Exhibit 26

Panel Report
United States - Continued Dumping and Subsidy Offset Act of 2000
(WT/DS217,234/R) / DSR 2003:II, 489

Parties

Complainants: DS217 - Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand; DS234 - Canada, Mexico
Respondent: U.S.
Third Parties: DS217 - Argentina, Canada, Costa Rica, Hong Kong (China), Israel, Mexico and Norway; DS234 - Australia, Brazil, Canada (in complaint by Mexico), EC, India, Indonesia, Japan, Korea, Mexico (in complaint by Canada), Thailand

Panelists

H.E. Mr. Luzius Wasescha (Chairperson), Mr. Maamoun Abdel-Fattah, Mr. William Falconer

Timeline of Dispute

Panel Request (DS217): July 12, 2001
Panel Request (DS234 - Canada): August 10, 2001
Panel Request (DS234 - Mexico): August 10, 2001
Panel Established (DS217): August 23, 2001
Panel Established (DS234): September 10, 2001
Panel Composed: October 25, 2001
Interim Report Issued: July 17, 2002
Final Report Issued to Parties: September 2, 2002
Final Report Circulated: September 16, 2002
Notice of Appeal: October 18, 2002
AB Report Circulated: January 16, 2003
Adoption: January 27, 2003

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Key Findings

- Found that the Offset Act constitutes a non-permissible "specific action against" dumping/subsidization, in violation of AD Agreement Article 18.1, SCM Agreement Article 32.1 and GATT Article VI:2 and VI:3. **[Upheld on appeal under modified reasoning.]**
- Found that the Offset Act "undermines the value" of the standing requirements of AD Agreement Article 5.4 and SCM Agreement Article 11.4, in violation of those provisions. **[Reversed on appeal.]**
- Rejected Mexico's claim that the Offset Act *per se* constitutes a "specific" subsidy that causes "adverse effects" under SCM Agreement Article 5(b).
- Finding that the Offset Act does not require investigating authorities to reject price undertakings, the Panel rejected the complainants' claims under AD Agreement Article 8.3 and SCM Agreement Article 18.3, as well as Indian and Indonesian claims under AD Agreement Article 15 related to "constructive remedies" (such as price undertakings) for developing country Members.
- Suggested that the United States bring the Offset Act into conformity by "repealing" the Act.

BACKGROUND

This dispute concerns the U.S. Continued Dumping and Subsidy Offset Act of 2000 (the "Offset Act," referred to by the Panel as the CDSOA), enacted on October 28, 2000. This law amends Title VII of the U.S. Tariff Act of 1930 by adding a new section 754 entitled *Continued Dumping and Subsidy Offset.* Regulations prescribing administrative procedures under the Act were brought into effect on September 21, 2001. The Offset Act applies to all anti-dumping and countervailing duty assessments made on or after October 1, 2000 pursuant to an order or finding in effect on or after January 1, 1999.

The Offset Act provides that "[d]uties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis ... to the affected domestic producers for qualifying expenditures. Such distribution shall be known as 'the continued dumping and subsidy offset.'" The term "affected domestic producers" is later defined, in part, as "a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that – (A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, ..." Thus, under the Act, petitioners in the specified proceedings, and interested parties supporting the petition, are eligible to receive the duties assessed.

The Offset Act provides that the Commissioner of Customs shall establish in the U.S. Treasury a special account with respect to each order or finding and deposit into such account all the duties assessed thereunder. Furthermore, the Act states that the Commissioner shall distribute all funds (including interest) from the assessed duties received in the preceding fiscal year to affected domestic producers based on a certification by the producer that it is eligible to receive, and desires to receive, the distribution, on the basis of qualifying expenditures. All unclaimed amounts are to be "permanently deposited into the general fund in the U.S. Treasury."

(Paras. 2.1-7)

The complainants claimed that the Offset Act is inconsistent with the following provisions: AD Agreement Article 18.1, in conjunction with GATT Article VI:2 and AD Agreement Article 1; SCM Agreement Article 32.1, in conjunction with GATT Article VI:3 and SCM Agreement Articles 4.10, 7.9 and 10; GATT Article X:3(a); AD Agreement Article 5.4 and SCM Agreement Article 11.4; AD Agreement Article 8 and SCM Agreement Article 18; and WTO Agreement Article XVI:4, AD Agreement Article 18.4 and SCM Agreement Article 32.5 (the claims under SCM Agreement Articles 4.10 and 7.9 were later withdrawn). In addition, Mexico claimed that payments made under the Act constitute "specific subsidies" that cause "adverse effects," in violation of SCM Agreement Article 5. Also, India and Indonesia argued that the Act violates AD Agreement Article 15, which provides for special treatment for developing country Members.

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Submission of New Evidence after Deadline - Panel's Working Procedures

On March 27, 2002, Canada requested permission to submit a letter that had been filed with the U.S. International Trade Commission by a U.S. producer in the context of a U.S. countervailing duty

investigation. The United States challenged this request, arguing that the evidence should be rejected because it was submitted after the first substantive meeting. (Para. 7.2)

In a letter issued to the parties on May 3, 2002, the Panel granted Canada's request. In response to a U.S. argument that the information at issue may have been available to Canada as early as February 13, 2002, the Panel stated that the letter at issue did not come into Canada's possession until March 24, 2002. Moreover, the Panel noted that the information contained in the letter is "in the public domain" and it relates to one of the issues that the Panel has been asked to consider in this panel proceeding, *i.e.*, whether or not the Offset Act will cause domestic producers to support petitions for the purpose of receiving offset payments. As a result, the Panel found that there is "good cause," under paragraph 14 of its Working Procedures, for it to accept the submitted letter. The Panel allowed all of the parties time to comment on the substance of the letter. (Para. 7.2)

DSU Article 9.2 - Issuance of Separate Panel Reports

On June 10, 2002, the United States requested, under DSU Article 9.2, that the Panel issue a separate final report on the dispute brought by Mexico. In particular, the United States based its request on the fact that Mexico's panel request included, in addition to the claims common to all complaining parties, a claim under SCM Agreement Article 5(b). (Para. 7.3)

The Panel rejected the U.S. request. In its analysis, the Panel first quoted DSU Article 9.2, which states in relevant part:

> If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned.

The Panel stated that any request for separate reports under this provision "should be made in a timely manner." It explained that the need to prepare separate reports could affect the manner in which a panel organizes its proceedings and opined that such a request should be made "at an early juncture" in the panel process, "preferably at the time a panel is established." (Paras. 7.3-4) In addition, responding to arguments made during the interim review stage of the proceedings, the Panel rejected the U.S. emphasis on the word "shall" in DSU Article 9.2. The Panel explained that DSU Article 9.2 cannot be read to grant parties an "unconditional" right to a separate report, or else respondents would be able to delay issuance of the final report by making a request for separate reports very late in the proceedings. (Para. 6.3)

In the case at hand, the Panel noted that the U.S. request was received two months after the issuance of the descriptive part of the Panel's report. Moreover, the United States did not explain why it was unable to submit its request earlier, and it did not describe any prejudice that it would suffer if the Panel declined to issue a separate report. Recalling that it handled Mexico's SCM Agreement Article 5 claim "separately and discretely" in its report, the Panel stated, "[i]t is not incumbent on us to assume that a failure to issue separate reports will prejudice the United States." (Para. 7.4) The Panel also noted, "[s]ince there is nothing on the record to suggest that the approach we are taking would impair any rights that the US would have enjoyed had separate panels been established, we do not consider ourselves bound to issue a separate report in respect of the dispute brought by Mexico." (Para. 6.4) By contrast, the Panel said, "rights accruing to Mexico would have been impaired had we granted the US request." (Para. 6.5) The Panel considered that the preparation of a separate report would have delayed the issuance of the interim report. Although the United States requested only the issuance of a separate *final* report, the Panel concluded that it could not issue a final report without having issued an interim report, or else it would deny Mexico its right under DSU Article 15.2 to request a review of precise aspects of its interim report. **For these reasons, the Panel rejected the U.S. request for a separate final report on the**

dispute brought by Mexico. (Paras. 7.5-6) (On appeal, the Appellate Body upheld the Panel's finding. *See DSC for U.S. - Offset Act (AB).*)

Terms of Reference - Measure Allegedly Not Mentioned in Panel Request

In responding to the complaining parties' claim under GATT Article X:3(a), the United States argued that this claim falls outside of the Panel's terms of reference, because the complaining parties failed to mention any provisions of U.S. law other than the Offset Act in their panel requests. While the Panel recognized that the U.S. trade laws that are allegedly "administered" by the Offset Act were not included in the panel requests, the Panel noted that the Offset Act itself, which allegedly does the "administer[ing]," was mentioned in the requests. **Therefore, the Panel concluded that the claim was properly within the Panel's terms of reference.** (Para. 7.142)

DSU Article 12.11 / Terms of Reference / AD Agreement Article 15

India and Indonesia argued that the Offset Act "undermines" AD Agreement Article 15, which recognizes that "special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures." (Para. 7.83) The United States responded, in part, that Article 15 is not within the Panel's terms of reference, as it was not identified in any of the complaining parties' panel requests. (Para. 7.84)

The Panel observed that there is no reference to AD Agreement Article 15 in the panel requests submitted by the complaining parties. Therefore, it said, "[g]enerally, ... AD Article 15 would not fall within our terms of reference." However, the Panel then noted that DSU Article 12.11 requires panels to "explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures." Because it considered AD Agreement Article 15 to be "relevant," and since that provision had been raised by developing country Members in the proceedings, the Panel said that it was "bound to consider that provision," even though it was not referred to in the various panel requests. (Para. 7.87)

SUBSTANTIVE ISSUES

AD Agreement Article 18.1, SCM Agreement Article 32.1, GATT Article VI:2 and VI:3 - Specific Action Against Dumping / Subsidization

The complaining parties argued that the Offset Act constitutes a "specific action against" dumping and subsidization that is contrary to AD Agreement Article 18.1, SCM Agreement Article 32.1 and GATT Article VI:2 and VI:3. AD Agreement Article 18.1 states:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]
>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

Similarly, SCM Agreement Article 32.1 provides:

> No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]
>
> [56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

In addressing these claims, the Panel stated at the outset that its "evaluation and findings focus primarily on the AD Article 18.1 claim." These claims had been based in large part on the Appellate Body's findings in *U.S. - 1916 Act*, where it was stated that there are three "permissible responses to dumping" available to WTO Members: "definitive anti-dumping duties, provisional measures, and price undertakings." Here, the complaining parties argued that the Offset Act provided a remedy other than one of these three, and was therefore inconsistent with GATT Article VI:2 and the AD Agreement. Despite the fact that the *U.S. - 1916 Act* findings focused on the AD Agreement, the Panel stated that its findings "apply equally in respect of the claims made under SCM Article 32.1 and GATT Article VI:2 and 3." In response to a U.S. argument that the *U.S. - 1916 Act* findings should not apply to GATT Article VI:3 and the SCM Agreement, the Panel stated: "... we fail to see why a different approach should apply in respect of the permissible responses to subsidization, simply because of a difference between the text of AD Article 1 and SCM Article 10." As noted by the Panel, "Part V of the SCM Agreement [dealing with 'Countervailing Measures'] foresees definitive countervailing duties, provisional measures and undertakings" as the "permissible responses to subsidization." (Para. 7.7)

Turning to the substantive claims, the Panel recalled the three "permissible responses to dumping" available to WTO Members, as stated by the Appellate Body in *U.S. - 1916 Act*. These "permissible responses to dumping," the Panel said, constitute the "specific action against dumping" referred to in AD Agreement Article 18.1. According to the Panel, any other types of "specific action against dumping" are "not permitted." Thus, it said, if the Offset Act is a "specific action against dumping," but not one of the three "permissible responses to dumping," it will violate AD Agreement Article 18.1. (Paras. 7.8-9)

