate that it has "given attention to and taken into account" the factor under consideration.[4] The USITC has considered properly when it puts a factor "into context."[5] In determining whether the USITC met this obligation, this Panel should take all "statements and characterizations into account."[6]

4. Accordingly, the USITC properly evaluated profits in its examination of the impact of dumped imports when it provided a description of the financial performance of the industry. The USITC's explicit findings demonstrate that it adequately considered profits in accordance with the Anti-dumping Agreement. The USITC discussed the 1997 to 1998 declines in operating income and

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

[2] *Angles* at para. 7.238.

[3] The Compact Edition of the Oxford English Dictionary 364 (1985).

[4] *Angles6oA 0.02023 Tw6and and t9.75 Tf l8 e 0.lsabglis a lsabs a lef8-Edition of the Oxford English Dictionary 38,*

[2] *Angles*

import competition. As a result, Japan's challenge to the USITC's analysis of captive production rests largely on the fact that the USITC characterized the effects of captive production differently in this case than it did in the 1993 *Flat Rolled Steel*

would have this Panel reject the USITC's decision in favour of a methodology which concerned itself

Department in fact provided all the "assistance" it could to these large, sophisticated companies who were, themselves, the masters of the information requested.

ANNEX E-12

Answers of the United States to Questions from the Panel at the Second Meeting of the Panel

(6 October 2000)

US RESPONSES TO THE PANEL'S QUESTIONS TO THE US

Question 6: According to the United States, did KSC provide KSC-to-CSI sales data with its Section A response as Japan maintains (paragraph 9 of Japan's Oral Statement)? On what basis did the United States conclude in this case that prices of KSC to CSI were unreliable because of association? Did it base this conclusion on any facts particular to the KSC-CSI relationship, or the facts in this case, or did the United States presume such prices were unreliable based on the fact of that relationship?

1. The United States presumed that the KSC/CSI transfer prices were unreliable based on the relationship between the parties: KSC owned 50 per cent of CSI. Such a presumption represents a permissible interpretation of Article 2.3 of the Agreement. That article states, in pertinent part, that "[i]n cases ... where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are ... not resold in the condition as imported, on such reasonable basis as the authorities may determine." In this case, Commerce presumed that the parent-subsidiary association between KSC and CSI caused any prices between them to be inherently unreliable, because of the potential for manipulation of those prices. In such a case, Commerce will nearly always use the downstream sales to the first unrelated buyers as a basis rce frd party75 0.75 re f BT 72P

product-by-product matching to Japan's home market sales. The missing information included: product characteristics such as prime or not prime, painted or not painted, the quality, the amount of carbon, the yield strength, coil or cut-to

9. Japan's position suggests that a respondent can simply assert that requested data are "unnecessary" or that it is "unable to respond," and that such statements in a questionnaire response would then enable it to submit any and all categories of data, for the first time, at verification, under