On this basis, the Panel described the issue here as "whether or not the [Offset Act] is a 'specific action against dumping.'" In this regard, the complaining parties argued that the Offset Act constitutes a "specific action against dumping" because "offset payments are dependent on a finding of dumping." In support, the complaining parties relied on the following statement by the Appellate Body at paragraph 122 of *U.S. - 1916 Act*:

> In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present. [footnote omitted]

However, the Panel considered that this statement is not "conclusive" as to whether or not a measure constitutes "specific action against dumping." In the Panel's view, "a measure is not 'specific action against dumping' *simply or only* because it is taken *in response to* situations presenting the constituent elements of dumping, or because it may be taken only when the constituent elements of dumping are present. Such a measure will be 'specific action' related to dumping, in the sense that it acts specifically in response to dumping, but it will not necessarily be 'specific action' against dumping." (italics added) The Panel emphasized that action "in response to" dumping will not always be "against" dumping, as the former is broader than the latter. In this regard, the Panel stated that action "in response to" dumping will

only constitute action "against" dumping to the extent that it has an "adverse bearing" on dumping. (Paras. 7.14-17)

The Panel then stated:

> A measure that may be taken only in situations presenting the constituent elements of dumping is clearly "specific action" in response to dumping. However, in order for that measure to constitute "specific action against dumping", something more is needed: the measure must also act "against" - and therefore have an adverse bearing on - dumping. *In other words, a measure will only constitute "specific action against dumping" if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping, and (2) it acts "against" dumping, in the sense that it has an adverse bearing on dumping.* (emphasis added)

The Panel then considered whether the Offset Act meets these two conditions. (Para. 7.18)

With regard to the first condition, after noting that the Offset Act contains no reference to the "constituent elements" of dumping, the Panel stated that it is nevertheless clear that offset payments may only be made in situations where the constituent elements of dumping are present. Specifically, offset payments follow from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus, according to the Panel, "there is a clear, direct and unavoidable connection between the determination of dumping and ... offset payments." (The Panel also noted the reference to "dumping" in the title of the Act.) The Panel concluded that offset payments may be made only in situations presenting the constituent elements of dumping and therefore act specifically "in response to" dumping. Thus, the Act is a "specific action" related to dumping. (Paras. 7.21-23)

As to the second condition, the Panel considered that a measure will only act "against" dumping if it has an "adverse bearing" on the practice of dumping. In the Panel's view, the ordinary meaning of the term "against" encompasses *any* form of adverse bearing, "be it direct or indirect." (Para. 7.33) The Panel concluded that the Offset Act does have an "adverse bearing" on dumping, for the following reasons. First, the Offset Act leads to a "distortion of competition" between dumped products and domestic products. Specifically, the Act "has an adverse impact on the competitive relationship between dumped/subsidized imports and goods produced by 'affected domestic producers.'" Moreover, it imposes a "penalty" on dumped imports, leading to a "double remedy" on such imports (this "double jeopardy" dissuades foreign producers/exporters from continuing to dump). The Panel noted that these consequences appear to be consistent with the "intent" of the U.S. Congress in enacting the Offset Act. (Paras. 7.35-41) Second, the Offset Act provides a "financial incentive" for domestic producers to file or support anti-dumping/countervailing duty applications in order to establish eligibility for offset payments. As a result, the Panel said, there will be a greater number of investigations and a greater number of orders imposed, thereby disrupting the "trading environment." (Paras. 7.42-45) On this basis, the Panel concluded that the Offset Act "has an adverse bearing on dumping, and therefore acts 'against' dumping." (Para. 7.46)

According to the Panel, the United States argued that, "even if the Panel were to find that the [Offset Act] is an action - but not specific action - against dumping/subsidization, footnotes 24 and 56 to Articles 18.1 and 32, respectively, operate to permit the [Act]." As stated by the Panel, the United States made the following argument:

> the combination of (1) Articles 18.1 and 32.1 and (2) footnotes 24 and 56 creates an integrated scheme proscribing only certain actions against dumping and subsidization. Under that scheme, actions against dumping and subsidies *as such* must proceed under the Antidumping or SCM Agreement; other actions, however, such as actions under GATT Article XVI to address the effects of dumping and/or subsidies, are explicitly permitted by footnotes 24 and 56. The [Offset Act], to the extent that the Panel were to find it to be an action against dumping and/or subsidies, is nevertheless clearly an action under GATT Article XVI to address the effects of such practices.

(Paras. 7.47-49)

In response, the Panel said, "the basis for the US reliance on footnotes 24 and 56 appears to be that the [Offset Act] is not a 'specific' action against dumping or subsidy." In other words, it said, the U.S. arguments "concern measures that constitute 'action against dumping' or subsidy, rather than *'specific* action against dumping' or subsidy." (emphasis added) However, because it had already found that the Act is a "specific action against dumping" or subsidy, the Panel said that "arguments regarding the application of the abovementioned footnotes to non-specific action against dumping or subsidy are not relevant." The Panel concluded that since the United States did not argue that a measure inconsistent with Articles 18.1 and 32.1 could somehow be "saved" by footnotes 24 and 56, "it is not necessary" to address the parties' arguments regarding those footnotes. (Para. 7.50)

For the above reasons, the Panel concluded that the Offset Act constitutes a specific action taken "in response to" situations presenting the constituent elements of dumping, and that action taken pursuant to the Act has an "adverse bearing" on dumping. Therefore, it concluded that the Act is a non-permissible "specific action against dumping," contrary to AD Agreement Article 18.1. The Panel also concluded that the Act is a non-permissible "specific action against a subsidy," contrary to SCM Agreement Article 32.1. Finally, because the Act is inconsistent with these provisions, the Panel found it to be in violation of GATT Article VI:2 and VI:3. (Para. 7.51) (On appeal, the Appellate Body upheld the Panel's finding, under modified reasoning. *See DSC for U.S. - Offset Act (AB).*)

AD Agreement Article 5.4 / SCM Agreement Article 11.4 - Standing

The complaining parties argued that the Offset Act is inconsistent with AD Agreement Article 5.4 and SCM Agreement Article 11.4. Specifically, because the offset payments are only made to those producers that file or support a petition, the Act provides a "financial inducement" to domestic producers to file petitions or to express support for a petition. According to the complainants, AD Agreement Article 5.4 and SCM Agreement Article 11.4 require a Member to conduct an "objective and good faith examination" of the level of support for the application. However, through the promise of offset payments, the complaining parties argued, the U.S. government is "unduly influencing the very facts which the authorities are required to examine in an objective manner." The complaining parties argued that Members must observe the general principle of good faith in the application and interpretation of the AD and SCM Agreements. According to the complainants, when a treaty provision specifies that actions of private parties are necessary to establish a Member's right to take action, provision by a government of a financial incentive for those private parties to act one way rather than another is inconsistent with the requirement that Members perform their treaty obligations in good faith. (Paras. 7.53-54)

AD Agreement Article 5.4 provides, in part, as follows:

> An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. ... (footnotes omitted)

Similarly, SCM Agreement Article 11.4 provides in part:

> An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. ... (footnotes omitted)

As noted by the Panel, the text of these provisions requires that there be sufficient support for an application before a Member may initiate an investigation. (Para. 7.59)

According to the Panel, the issues before it were: (1) whether the Offset Act operates in such a manner that the U.S. investigating authorities "will be unable to conduct an objective and impartial examination of the level of support for the application"; and (2) "whether in consequence the [Act] has undermined the value of the provisions of AD Article 5.4 and SCM Article 11.4." (Para. 7.60)

At the outset, the Panel noted the EC argument that "[AD Agreement Article 5.4 and SCM Agreement Article 11.4] were introduced in response to the controversial practice of the United States authorities of presuming that an application was made by or on behalf of the domestic industry unless a major proportion of the domestic industry expressed active opposition to the petition." According to the Panel, the significance of the tests in AD Agreement Article 5.4 and SCM Agreement Article 11.4 is that under these provisions it may be presumed that investigations will not proceed in circumstances where there is a small proportion of the domestic industry which is affected by dumped/subsidized imports, but "they do not have the support of at least 50 percent of the industry." (Para. 7.61)

The Panel then stated that as a consequence of the Offset Act's requirement that offset payments will be made only to domestic producers who have filed or supported anti-dumping/countervailing duty petitions, there is a "financial incentive" for domestic producers to initiate and support petitions. This incentive, it said, "will result in more petitions having the required level of support from domestic industry than would have been the case without the [Act]." In this regard, the Panel stated, "given the low costs of supporting a petition, and the strong likelihood that all producers will feel obliged to keep open their eligibility for offset payments for reasons of competitive parity, we could conclude that the majority of petitions will achieve the levels of support required under AD Article 5.4/ SCM Article 11.4." (Para. 7.62)

As a consequence, the Panel said, the Act "renders the quantitative tests included in [these provisions] irrelevant, and leaves the investigating authority to make its decision on whether or not to pursue an investigation solely in terms of the requirements set out in AD Article 5.2 and 5.3/SCM Article 11.2 and 11.3, thus denying parties potentially subject to the investigation a meaningful test of whether the petition has the required support of the industry." Indeed, the Panel said, the Act "recreates the spectre of an investigation being pursued where only a few domestic producers have been affected by the alleged dumping, but industry support is forthcoming because of the prospect of offset payments being distributed if dumping is found in consequence of the investigation and anti-dumping duties imposed." Therefore, the Act "may be regarded as having undermined the value of AD Article 5.4/ SCM Article

11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith in promoting this outcome." (Para. 7.63)

Elaborating on its reference to "good faith," the Panel stated, "[t]he importance of the principle of good faith as a general rule of conduct in international relations is well established." In this regard, the Panel said, "good faith requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question." In the Panel's view, AD Agreement Article 5.4 and SCM Agreement Article 11.4 "have as their object and purpose to require the authority to examine the degree of support which exists for an application and to determine whether the application was thus filed by or on behalf of the domestic industry." In this case, it said, the question is whether the Act "defeats this object and purpose" of AD Agreement Article 5.4 and SCM Agreement Article 11.4. Here, the Panel considered that the Act "implies a return to the situation which existed before the Uruguay Round Agreement and which led to the introduction of [these provisions]." (Paras. 7.64-65)

On this basis, the Panel concluded that "by requiring support for the petition as a prerequisite for receiving offset payments, the [Act] in effect mandates domestic producers to support the application and renders the threshold test of AD Article 5.4 and SCM Article 11.4 completely meaningless." Therefore, the Panel concluded that the Offset Act is inconsistent with AD Agreement Article 5.4 and SCM Agreement Article 11.4. (Para. 7.66) (On appeal, the Appellate Body reversed the Panel's finding. *See DSC for U.S. - Offset Act (AB).*)

AD Agreement Article 18.4 / SCM Agreement Article 32.5 / WTO Agreement Article XVI:4

The Panel noted that there was no disagreement among the parties that a violation of AD Agreement Articles 18.1, 5.4 or 8.3 or SCM Agreement Articles 32.1, 11.4 and 18.3 would also constitute a violation of AD Agreement Article 18.4, SCM Agreement Article 32.5 and WTO Agreement Article XVI:4, which require Members to bring their laws into conformity. **Because the Panel found violations of AD Agreement Articles 5.4 and 18.1 and SCM Agreement Articles 11.4 and 32.1, it also found violations of AD Agreement Article 18.4, SCM Agreement Article 32.5, and therefore WTO Agreement Article XVI:4.** (Paras. 7.91-92) (On appeal, the Appellate Body upheld the Panel's findings of violations of AD Agreement Article 18.4, SCM Agreement Article 32.5 and WTO Agreement Article XVI:4, based on the violations of AD Agreement Article 18.1 and SCM Agreement Article 32.1. *See DSC for U.S. - Offset Act (AB).*)

AD Agreement Article 8.3 / SCM Agreement Article 18.3 - Price Undertakings (Mandatory/Discretionary)

The complaining parties argued that the Offset Act "as such" effectively grants domestic producers a "veto right" when it comes to the acceptance of price undertakings by the investigating authority, in violation of AD Agreement Article 8.3 and SCM Agreement Article 18.3. (Paras. 7.67-68)

The Panel rejected the complaining parties' claims. It began its analysis by examining the texts of Article 8.3 and 18.3, which are nearly identical. Article 8.3 states in relevant part:

> Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy.

Similarly, Article 18.3 states in relevant part:

> Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy.

The Panel explained that these provisions provide that "if an undertaking is offered, such an undertaking may be rejected for a number of reasons, including reasons of general policy." (Paras. 7.71-72)

Given that the complainants challenged the Offset Act *as such*, the Panel recalled that it could find an inconsistency with Articles 8.3 and 18.3 "only when [the Act] *mandates* a violation of these provisions." (Emphasis added) The Panel said that this would be the case if the Offset Act either: 1) explicitly amends the statutory provisions relating to price undertakings in a manner inconsistent with these provisions, or 2) "if its effect is such that the authority cannot possibly comply with its obligations in respect of price undertakings under the AD and SCM Agreement." (Para. 7.72)

Turning to an examination of the Offset Act, the Panel noted at the outset that it does not contain any provisions that amend the U.S. statutory provisions governing price undertakings. As to the *effect* of the Offset Act, the Panel said that it would first determine the role of the U.S. domestic industry in respect of the acceptance or rejection of price undertakings. In this regard, the Panel noted that the relevant U.S. statutory provisions require that the investigating authority consult with domestic producers and potentially affected domestic consuming industries before deciding whether to accept a price undertaking. Similarly, the relevant regulations make clear that the investigating authority must assess the public interest in respect of acceptance of the price undertaking on the basis of "all of the facts." Thus, the Panel stated, under both the statute and the regulations, "the objection of the petitioners to the acceptance of an undertaking is only one, be it important, factor in the authority's assessment of whether it is in the public interest to accept an undertaking." As a result, the Panel opined that the investigating authority "remains free to accept an undertaking even if there is domestic industry opposition to such acceptance." In this respect, the Panel noted that, in fact, almost all suspension agreements concluded by the U.S. investigating authority had been entered into over the opposition of the domestic industry. (Paras. 7.73-79) In addition, the Panel noted that Articles 8.3 and 18.3 do not "require investigating authorities to examine objectively any undertaking offered," but, rather, those provisions stress that "undertakings need not be accepted," including for reasons of general policy. (Para. 7.81)

For these reasons, the Panel concluded that because the Offset Act does not mandate a violation of AD Agreement Article 8.3 and SCM Agreement Article 18.3, it therefore is not inconsistent with those provisions. (Para. 7.82)

AD Agreement Article 15 - Developing Country Members

India and Indonesia argued that the Offset Act "undermines" AD Agreement Article 15, which recognizes that "special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures," and states that "[p]ossibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members." (Para. 7.83)

After noting that certain developing country Members attach importance to price undertakings as a "constructive" alternative to anti-dumping duties, the Panel observed that the concern expressed by India and Indonesia regarding Article 15 rests on the understanding that the Act will cause the domestic industry to oppose the acceptance of price undertakings, and therefore lead the U.S. Commerce

Department to reject such undertakings. However, the Panel stated, "there is no factual basis for this premise, since the USDOC remains free to accept an undertaking, even if there is domestic industry opposition to such acceptance." The Panel concluded, "[s]ince the relevant complaining parties' reliance on AD Article 15 is based on a premise which has not been substantiated, we see no need to give any further consideration to AD Article 15 in these proceedings." (Para. 7.88)

SCM Agreement Article 5(b) - Adverse Effects (Nullification or Impairment)

Mexico claimed that the Offset Act is inconsistent with SCM Agreement Article 5(b) because "(1) it mandates the granting of specific subsidies in a manner and in circumstances that will necessarily nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994, and (2) it maintains subsidies in a manner and in circumstances that nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994." (Para. 7.94)

The Panel rejected Mexico's claim. SCM Agreement Article 5(b) states:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> ...
>
> (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[12]
>
> [12]The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

The Panel began its analysis by considering whether the Offset Act is an "actionable subsidy." The Panel explained that a measure constitutes an "actionable subsidy" if 1) it is a "subsidy," 2) it is "specific," and 3) its use causes "adverse effects." Because the United States did not deny that the Offset Act is a subsidy, the Panel focused on the issues of specificity and adverse effects. (Para. 7.106)

SCM Agreement Article 2.1(a) - Specificity

In respect of specificity, Mexico relied on SCM Agreement Article 2.1(a) to claim *de jure* specificity (as opposed to *de facto* specificity). Article 2.1(a) refers to measures that "explicitly limit[] access to a subsidy to certain enterprises." In turn, the Panel noted that the chapeau to Article 2.1 provides that the phrase "certain enterprises" means "enterprise or industry or group of enterprises or industries." Therefore, the Panel said that it must "determine whether or not the [Offset Act] explicitly limits access to offset payments to an 'enterprise or industry or group of enterprises or industries.'" (Para. 7.108-109)

The Panel noted that the measure at issue in these proceedings is the Offset Act, such that it is the Offset Act by itself, rather than disbursements made thereunder, that must be found to constitute a subsidy and to be "specific." However, because Mexico based its specificity arguments on the actual disbursements, and did not argue that the Offset Act *per se* limits access to certain enterprises, the Panel concluded that there was no basis upon which to find that the Offset Act *per se* is "specific" within the meaning of SCM Agreement Article 2.1(a). The Panel then explained that, as a matter of law, under

SCM Agreement Article 1.2 a subsidy that is not "specific" falls outside the scope of the SCM Agreement and therefore cannot be inconsistent with Article 5(b). As a result, the Panel said, "in principle" it would not be necessary to consider the issue of "adverse effects." Nonetheless, the Panel said that it would "set out" its "consideration" of this issue. (Paras. 7.113-116)

SCM Agreement Article 5(b) - Adverse Effects (Nullification or Impairment)

In respect of "adverse effects," Mexico argued that the Offset Act payments *per se* nullify or impair benefits accruing to Mexico under GATT Articles II and VI. In this regard, Mexico made arguments of both "violation" and "non-violation" nullification or impairment. (Para. 7.117)

As for Mexico's claims of "violation" nullification or impairment, Mexico based its argument on alleged violations of GATT Articles VI:2 and X:3(a). Specifically, Mexico relied on DSU Article 3.8, which states that an infringement of obligations under a covered agreement is *prima facie* considered to constitute nullification or impairment. In response, the Panel recalled its earlier findings that the Offset Act violates AD Agreement Articles 5.4 and 18.1, SCM Agreement Articles 11.4 and 32.1 and GATT Articles VI:2 and VI:3. However, the Panel stated that any presumption arising under DSU Article 3.8 stemming from these violations would relate to nullification or impairment caused "*by the violation at issue.*" (Emphasis in original) For the purpose of SCM Agreement Article 5(b), by contrast, the Panel explained that Mexico must demonstrate that "*the use of a subsidy*" caused nullification or impairment. (Emphasis in original) (Paras. 7.118-119) Therefore, the Panel rejected this argument.

With regard to Mexico's claims of "non-violation" nullification or impairment, the Panel recalled the practice of application of GATT Article XXIII:1(b), as set forth by the *Japan - Film* panel in paragraph 10.41. In particular, that panel concluded that three elements must be established under Article XXIII:1(b): (i) the application of a measure by a WTO Member; (ii) the existence of a benefit accruing under the applicable agreement; and (iii) the nullification or impairment of a benefit as a result of the application of a measure. The Panel addressed each element in turn.

In respect of the first element, the application of a measure, the Panel emphasized that the drafters of SCM Agreement Article 5 envisaged the possibility of nullification or impairment resulting from the "use" of a subsidy. Therefore, in the context of SCM Agreement Article 5, the Panel stated that the *Japan - Film* panel's reference to "application" of a measure must encompass the "use" of a subsidy. In this regard, the Panel noted that SCM Agreement Article 7.1 provides useful context by clarifying that the "use" of a subsidy is to be equated with the "grant[]" or "maintain[ing]" of a subsidy. As a result, the Panel rejected the U.S. argument that the Offset Act did not meet this element if no offset payments had yet been disbursed. The Panel stated, "[e]ven if disbursements have not been granted under the [Offset Act], the maintenance of the [offset program] constitutes 'application' of a measure for the purpose of a 'non-violation' nullification or impairment claim under SCM Article 5(b)." Therefore, the Panel concluded that this first element was in fact met. (Paras. 7.121-122) The Panel later said that it considered that the existence of a subsidy program, and the potential use of that subsidy program, is sufficient for that program to "apply." (Para. 7.123)

As for the second element, the existence of a benefit, given that the United States did not dispute that benefits resulting from negotiated tariff concessions accrue to Mexico under GATT Articles II and VI, the Panel saw no reason why it should not find that this requirement had been met. (Para. 7.124)

Finally, the Panel turned to the third element, the nullification or impairment of a benefit. At the outset, the Panel noted statements in previous WTO cases that non-violation is a "rather unusual remedy" and that it "should be approached with caution and should remain an exceptional remedy." (Para. 7.125) Next, the Panel recalled that there is only one adopted GATT panel report that concerns non-violation in

the context of a subsidy program, namely EEC - Oilseeds. As described by the Panel, the *Oilseeds* panel "considered that non-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme." The Panel found this approach to be "reasonable" since "a standard of 'systematic offsetting/counteracting' would preserve the exceptional nature" of the non-violation remedy. Therefore, the Panel said it would examine whether or not the Offset Act systematically offsets or counteracts benefits accruing to Mexico. (Paras. 7.126-127)

To determine whether the *grant* of Offset Act subsidies would result in nullification or impairment, the Panel said that, at a minimum, it must assess the amount of the subsidy to be provided, relative to the amount of the tariff concession. However, because the Offset Act is not product-specific, and because the amount of such subsidies is not directly linked to the level of tariff concession made for the specific product at issue (but rather to the amount of anti-dumping or countervailing duties collected), it said that "there is no certainty that the grant of offset payments under the [Offset Act] will systematically offset or counteract benefits accruing to Mexico under Articles II and VI of the GATT 1994." (Para. 7.128)

As for whether the *maintaining* of the Offset Act program *per se* nullifies or impairs benefits, Mexico asserted that Mexican exporters are unable to predict in advance how much of a subsidy will be bestowed on their affected U.S. domestic industry competitors. The Panel, however, agreed with the U.S. counter-argument that commitments made under GATT Articles II and VI "do not include an express or implied promise of total predictability." Moreover, the Panel stated that acceptance of Mexico's argument would render problematic all subsidy programs that do not fix the exact subsidy amount in advance as well as all *ad hoc*, non-recurring subsidies, thereby running counter to the Appellate Body's statement that non-violation should be approached with "caution" and should remain an "exceptional remedy." (Paras. 7.129-130)

As a final point, the Panel noted the relevance of whether Mexico could have reasonably anticipated at the conclusion of the Uruguay Round of trade negotiations that the United States would pass the Offset Act. Since the Offset Act was introduced in the U.S. Congress after the conclusion of the Uruguay Round negotiations, the Panel explained that there is a "presumption that Mexico could not reasonably have anticipated the introduction of that measure." The United States sought to rebut this presumption by arguing that measures similar to the Offset Act had been proposed in the U.S. Congress prior to the conclusion of the Uruguay Round. However, given that prior proposals for similar legislation were defeated and had been opposed by the U.S. Administration, the Panel found that Mexico could not have reasonably anticipated that the United States would pass the Offset Act. In addition, given the Panel's earlier findings that the Offset Act violates AD Agreement Article 18.1 and SCM Agreement Article 32.1, the Panel considered that Mexico should not be held to have reasonably anticipated that the United States would take these actions against dumping or subsidization. (Para. 7.131)

On this basis, the Panel found that Mexico failed to establish the necessary elements of "violation" or "non-violation" nullification or impairment, and therefore failed to demonstrate that the Offset Act has caused "adverse effects" under SCM Agreement Article 5(b). (Para. 7.132)

In conclusion, because Mexico failed to establish that the Offset Act *per se* is a "specific" subsidy that causes "adverse effects," the Panel rejected Mexico's claim that the Offset Act is inconsistent with SCM Agreement Article 5(b). (Para. 7.133)

GATT Article X:3(a)

The complaining parties argued that the Offset Act violates GATT Article X:3(a) because it "leads to an unreasonable and partial administration of US laws and regulations regarding the initiation of

investigations and the acceptance of undertakings." Specifically, they argued that the Offset Act leads to *unreasonable* administration of anti-dumping and countervailing duty laws and regulations "because investigations will be initiated and measures will be imposed in cases where the domestic industry has no genuine interest in the adoption of such measures, but is acting on the basis of a strong financial incentive to support the application and to oppose an undertaking." Similarly, they also argued that the Offset Act leads to a *partial* administration of U.S. law "since it artificially increases the level of support for the application and deprives the exporters of a fair consideration for an alternative remedy as the exporters' interests in obtaining such an alternative remedy is subordinated to the pecuniary interests of the domestic producers." (Paras. 7.137-138)

The Panel rejected the complaining parties' arguments. It began its analysis by setting forth the relevant text of GATT Article X:3(a), which provides:

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

(Para. 7.141) Citing paragraphs 11.70 and 11.72 of the panel report in *Argentina - Bovine Hides*, the Panel noted that Article X:3(a) applies only in respect of measures that are "administrative in nature." As described by the Panel, the *Bovine Hides* panel found the law at issue in that case to be "administrative in nature" because it did not "establish substantive Customs rules for enforcement of export laws," and it "merely provide[d] for a certain manner of applying [the relevant] substantive rules." (Para. 7.143) By contrast, in the case at hand, the Panel found the Offset Act to be "*substantive* in nature," stating that "we do not consider that the [Offset Act] 'merely provides for a certain manner of applying [the relevant] substantive rules.'" Rather, the Panel noted, "[t]he alleged impact of the [Offset Act] on domestic producers' participation in anti-dumping or countervail proceedings only arises because the [Offset Act] contains *substantive* rules governing the provision of offset payments." (Para. 7.144, emphasis added)

On this basis, the Panel concluded that the Offset Act is "substantive in nature" and therefore falls outside the scope of GATT Article X:3(a). As a result, the Pauel rejected the complainants' claim under this provision. (Para. 7.145)

DSU Article 19.1 - Suggestion by Panel

The Panel observed that certain complaining parties had requested that the Panel snggest that the United States bring the Offset Act into conformity by repealing that measure. Noting that DSU Article 19.1 provides panels with the authority to suggest means of implementation, the Panel stated, "[a]lthough there could potentially be a number of ways in which the United States could bring the [Offset Act] into conformity, we find it difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the ... measure. For this reason, we suggest that the United States bring the [Offset Act] into conformity by repealing the [Act]." (Para. 8.6)

COMMENTARY

For further reading on this dispute, see:

Jagdish Bhagwati and Petros Mavroidis, "Why the Byrd Amendment Must Be Buried," 7 BRIDGES Monthly Review 1 (January/February 2003).

Steve Charnovitz, "The Byrd Amendment Ruling Needs Careful Review," 7 BRIDGES Monthly Review 1 (January/February 2003).

Hale E. Sheppard, "The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for US Trade," 10 Tulane J. of Int'l and Comp. L. (Spring 2002).

AD Agreement and SCM Agreement - Specific Action Against Dumping / Subsidization

See DSC for U.S. - Offset Act (AB).

Good Faith

See DSC for U.S. - Offset Act (AB).

Last Update: January 6, 2006

Appellate Body Report
United States - Continued Dumping and Subsidy Offset Act of 2000
(WT/DS217.234/AB/R) / DSR 2003:I, 375

Participants
Appellant: U.S.
Appellees: Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Korea, Mexico, Thailand
Third Participants: Argentina, Costa Rica, Hong Kong (China), Israel, Norway

Appellate Body Division
Sacerdoti (Presiding Member), Baptista, Lockhart

Timeline of Dispute
Panel Request (DS217): July 12, 2001
Panel Request (DS234 - Canada): August 10, 2001
Panel Request (DS234 - Mexico): August 10, 2001
Panel Established (DS217): August 23, 2001
Panel Established (DS234): September 10, 2001
Panel Composed: October 25, 2001
Interim Report Issued: July 17, 2002
Final Report Issued to Parties: September 2, 2002
Final Report Circulated: September 16, 2002
Notice of Appeal: October 18, 2002
AB Report Circulated: January 16, 2003
Adoption: January 27, 2003

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Key Findings

- Upheld, under modified reasoning, the Panel's finding that the Offset Act is a non-permissible "specific action against" dumping or a subsidy, contrary to AD Agreement Article 18.1 and SCM Agreement Article 32.1. Consequently, upheld the Panel's findings of violation of AD Agreement Article 18.4, SCM Agreement Article 32.5 and WTO Agreement Article XVI:4.
- Reversed the Panel's finding that the Offset Act is inconsistent with AD Agreement Article 5.4 and SCM Agreement Article 11.4. Rejected Panel's conclusion that the Offset Act "defeats" the object and purpose of these provisions; also rejected Panel's conclusion that the United States may be regarded as not having acted in good faith with respect to its obligations under Article 5.4 and Article 11.4.
- Found that two allegations of error in the U.S. appellant's submission had not been properly included in the notice of appeal. However, noting that these two allegations related to "jurisdictional" issues, stated that "the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal."
- Excluded "new evidence" referred to in the U.S. appellant's submission as outside the scope of appeal, pursuant to DSU Article 17.6.

BACKGROUND

This dispute concerns the U.S. Continued Dumping and Subsidy Offset Act of 2000 (the "Offset Act," referred to by the Appellate Body as the CDSOA), enacted on October 28, 2000. This law amends Title VII of the U.S. Tariff Act of 1930 by adding a new section 754 entitled "Continued Dumping and Subsidy Offset." Regulations prescribing administrative procedures under the Act were brought into effect on September 21, 2001. The Offset Act applies to all anti-dumping and countervailing duty assessments made on or after October 1, 2000 pursuant to an order or finding in effect on or after January 1, 1999.

The Offset Act provides that "[d]uties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis ... to the affected domestic producers for qualifying expenditures. Such distribution shall be known as 'the continued dumping and subsidy offset.'" The term "affected domestic producers" is defined, in part, as "a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that – (A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, ..." Thus, under the Act, petitioners in the specified proceedings, and interested parties supporting the petition, are eligible to receive the duties assessed.

The Offset Act provides that the Commissioner of Customs shall establish in the U.S. Treasury a special account with respect to each order or finding and deposit into such account all the duties assessed thereunder. Furthermore, the Act states that the Commissioner shall distribute all funds (including interest) from the assessed duties received in the preceding fiscal year to affected domestic producers based on a certification by the producer that it is eligible to receive, and desires to receive, the distribution, on the basis of qualifying expenditures. All unclaimed amounts are to be "permanently deposited into the general fund in the U.S. Treasury."

As noted by the Appellate Body, the Panel found that the Offset Act distributions made as of December 2001 exceeded US$206 million.

(Panel Report, paras. 2.1-7; AB Report, paras. 11-14)

Before the Panel, the complainants claimed that the Offset Act was inconsistent with the following provisions: AD Agreement Article 18.1, in conjunction with GATT Article VI:2 and AD Agreement Article 1; SCM Agreement Article 32.1, in conjunction with GATT Article VI:3 and SCM Agreement Articles 4.10, 7.9 and 10; GATT Article X:3(a); AD Agreement Article 5.4 and SCM Agreement Article 11.4; AD Agreement Article 8 and SCM Agreement Article 18; and WTO Agreement Article XVI:4, AD Agreement Article 18.4 and SCM Agreement Article 32.5 (the claims under SCM Agreement Articles 4.10 and 7.9 were later withdrawn). In addition, Mexico claimed that payments made under the Act constitute "specific subsidies" that cause "adverse effects," in violation of SCM Agreement Article 5. Also, India and Indonesia argued that the Act violates AD Agreement Article 15, which provides for special treatment for developing country Members.

The Panel found that the Offset Act was inconsistent with AD Agreement Articles 5.4, 18.1 and 18.4; SCM Agreement Articles 11.4, 32.1 and 32.5; GATT Articles VI:2 and VI:3; and WTO Agreement Article XVI:4. On appeal, the United States challenged all of these findings of inconsistency, as well as a finding by the Panel regarding the number of panel reports to be issued.

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Working Procedures for Appellate Review Rule 13 - Replacement Member for Division

Pursuant to Rule 13 of the Working Procedures for Appellate Review, Mr. Giorgio Sacerdoti was selected to replace Mr. A.V. Ganesan -- who had to step down for "serious personal reasons" -- on the Appellate Body Division hearing this appeal. (Para. 8)

Working Procedures for Appellate Review Rule 20(2)(d) - Sufficiency of Notice of Appeal

Canada, supported by other appellees and third participants, argued that the United States breached Rule 20(2)(d) of the Working Procedures for Appellate Review because its appellant's submission allegedly included claims, allegations and requests for ruling that were not included in the U.S. notice of appeal. Canada, therefore, requested that these claims be "struck from the appeal." In particular, Canada referred to four issues from the appellant's submission: 1) the U.S. contention that the Panel failed to meet its obligations under DSU Article 11 because the Panel did not undertake an objective assessment of the matter before it; 2) the U.S. contention that the Panel failed to meet its obligations under DSU Article 12.7 because the Panel did not explain why it examined the burden that the measure creates on conditions of competition; 3) the U.S. contention that the Panel exceeded its terms of reference by examining claims concerning the Offset Act "in combination" with other U.S. laws and regulations; and 4) the U.S. contention that the Panel exceeded its terms of reference by issuing an "advisory opinion" on a measure that was not before it. (Paras. 185-187)

As for the first two issues challenged by Canada, the United States clarified, at the oral hearing, that it was not requesting a finding that the Panel acted inconsistently with DSU Articles 11 and 12.7. Rather, it described these assertions as merely arguments in support of the claim that the Panel erred in its interpretation of AD Agreement Article 18.1 and SCM Agreement Article 32.1. **Given this clarification, the Appellate Body noted that the issue of whether these allegations were included in the notice of appeal "has become moot," and therefore made no findings on this point.** (Paras. 189-190)

With regard to the latter two issues challenged by Canada, namely the U.S. claims that the Panel exceeded its terms of reference and issued an "advisory opinion," the Appellate Body began its analysis by examining Rule 20(2)(d). That rule requires that a notice of appeal include "a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel." The Appellate Body described the "underlying rationale" of this rule as follows: "to require the appellant to provide notice of the claims of error that the appellant intends to argue on appeal." (Paras. 193, 195)

Examining the U.S. notice of appeal in respect of the third issue referred to by Canada (*i.e.*, that the U.S. claim regarding the Panel's examination of the Offset Act "in combination" with other U.S. laws and regulations exceeded its terms of reference), the Appellate Body observed that, in the notice of appeal, there is no reference to DSU Article 7, which governs a panel's terms of reference. Moreover, there is no explicit or implied allegation that the Panel exceeded its terms of reference in respect of any of its findings. The Appellate Body disagreed with the U.S. argument that its claim regarding the Panel's failure to properly interpret AD Agreement Article 18.1 and SCM Agreement Article 32.1 "plainly covers" a claim that the Panel exceeded its terms of reference. In particular, the Appellate Body asserted that "[g]eneric statements ... cannot serve to give the appellees adequate notice that they will be required to defend against a claim that the Panel exceeded its terms of reference." It added that this statement is

particularly true in respect of claims of procedural errors. (Paras. 199-200) On this basis, the Appellate Body agreed with Canada that the U.S. notice of appeal "does not provide adequate notice that a claim that the Panel exceeded its terms of reference in ruling on the [Offset Act] in combination with other laws would be argued by the United States on appeal." (Para. 201)

Finally, the Appellate Body examined the fourth issue challenged by Canada, namely the U.S. argument that the Panel exceeded its terms of reference by issuing an "advisory opinion" on a measure that was not before it. As with the previous terms of reference issue, the United States responded to Canada's challenge by pointing to its claim in the notice of appeal related to the Panel's legal interpretations of AD Agreement Article 18.1 and SCM Agreement Article 32.1. Given that the Appellate Body could find no reference in the U.S. notice of appeal to the Panel exceeding its terms of reference, the Appellate Body said that its reasoning set forth above applies equally to the alleged "advisory opinion." (Paras. 202-205)

Having concluded that the notice of appeal does not provide adequate notice in respect of the U.S. claims that the Panel exceeded its terms of reference and issued an "advisory opinion," the Appellate Body said that the next question is "whether we are precluded from examining these claims on appeal." In particular, the Appellate Body considered the U.S. argument that questions of "jurisdiction" may be examined even if they were not included in the notice of appeal. (Para. 206)

The Appellate Body agreed with the U.S. position. Citing paragraph 36 of its decision in *Mexico - HFCS, Article 21.5*, the Appellate Body explained that the issue of a panel's jurisdiction is "so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal." **Therefore, the Appellate Body agreed to examine the two U.S. claims regarding the Panel exceeding its terms of reference.** (The Appellate Body pointed out that it would be "preferable," in the interests of due process, for the appellant to raise such issues in the notice of appeal.) (Paras. 207-208)

DSU Article 7 - Terms of Reference

The United States challenged two alleged findings by the Panel as outside the Panel's terms of reference. First, the United States argued that the Panel exceeded its terms of reference by examining claims concerning the Offset Act "in combination" with other U.S. laws and regulations. The Appellate Body rejected this U.S. challenge. Examining specific statements made by the Panel in this regard, the Appellate Body explained, "[t]he Panel was merely reflecting in its reasoning the fact that the [Offset Act] does not operate in a vacuum but, rather, operates in a context that includes other laws and regulations." **On this basis, the Appellate Body dismissed the U.S. claim that the Panel exceeded its terms of reference by examining claims concerning the Offset Act "in combination" with other U.S. laws and regulations.** (Para. 212)

Second, the United States argued that the Panel erred by issuing an "advisory opinion" on a measure outside the terms of reference. In particular, the Panel had made the following statement in paragraph 7.22 of its report:

> Even if [Offset Act] offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph – that offset payments may be made only in situations presenting the constituent elements of dumping.

In considering this statement, the Appellate Body disagreed with the United States that the Panel was making a finding on a matter outside its terms of reference. According to the Appellate Body, "the Panel was simply making an observation to make it abundantly clear that its finding was in no way based on the fact that offset payments are funded from collected anti-dumping duties." **On this basis, the Appellate Body dismissed the U.S. claim that the Panel issued an "advisory opinion" exceeding its terms of reference.** (Paras. 213-214)

DSU Article 17.6 - Scope of Appellate Review (New Arguments and Evidence)

Canada, supported by other appellees and third participants, argued that the United States included "arguments and evidence" in its appellant's submission that are outside the scope of appellate review, as defined by DSU Article 17.6. In particular, Canada referred to comments in the U.S. appellant's submission regarding two letters referred to in the Panel report, as well as evidence referred to by the United States in footnotes 148 and 149 of its appellant's submission. (Para. 215)

At the outset, the Appellate Body recalled the text of DSU Article 17.6, which provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." (Para. 216)

Turning to the specific claims, the Appellate Body first considered the U.S. comments regarding the two letters referred to in the Panel report. Specifically, in its appellant's submission, the United States commented on the Panel's analysis of two letters that had been in evidence before it, essentially alleging that the letters did not represent what the Panel claimed them to be. Canada argued that DSU Article 17.6 prohibits the United States from challenging the "credibility and weight the Panel attached to the two letters." (Paras. 217-219) The Appellate Body rejected Canada's claim. It found that the U.S. comments at issue did not "impugn" the Panel's factual findings on the two letters, but, rather, the comments form part of the U.S. challenge to the Panel's legal conclusions under AD Agreement Articles 5.4 and 18.1 and SCM Agreement Articles 11.4 and 32.1. It explained, "[w]hether such findings are supported by those letters is an issue of law, properly raised by the United States in its Notice of Appeal, on which we have the authority to decide under Article 17.6 of the DSU." **Therefore, the Appellate Body rejected Canada's request and did not exclude these U.S. comments.** (Para. 220)

Next, the Appellate Body considered Canada's arguments regarding the alleged "new evidence" contained in footnotes 148 and 149 of the U.S. appellant's submission. Specifically, in these footnotes, the United States cited to various documents, which it said were available on the puhlic record, in connection with its challenge to the Panel's conclusions regarding the two letters referred to above. Noting that it was not disputed that the documents referred to by the United States were not part of the Panel record, the Appellate Body said that Article 17.6 is clear in limiting its jurisdiction to issues of law and legal interpretations, such that it has no authority to consider "new facts" on appeal. Moreover, it stated that the fact that the documents are "available on the public record" does not excuse it from the limitations imposed by Article 17.6. **On this hasis, the Appellate Body said that it is "precluded from taking those documents into account in deciding this appeal."** (Paras. 221-222)

DSU Article 9.2 - Separate Panel Reports

During the Panel proceeding, the Panel had denied a U.S. request, pursuant to DSU Article 9.2, that the Panel issue a separate panel report for the complaint brought by Mexico. In doing so, the Panel had found the U.S. request to be untimely, coming two months after the issuance of the descriptive part of the Panel's report, and the Panel had also noted that the United States had not referred to any prejudice that it would suffer if the Panel failed to issue a separate report. The United States appealed this finding. (Paras. 305-308)

The Appellate Body rejected the U.S. appeal. It began its analysis by examining the ordinary meaning of the text of DSU Article 9.2, which states in relevant part:

> The ... panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. *If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned.* (Emphasis added by Appellate Body)

The Appellate Body noted that this provision accords to the requesting party a "broad right to request a separate report," and that the text does not make this right dependant on any conditions, nor does it set any requirement that the request be made by a certain time. On the other hand, the Appellate Body also observed that the text does not explicitly provide that these requests may be made at *any* time. (Paras. 309-310)

Next, the Appellate Body explained that Article 9.2 "must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement." It considered that the overall object and purpose of the DSU is expressed in Article 3.3, which provides that the "prompt settlement" of disputes is "essential to the effective functioning of the WTO." On this basis, it concluded that an "unqualified" right to request a separate panel report under Article 9.2, at any time during the proceedings, and for whatever reason (or even without any reason), even on the day that immediately precedes the day the panel report is due to be circulated to WTO Members, "would clearly undermine the overall object and purpose of the DSU to ensure the 'prompt settlement' of disputes." (Para. 311)

In the case at hand, the Appellate Body noted that the United States made its request approximately two months after the issuance of the descriptive part of the Panel's report and more than seven months after the Panel had been composed. On this basis, the Appellate Body opined that "it ... cannot be said that the United States made its request 'promptly' or in a 'timely manner, notwithstanding one or more opportunities to do so.'" (Para. 314)

Finally, the Appellate Body also referred to the first sentence of Article 9.2, and it noted the relevance of its comments in footnote 138 of *EC - Hormones* concerning a panel's discretion in dealing with procedural issues. In that case, the Appellate Body noted that the DSU leaves panels a "margin of discretion" to deal with situations that are not explicitly regulated and that, within this context, an appellant requesting a reversal on matters of procedure "must demonstrate the prejudice generated by such legal ruling." In the case at hand, the Appellate Body considered that the Panel acted within its "margin of discretion," stating that the Panel's decision "appears to have been reasonable and in accordance with due process." Moreover, it noted that the United States was not claiming that it suffered any prejudice as a result of the Panel's denial of its request. In addition, it observed that Article 9.2 refers to the rights of all the parties to the dispute and that the Panel had correctly based its decision on an assessment of the rights of all the parties, and not of one alone. (Paras. 315-316)

On this basis, the Panel rejected the U.S. claim that the Panel acted inconsistently with DSU Article 9.2 by not issuing a separate panel report for the complaint brought by Mexico. (Para. 317)

SUBSTANTIVE ISSUES

AD Agreement Article 18.1/SCM Agreement Article 32.1/GATT Article VI:2 and VI:3 - Specific Action Against Dumping / Subsidization

The Panel had found that the Offset Act is a "non-permissible specific action against dumping," contrary to AD Agreement Article 18.1, and a "non-permissible specific action against a subsidy," contrary to SCM Agreement Article 32.1. The United States appealed these findings. (Paras. 224-233)

The Appellate Body began its analysis of this issue by quoting the relevant provisions. AD Agreement Article 18.1 provides:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]
>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

SCM Agreement Article 32.1 has similar wording, with the words "dumping of exports" replaced by "a subsidy." As a result, the Panel had analyzed both provisions in the same manner. The Appellate Body noted that it agreed with this approach.

Examining these provisions, the Appellate Body stated that there are "two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be 'specific' to dumping or subsidization. The second is that a measure must be 'against' dumping or subsidization." If both of these conditions are met, the Appellate Body said, it would then be necessary to determine whether the measure is taken in accordance with the provisions of the GATT. The Appellate Body considered each of these issues. (Paras. 236-237)

The Term "Specific" in the Phrase "Specific Action against Dumping or a Subsidy"

In examining the term "specific," the Appellate Body first noted its statement in paragraph 122 of *U.S. - 1916 Act* that "the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'. 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present." (Emphasis in original) In other words, the Appellate Body elaborated, "the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy." Such link or correlation may, it said, "be derived from the text of the measure itself." (Paras. 238-239)

After recalling that the "constituent elements" of dumping are found in GATT Article VI:1 and AD Agreement Article 2, while the "constituent elements" of subsidization are found in SCM Agreement Article 1, the Appellate Body considered whether the Offset Act constitutes a "specific action" against dumping or subsidization. On this point, the Appellate Body concluded that "the Panel was correct in finding that the [Offset Act] is a specific action related to dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*." Specifically, the Appellate Body stated that "[i]t is clear from the text of the [Offset Act] ... that the ... offset payments are inextricably linked to, and strongly correlated with, a determination of dumping ... or a determination of a subsidy... ." In particular, the Appellate Body referred to the following four factors in support of this

conclusion: (1) "offset payments can be made *only* if anti-dumping duties or countervailing duties have been collected"; (2) "such duties can be collected *only* pursuant to an anti-dumping duty order or countervailing duty order"; (3) "an anti-dumping duty order can be imposed *only* following a determination of dumping ... "; and (4) "a countervailing duty order can be imposed only following a determination that exports have been subsidized ... ." (Emphasis added by Appellate Body) On this basis, the Appellate Body said that it agreed with the Panel that "there is a clear, direct and unavoidable connection between the determination of dumping and ... offset payments," and the same is true for subsidization. In other words, the Appellate Body said, offset payments can be made only following a determination that the constituent elements of dumping or subsidization are present. **Therefore, the Appellate Body found that the Offset Act is "'specific action' related to" dumping or a subsidy within the meaning of AD Agreement Article 18.1 and SCM Agreement Article 32.1.** (Paras. 240-242)

In addition, the Appellate Body rejected two arguments made by the United States. First, the United States argued that the "language" of the Offset Act does not refer to the constituent elements of dumping or subsidization. However, the Appellate Body noted that the "link" or "correlation" between the measure and these elements need not be "explicitly built into" the measure, but may also be implicit, as was the case here. Second, the United States argued that under the Panel's finding, *any* expenditure of collected anti-dumping or countervailing duties would constitute a specific action against dumping. The Appellate Body rejected this argument, noting that only actions that are "against" dumping or subsidization would be covered by this provision. (Paras. 243-245)

The Term "Against" in the Phrase "Specific Action against Dumping or a Subsidy"

The Panel had stated that an action operates "against" dumping or subsidization if it has an "adverse bearing" on dumping or subsidization. On appeal, the United States challenged this approach, arguing that an action is "against" dumping or subsidization if it is "in hostile/active opposition" to dumping or subsidization and that in order to be "against" dumping or subsidization, an "action" must "come into contact" with dumping or subsidization in the sense of "operating directly" on the imported good or the entity responsible for the good. (Para. 247)

In addressing this issue, the Appellate Body first criticized one definition of "against" cited by the United States that used the phrase "in contact with," noting that this definition is not appropriate in this context. Therefore, the Appellate Body rejected the view that an action must have "direct contact" with the imported good or responsible entity in order to be "against" dumping or subsidization. (Paras. 248-250) The Appellate Body noted that its view was confirmed by the text, context and object and purpose of the relevant provisions. (Paras. 251-252)

Therefore, the Appellate Body said that it agreed with the Panel that there is no requirement that the measure must come into "direct contact" with the imported product, or entities connected to, or responsible for, the imported good. In addition, it agreed that the test should focus on dumping or subsidization "as *practices*." Then, recalling the other two elements of the definition of "against" referred to by the United States, namely "of motion or action in opposition" and "in hostility or active opposition to," the Appellate Body said that to answer this question, "it is necessary to assess whether the design and structure of a measure is such that the measure is 'opposed to', has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices." (Paras. 253-254)

On the facts of this case, the Appellate Body concluded that the Offset Act has those effects because of its design and structure. Specifically, the Appellate Body noted that the Offset Act "effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their

domestic competitors," in the following way: (1) the offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters; (2) the offset payments are made to an "affected domestic producer," defined in Section 754(b) of the Tariff Act as "a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered" and that "remains in operation"; (3) under the implementing regulations issued by the Commissioner of Customs, the "qualifying expenditures" of the affected domestic producers, for which the offset payments are made, "must be related to the production of the same product that is the subject of the related order or finding, with the exception of expenses incurred by associations which must relate to a specific case"; and (4) there is no statutory or regulatory requirement as to how an offset payment to an affected domestic producer is to be spent, "thus indicating that the recipients are entitled to use this money to bolster their competitive position... ." On this basis, the Appellate Body concluded that the Offset Act has an "adverse bearing" on the foreign producers/exporters in that the imports of the dumped or subsidized products result in the financing of U.S. competitors through the transfer to the latter of the duties collected on those exports. Therefore, the Appellate Body said, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products. Because the Offset Act "has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices," **the Appellate Body concluded that the Act is "undoubtedly an action 'against' dumping or a subsidy," within the meaning of AD Agreement Article 18.1 and SCM Agreement Article 32.1** (Paras. 254-256)

In addition, the Appellate Body considered three other specific arguments made by the United States. First, the United States argued that the Panel erred by incorporating a "conditions of competition" test into its analysis. On this point, the Appellate Body said that it was "not necessary, nor relevant" for the Panel to have made such an examination. Second, the United States challenged the Panel's reliance on the view that the Offset Act "provides a financial incentive" to file or support anti-dumping or countervailing duty applications. Here, the Appellate Body also agreed with the United States that this consideration is not proper, as a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of WTO-consistent rights. Third, the United States criticized the Panel's reliance on the "stated purpose" of the Offset Act. While noting that there was no need to examine the legislative intent, the Appellate Body concluded that the Panel did not err in stating that the legislative intent "confirms" its conclusion. (Paras. 257-259)

AD Agreement Footnote 24 and SCM Agreement Footnote 56

In addition, the United States challenged the Panel's treatment of footnotes 24 and 56 as part of its analysis. Specifically, the United States argued that an action that falls within these footnotes cannot be characterized as a "specific action" under AD Agreement Article 18.1 or SCM Agreement Article 32.1. (Para. 260)

The Appellate Body rejected this argument. Referring to its findings in paragraph 123 of *U.S. - 1916 Act*, the Appellate Body recalled that under Articles 18.1 and 32.1, "an action is specific to dumping (or a subsidy) when it may be taken *only* when the constituent elements of dumping (or a subsidy) are present, or, put another way, when the measure is inextricably linked to, or strongly correlates with, the constituent elements of dumping (or of a subsidy)." Thus, it said that the footnotes simply confirm what is implicit in the text of the main provisions: "that an action that is *not* 'specific' within the meaning of [AD Agreement Article 18.1 and SCM Agreement Article 32.1], but is nevertheless related to dumping or subsidization, is not prohibited by [these provisions]." (Paras. 261-262)

Whether the Offset Act is "in Accordance with the WTO Agreement"

Turning to the last step in its analysis, the Appellate Body considered whether the Offset Act is "in accordance with the provisions of the GATT 1994, as interpreted by" the AD Agreement or the SCM Agreement. In doing so, the Appellate Body considered separately the AD Agreement and the SCM Agreement. (Para. 263)

With regard to the AD Agreement, the Appellate Body stated that the provisions of the GATT at issue, as noted in paragraph 125 of *U.S. - 1916 Act*, are those in GATT Article VI "concerning dumping." Furthermore, the Appellate Body recalled that in that decision, it also stated in paragraph 137 that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings." Here, it noted, the offset payments are not definitive anti-dumping duties, provisional measures or price undertakings. **Therefore, because the Offset Act is a specific action against dumping other than one of these three permissible actions, it concluded that the Act is not "in accordance with the provisions of the GATT 1994, as interpreted by" the AD Agreement, and is inconsistent with AD Agreement Article 18.1.** (Paras. 264-265)

As to the SCM Agreement, the Appellate Body stated that its conclusion in *U.S. - 1916 Act* that there are certain permissible responses to dumping also applies to subsidization under the SCM Agreement. In this regard, it noted that SCM Agreement Article 32.1 "is identical in terminology and structure to" AD Agreement Article 18.1, except for the reference to "a subsidy" instead of "dumping." According to the Appellate Body, "[t]his identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition." The Appellate Body then noted that the GATT and the SCM Agreement provide four responses to a countervailable subsidy: "(i) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally-sanctioned countermeasures under the dispute settlement system." It further stated that "[n]o other response to subsidization is envisaged in the text of the GATT 1994, or in the text of the *SCM Agreement*." Therefore, it said, to be "in accordance with the GATT 1994, as interpreted by" the SCM Agreement, a response to subsidization must be in one of those four forms. (Paras. 268-269) This conclusion, it said, is "consistent" with footnote 35 to SCM Agreement Article 10 and with the "function" of SCM Agreement Article 32.1. (Paras. 270-272) **Because the Offset Act does not correspond to any of the responses to subsidization envisaged by the GATT and the SCM Agreement, the Appellate Body concluded that it is not in accordance with the provisions of the GATT, as interpreted by the SCM Agreement, and that, therefore, the Act is inconsistent with SCM Agreement Article 32.1.** (Para. 273)

Conclusion

Based on the reasoning above, the Appellate Body upheld, under modified reasoning, the finding of the Panel that the Offset Act is a "non-permissible specific action against" dumping or a subsidy, contrary to AD Agreement Article 18.1 and SCM Agreement Article 32.1. (Para. 274)

AD Agreement Article 5.4 / SCM Agreement Article 11.4 - "By or on Behalf of the Domestic Industry"

The Panel had found that the Offset Act is inconsistent with AD Agreement Article 5.4 and SCM Agreement Article 11.4, which require a certain amount of support "by or on behalf of" the domestic industry in order for an investigation to be initiated. Turning to what it identified as the "object and purpose" of these provisions, the Panel found that the provisions require investigating authorities "to examine the degree of support which exists for an application and to determine whether the application

was thus filed by or on behalf of the domestic industry." The Panel found that the Offset Act "defeats this object and purpose" by "implying a return to the situation which existed before the introduction of Articles 5.4 and 11.4." Specifically, the Panel said that those Articles were "introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports." It concluded that the Act "in effect mandates" domestic producers to support applications for the initiation of anti-dumping and countervailing duty investigations by making such support "a prerequisite for receiving offset payments" and thus renders the threshold test of Articles 5.4 and 11.4 "completely meaningless." On this basis, the Panel found that the Act is inconsistent with Article 5.4 and Article 11.4. The United States appealed this finding. (Paras. 275-280)

In addressing this issue, the Appellate Body emphasized that the interpretation of Articles 5.4 and 11.4 must be based on the principles of interpretation in the Vienna Convention on the Law of Treaties, which focus on the ordinary meaning of the words of a provision. Here, it said, Articles 5.4 and 11.4 require investigating authorities to "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry." If a sufficient number of domestic producers have "expressed support" and the thresholds set out in Articles 5.4 and 11.4 have therefore been met, the "application shall be considered to have been made by or on behalf of the domestic industry." In such circumstances, an investigation may be initiated. By contrast, there is no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Thus, an "examination" of the "degree" of support, and not the "nature" of support is required (*i.e.*, it is the "quantity," rather than the "quality," of support that is the issue). (Paras. 281-283)

Next, the Appellate Body noted that when the Panel examined the text of these provisions, it had arrived at the "same conclusion" as had the Appellate Body above. However, the Panel had then continued its analysis by examining whether the Offset Act "defeats" the object and purpose of these provisions. The Appellate Body said that it had "difficulty" with the Panel's approach, and stated that the Panel "dismissed all too quickly the textual analysis of those provisions as irrelevant." The Appellate Body concluded that the text of Article 5.4 and Article 11.4 does not support the reasoning of the Panel. By their terms, it said, "those provisions require no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application." (Paras. 284-286)

The Appellate Body then considered the "object and purpose" that had been identified by the Panel. Specifically, the Panel said that these provisions have as their "object and purpose" to require investigating authorities "to examine the degree of support which exists for an application and to determine whether the application was thus filed by or on behalf of the domestic industry." The Appellate Body noted that the Panel appears to have found that the Offset Act defeats this "object and purpose" because it "in fact implies a return to the situation which existed before the introduction of [these provisions]," in which an application could be "presumed" to have been made by or on behalf of the domestic industry. The Appellate Body disagreed with the Panel's analysis. By their terms, it said, Articles 5.4 and 11.4 do not permit investigating authorities to "presume" that industry support for an application exists. Rather, a sufficient number of domestic producers must have "expressed support" for an application. The Offset Act does not change the fact that investigating authorities are required to examine the "degree of support" that exists for an application and that an application shall be considered to have been made "by or on behalf of the domestic industry" only if sufficient support has been "expressed." Thus, the Appellate Body did not agree with the Panel that the Offset Act has "defeated" the object and purpose of Articles 5.4 and 11.4, even if it were to assume that the Panel's understanding of the object and purpose was correct. Similarly, the Appellate Body did not agree with the Panel that the Offset Act renders the quantitative threshold tests included in Articles 5.4 and 11.4 "irrelevant" and "completely meaningless." (Paras. 287-289)

Furthermore, the Appellate Body said, the Panel took the view that Articles 5.4 and 11.4 "[were] introduced precisely to *ensure* ... that support expressed by domestic producers was *evidence of industry-wide concern of injury.*" On this point, the Appellate Body said that while it agreed with the Panel that support expressed by domestic producers *may* be evidence of an "industry-wide concern of injury," it did not agree that such support may be taken to be evidence of such concern *alone*. Nor, it said, do Articles 5.4 or 11.4 require support to be based on that concern alone. As noted, Article 5.4 and Article 11.4 "contain no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application." (Paras. 290-291)

In addition, the Panel had found that the Offset Act "will result" in more applications having the required level of support from domestic industry than would have been the case without the Act and stated that "given the low costs of supporting a petition, and the strong likelihood that all producers will feel obliged to keep open their eligibility for offset payments for reasons of competitive parity," it "could conclude that the *majority of petitions will achieve the levels of support required* under AD Article 5.4/ SCM Article 11.4." However, according to the Appellate Body, the evidence contained in the Panel record does not support the "overreaching" conclusion that "the majority of petitions will achieve the levels of support required" under Articles 5.4 and 11.4 "as a *result*" of the Act. In this regard, the Appellate Body noted that, in its first written submission to the Panel, the United States explained that "it is rare for domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions." (Para. 292)

Finally, the Appellate Body said that the Panel had no basis for stating that the Act "in effect *mandates* domestic producers to support the application." The fact that a measure provides an "incentive" to act in a certain way, it said, does not mean that it "in effect mandates" or "requires" a certain form of action. While a measure that would "coerce" or "require" domestic producers to support an application might well be found to circumvent the obligations contained in AD Agreement Article 5.6 and SCM Agreement Article 11.6 -- that is, the obligation not to initiate an investigation without a written application "by or on behalf of the domestic industry" except when certain conditions have been met -- the Offset Act is not such a measure. (Para. 293)

On this basis, the Appellate Body reversed the Panel's finding that the Offset Act is inconsistent with AD Agreement Article 5.4 and SCM Agreement Article 11.4. (Para. 294)

As a final point, the Appellate Body considered the Panel's conclusion that the United States did not act in "good faith" with respect to its obligations under Articles 5.4 and 11.4. On this issue, the Appellate Body first observed that VCLT Article 31(1) directs a treaty interpreter to interpret a treaty in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. Moreover, under VCLT Article 26, entitled "*Pacta Sunt Servanda*," performance of treaties is also governed by good faith. Furthermore, the Appellate Body noted that it had recognized the relevance of the principle of good faith in a number of cases, such as *U.S. - Shrimp* and *U.S. - Japan Hot-Rolled Steel*. Therefore, the Appellate Body said, there is "clearly ... a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith," thus rejecting the U.S. argument that there is no basis in the WTO Agreement to conclude that a Member has not acted in good faith. However, it noted that nothing in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. It said that "it would be necessary to prove more than mere violation to support such a conclusion." Turning to this case, it said that the evidence in the Panel record does not support the Panel's statement that the United States "may be regarded as not having acted in good faith." Therefore, it rejected the Panel's conclusion to this effect. (Paras. 295-299)

WTO Agreement Article XVI:4/AD Agreement Article 18.4/SCM Agreement Article 32.5/DSU Article 3.8

On the basis of its claims that the Offset Act is consistent with GATT Articles VI:2 and VI:3, AD Agreement Articles 5.4, 18.1 and 18.4 and SCM Agreement Articles 11.4, 32.1 and 32.5, the United States requested, for the same reasons, that the Appellate Body reverse the Panel's findings that the Act violates WTO Agreement Article XVI:4 and that the benefits accruing to the appellees under the WTO Agreement have been nullified or impaired. In response, the Appellate Body noted, generally speaking, that AD Agreement Article 18.4, SCM Agreement Article 32.5 and WTO Agreement Article XVI:4 all require that Members ensure the conformity of their laws with the relevant WTO agreements. **As a result of its findings above that the United States acted inconsistently with AD Agreement Article 18.1 and SCM Agreement Article 32.1, the Appellate Body upheld the Panel's findings that the United States failed to comply with AD Agreement Article 18.4, SCM Agreement Article 32.5 and WTO Agreement Article XVI:4.** (Paras. 300-301) **Moreover, pursuant to DSU Article 3.8, the Appellate Body concluded, to the extent that it had found the Offset Act to be inconsistent with AD Agreement Article 18.1 and SCM Agreement Article 32.1, "the [Offset Act] nullifies or impairs benefits accruing to the appellees in this dispute under those Agreements."** (Para. 304)

COMMENTARY

For further reading on this dispute, see:

Jagdish Bhagwati and Petros Mavroidis, "Why the Byrd Amendment Must Be Buried," 7 BRIDGES Monthly Review 1 (January/February 2003).

Steve Charnovitz, "The Byrd Amendment Ruling Needs Careful Review," 7 BRIDGES Monthly Review 1 (January/February 2003).

Hale E. Sheppard, "The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for US Trade," 10 Tulane J. of Int'l and Comp. L. (Spring 2002).

AD Agreement and SCM Agreement - "Specific Action Against" Dumping / Subsidization

With regard to the issue of whether the Offset Act is a "specific action against" dumping/subsidization under AD Agreement Article 18.1 and SCM Agreement Article 32.1, we note two points. First, one of the key elements of the Panel's affirmative finding on this issue was its reference to the Appellate Body's statement in *U.S. - 1916 Act* that there are three "permissible responses to dumping" available to WTO Members: "definitive anti-dumping duties, provisional measures, and price undertakings." These "permissible responses to dumping," the Panel said, constitute the "specific action against dumping" referred to in AD Agreement Article 18.1. According to the Panel, any other types of "specific action against dumping" are "not permitted." Thus, if the Offset Act is a "specific action against dumping," but is not one of the three "permissible responses to dumping," then it will violate AD Agreement Article 18.1. (Similarly, in the context of the SCM Agreement, if the Act is not one of the permissible responses to subsidization, it will violate SCM Agreement Article 32.1). The Panel then focused its analysis on the question of whether the Offset Act is a "specific action against dumping." Based on its conclusion that the Act was "in response to" dumping and had an "adverse bearing" on dumping, the Panel concluded that the Act constitutes such a "specific action." It concluded that the Act violates AD Agreement Article 18.1 and SCM Agreement Article 32.1. The Appellate Body reached the same findings, under modified reasoning.

With the emphasis on the issue of whether the measure is a "specific action against" dumping/subsidization, neither the Panel nor the Appellate Body explicitly addressed an earlier step in the analysis: namely, is the Offset Act one of the types of permissible actions referred to by the Appellate Body? In the view of at least a few supporters of the Act, the Act is consistent with WTO rules because it is, in fact, related to anti-dumping/countervailing duties, which are permitted actions. The Act is simply part of the overall anti-dumping/countervailing duty law and merely governs how such duties are to be distributed. Because WTO rules do not regulate the manner in which these duties may be distributed, under this view there would be no violation. By contrast, the Panel and the Appellate Body appear to have assumed that the Act was *not* one the permitted measures. This assumption may have arisen from the manner in which the Act itself was examined (perhaps in response to the way the parties made their arguments). In particular, the Act appears to have been treated as *separate* from the rest of U.S. anti-dumping/countervailing duty law, that is, as a measure that simply distributes money to particular companies in response to dumping or subsidization. In other words, despite the fact that duties are involved here, the key point for the Panel and the Appellate Body was that the Act itself operates as a subsidy. Viewed from this perspective, it is not surprising that the Panel and Appellate Body concluded that the Act is not one of the permitted "specific actions against" dumping or subsidization.

Second, also noteworthy was the Panel's rejection of the U.S. argument that:

> ... in the event that the Panel concludes that the [Offset Act] is an action against dumping and a subsidy, footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively, operate to *exclude* the [Offset Act] from the scope of Article VI and the Antidumping and SCM Agreements. ... The United States argues that the [Offset Act] is an action consistent with GATT 1994 Article XVI entitled "Subsidies." Article XVI is a "relevant provision of GATT 1994" which recognizes that Members have the general right to use subsidies and may provide non-export subsidies to the extent that they do not cause serious prejudice to the interests of other Members. ... Therefore, if the [Offset Act] is considered to be an action against dumping, the distributions are otherwise permitted by the footnotes to Articles 18.1 and 32.1 as action under another relevant GATT provision. (emphasis added)

See paras. 4.244-245 of Panel report. It appears that the Panel took the view that, because it had already found the Act to be a "specific action against" dumping/subsidization under Article 18.1/Article 32.1, the footnotes were irrelevant. As stated by the Panel in paragraph 7.50:

> insofar as we have already found that the [Offset Act] is a "specific action against dumping" or subsidy, in the meaning of AD Article 18.1 and SCM Article 32.1, arguments regarding the application of the abovementioned footnotes to non-specific action against dumping or subsidy are not relevant.

Implicit in this statement is the notion that because the measure is a "specific action against" dumping/subsidization pursuant to Article 18.1/Article 32.1, it cannot be an "action under other relevant provisions" pursuant to the footnotes. In other words, under this view, the scope of the main text and of the footnotes is mutually exclusive, with no overlap.

On appeal, the Appellate Body appears to have confirmed this implicit finding. In paragraphs 261-262, it said that the footnotes simply confirm what is implicit in the text of the main provisions: "that

an action that is *not* 'specific' within the meaning of [AD Agreement Article 18.1 and SCM Agreement Article 32.1], but is nevertheless related to dumping or subsidization, is not prohibited by [these provisions]." In other words, actions that are "specific" are covered by the main text of these provisions, whereas actions that are not "specific" are not covered.

Good Faith

In its analysis of AD Agreement Article 5.4 and SCM Agreement Article 11.4, the Panel's reasoning did not focus on the specific language in the provisions at issue. Rather, the Panel emphasized that the Offset Act "defeated" the object and purpose of these provisions and "undermined their value." Furthermore, it said that "the United States may be regarded as not having acted in good faith in promoting this outcome." It further stated: "Good faith requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question." (*See* paras. 7.63-65)

The Panel's reliance on this type of reasoning went further than previous invocations of good faith in WTO dispute settlement decisions. Past citations to the principle of good faith are generally tied to particular language in the text of a provision, such as a word like "objective." In addition, the Panel's emphasis on these factors as part of a "violation" finding appears to lead to some overlap between "violation" and "non-violation" claims.

The Appellate Body's treatment of this issue on appeal raises some interesting points. First, the Appellate Body recognized that there is "clearly ... a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith." As support, it mentioned the references to "good faith" in VCLT Article 31(1) and Article 26, as well as its own references to this principle in the *U.S. - Shrimp* and *U.S. - Japan Hot-Rolled Steel* decisions. In *Shrimp*, the Appellate Body said that the Article XX *chapeau* is an "expression" of good faith; in *Hot-Rolled Steel*, the Appellate Body noted that good faith "informs" the provisions of the covered agreements. Unfortunately, these references do not provide much insight as to how precisely "good faith" is relevant in WTO dispute settlement. However, the Appellate Body did appear to take a narrower view of the principle of good faith than had the Panel, rejecting the Panel's conclusion that the Offset Act was evidence that the United States did not act in good faith.

In addition, we note that the basis for the Appellate Body's reversal of the Panel's findings on good faith is unclear. In paragraph 298, the Appellate Body said: "Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion." Then, in paragraph 299, the Appellate Body stated its conclusion: "The evidence in the Panel record does not, in our view, support the Panel's statement that the United States 'may be regarded as not having acted in good faith'. We are of the view that the Panel's conclusion is erroneous and, therefore, we reject it." Implicit in the sequence of these two paragraphs appears to be an assumption by the Appellate Body that the Panel's finding that the United States did not act in good faith was based on the Panel's finding of a violation. In fact, the opposite seems to be true: The Panel's finding that the United States did not act in good faith formed part of the basis for its finding of violation. (*See* paras. 7.63-66 of the Panel report) Given this disconnect between the Appellate Body's statement in paragraphs 298-299 and the Panel's actual finding, the Appellate Body's specific concerns regarding the Panel's conclusions on good faith are not clear.

Working Procedures for Appellate Review Rule 20(2)(d) - Sufficiency of Notice of Appeal

In considering the issue of whether certain U.S. allegations of error were properly before it, the Appellate Body made a noteworthy finding related to jurisdictional issues. Specifically, the Appellate Body found that even though certain allegations related to the Panel's terms of reference were not mentioned in the notice of appeal, these allegations could still be considered as part of the appeal because they were "jurisdictional" issues. The Appellate Body's finding on this point appears to be consistent with its treatment of "jurisdictional" issues in other cases. *See, e.g.,* *U.S. - 1916 Act*, paras. 53-54; and *U.S. - German Steel CVDs*, para. 123. Nonetheless, we note that this ruling could allow appellants in future cases to seek a tactical advantage as part of the appeal process. By not mentioning a jurisdictional issue in the notice of appeal, an appellant could maintain the element of surprise when raising this issue in its appellant's submission. Of course, DSU Article 3.10 states that Members will apply WTO dispute settlement procedures in "good faith."

Last Update: January 6, 2006

Exhibit 27

Panel Report
United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan
(WT/DS184/R) / DSR 2001:X, 4769

Parties
Complainant: Japan
Respondent: U.S.
Third Parties: Brazil, Canada, Chile, EC, Korea

Timeline of Dispute
Panel Request: February 11, 2000
Panel Established: March 20, 2000
Panel Composed: May 24, 2000
Interim Report Issued: January 22, 2001
Final Report Circulated: February 28, 2001
Notice of Appeal: April 25, 2001
AB Report Circulated: July 24, 2001
Adoption: August 23, 2001

Panelists
Mr. Harsha V. Singh (Chairperson),
Mr. Yanyong Phuangrach, Ms. Elena Lidia di Vico

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Key Findings

- The U.S. Department of Commerce ("DOC") erred in applying "facts available" and therefore acted inconsistently with AD Agreement Article 6.8 and/or Annex II(7). **[Upheld by Appellate Body based, in part, on modified reasoning.]**
- The DOC's "arm's length" test for excluding sales to affiliates is inconsistent with AD Agreement Article 2.1. **[Upheld by Appellate Body based on modified reasoning.]** The replacement of those sales with downstream resales by the affiliates is inconsistent with AD Agreement Article 2.1. **[Reversed by Appellate Body; Appellate Body unable to complete analysis of Japan's claim.]**
- The U.S. statute governing critical circumstances and its application in the hot-rolled investigation is "not inconsistent" with AD Agreement Article 10.
- The U.S. statute requiring the inclusion of margins based partially on "facts available" in the calculation of the "all others" dumping margin is inconsistent with Article 9.4 "as such" and as applied in the hot-rolled investigation. **[Upheld by Appellate Body.]**

Key Findings Continued on Next Page

Key Findings (Continued)

- The U.S. statutory requirement to "focus primarily" on the merchant market (also called the "captive production" provision) is "not inconsistent" with the AD Agreement requirement to examine the domestic industry "as a whole" **[upheld by Appellate Body based on modified reasoning]**, and it was applied consistently with that requirement in the hot-rolled investigation **[reversed by Appellate Body]**.
- In the circumstances of this case, the examination of two years of data by the U.S. International Trade Commission ("ITC") is consistent with the injury standards of Article 3.
- Under AD Agreement Article 3.5, the ITC is not required to identify the injurious effects of the other factors known to be causing injury to the domestic industry at the same time as imports. **[Interpretation of Article 3.5 reversed by Appellate Body; Appellate Body was unable to complete the analysis under a proper interpretation of Article 3.5.]**
- The U.S. agency actions at issue are consistent with the GATT Article X:3(a) requirement of a "uniform, impartial and reasonable" administration.

BACKGROUND

This dispute concerns the U.S. imposition of definitive duties on imports of certain hot-rolled flat-rolled-carbon-quality steel products ("hot-rolled steel") from Japan. The petition for this investigation was filed on September 30, 1998 with respect to imports from Brazil, Japan and Russia. The petition also alleged that critical circumstances existed for imports from Japan.

Upon the filing of the petition, the relevant U.S. anti-dumping authorities initiated an investigation. Specifically, the U.S. International Trade Commission ("ITC") instituted its injury investigation on September 30, 1998, and the U.S. Department of Commerce ("DOC") initiated an anti-dumping duty investigation on October 15, 1998. Finding it impractical to examine all of the relevant Japanese exporters, the DOC decided to conduct its investigation on the basis of a sample of three Japanese producers -- Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC") and NKK Corporation ("NKK").

Effective November 16, 1998, the ITC issued an affirmative preliminary determination of a "reasonable indication" that the U.S. industry was threatened with material injury. Then, effective November 30, 1998, the DOC issued its affirmative preliminary critical circumstances determination with respect to imports from Japan. Based on its preliminary finding that critical circumstances existed, the DOC stated that upon issuance of an affirmative preliminary dumping determination, it would direct the U.S. Customs Service to suspend liquidation of all entries of hot-rolled steel from Japan for a period of ninety days prior to the preliminary dumping determination. On February 19, 1999, the DOC issued its preliminary affirmative dumping determination, finding dumping margins for the three investigated respondents ranging from 25 to 67 percent.

On May 6, 1999, the DOC published its final determination of dumping, establishing the following dumping margins: KSC (67.14%), NSC (19.65%), NKK (17.86%), All Others Rate (29.30%). The DOC also made a final negative determination of critical circumstances with respect to NSC and NKK, but it continued to find that critical circumstances existed as to KSC and the "all others" companies.

On June 11, 1999, the ITC voted unanimously that the U.S. industry was materially injured or threatened with material injury by reason of hot-rolled steel imports from Japan, and it published its final affirmative determination of injury on June 23, 1999. It also reached a negative critical circumstances determination.

On June 29, 1999, the DOC published an anti-dumping duty order imposing estimated dumping duties on imports from Japan at the rates announced in its final determination. Since the ITC had not found critical circumstances to exist, it ordered the refund of any cash deposits and/or release of any guarantees provided for the period of the preliminary critical circumstances finding.

(Paras. 2.1-9)

Japan challenged the anti-dumping measures "as applied" in this case under AD Agreement Articles 2, 3, 4, 6, 9 and 10, and Annex II. It also challenged certain of the U.S. anti-dumping laws, regulations and administrative procedures "as such" under those same provisions. Finally, Japan challenged several actions taken by the DOC and the ITC in the course of the investigation under GATT Article X:3(a).

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Exclusion of Certain Evidence

The United States argued that, under AD Agreement Article 17.5(ii), the Panel is not permitted to examine evidence submitted to it by Japan that was not before the investigating authority during the anti-dumping investigation. In particular, the United states requested that the Panel disregard in their entirety four affidavits prepared for the purpose of these panel proceedings by the U.S. attorneys of the Japanese respondents and a statistician, as well as numerous newspaper Articles that were either never presented to the U.S. authorities in the course of the investigation, or were presented to only one of the U.S. authorities (*i.e.*, the DOC *or* the ITC) for a different purpose than the one for which they are being submitted by Japan to the Panel. Moreover, the United States contended that by presenting new evidence, Japan "seeks to have the Panel go beyond its mission under Article 17.6(i) of the AD Agreement to determine whether the establishment of the facts by the investigating authority was proper and its evaluation of those facts unbiased and objective. Similarly, the United States argued that if permission to present new evidence were given to only the Japanese producers, the Panel's decision would run counter to the "guarantee" expressed in AD Agreement Article 6.1 that all interested parties may present evidence. (Paras. 7.2-3)

At the outset, the Panel noted its obligation under DSU Article 11 to "conduct 'an objective assessment of the matter before it." It also recognized, however, that it must consider "the implications" of AD Agreement Article 17.5(ii), and it examined the text of that provision:

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

Based on the text of this provision, the Panel stated:

> It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions

> that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation.

(Para. 7.6) The Panel found that this conclusion (not to consider new evidence with respect to claims under the AD Agreement) flows not only from Article 17.5(ii), but "also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities." In this regard, the Panel noted similar decisions made by WTO panels, including the panel in *U.S. - Wheat Gluten Safeguards*, in the context of safeguards investigations. (Para. 7.7) While recognizing Japan's point that investigating authorities control what information is placed on the record, the Panel considered that Japan has not raised any challenge that the U.S. authorities wrongly rejected information submitted during the course of the investigation, and, therefore, the Panel did not address that issue here. (Para. 7.8)

In making this decision not to consider certain evidence as it pertains to Japan's claims under the *AD Agreement*, the Panel also emphasized that some of the challenged evidence pertains to Japan's claims under *GATT Article X:3*. The Panel made clear that the limits imposed under AD Agreement Article 17.5(ii) do not apply to the evidence to be considered in connection with an Article X claim. In support of this interpretation, the Panel referred to its general right to seek information under DSU Article 13.2. (Paras. 7.9-10)

Turning to the specific evidence under challenge, the Panel reached the following decisions. With regard to the newspaper articles, noting their possible relevance to Japan's Article X claims, the Panel decided that it would not be appropriate to exclude them at the outset. Similarly, the Panel decided not to exclude the four affidavits and certain other information, although it added the following caveat: "[t]o the extent that these exhibits purport to present facts relating to the DOC or ITC determinations different from or additional to those that were made available to those authorities in conformity with appropriate domestic procedures during the course of the investigation, we have not taken such facts into account in our review of those determinations." **Therefore, the Panel rejected the U.S. request that it exclude at the outset certain evidence submitted by Japan to the Panel.** (Para. 7.11)

DSU Article 6.2 and Article 7 - Panel Request / Terms of Reference (Identification of Measure)

The United States contended that one of Japan's arguments, that the DOC's "general practice" with regard to the use of adverse facts available violates the AD Agreement, was not included in Japan's panel request, and, therefore, falls outside the Panel's terms of reference. (Para. 7.13)

The Panel accepted the U.S. request and declined to examine Japan's argument. For purposes of its finding, the Panel *assumed for the sake of argument* that claims against "general practices," which are not set out in U.S. statutes or regulations but are contained in investigation-specific determinations, can be challenged in WTO dispute settlement. (Para. 7.18) Turning to Japan's panel request, the Panel noted that the phrase "general practice" does not appear in Japan's request at all, nor does the panel request mention the DOC's interpretation or application of the U.S. statutory provisions that govern facts available. By contrast, the Panel observed that, in respect of the other aspects of U.S. law about which Japan raised claims in its panel request, Japan clearly spelled out whether its challenge was against the statute "on its face" or "as applied." (Paras. 7.19-20)

The Panel rejected Japan's argument that a general claim contained at the end of its panel request was sufficient to bring this specific claim within the Panel's terms of reference. Specifically, the last part of Japan's panel request contains the following general claim: "by maintaining 'the above-detailed laws, regulations and administrative rulings of general application' which are allegedly not in conformity with

its obligations under the WTO Agreements, the United States has acted inconsistently" with WTO Agreement Article XVI:4 and AD Agreement Article 18.4. The Panel observed that the "general practice" regarding the application of facts available, however, is never identified in the preceding sections of Japan's panel request referred to in this final claim. Indeed, the Panel commented that the section dealing with facts available refers only to the "determination" of facts available in the hot-rolled investigation and not to any "general practice." (Para. 7.21)

For these reasons, the Panel concluded that "Japan has failed to state a claim at all with respect to the 'general practice' of the DOC concerning application of facts available," and, therefore, this claim is not within its terms of reference. (Para. 7.22)

Standard of Review

The parties made several arguments concerning the special standard of review contained in AD Agreement Article 17.6. The factual standard of review contained in Article 17.6(i), provides:

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

With respect to this factual standard of review, the Panel described what is effectively a two-step process. First, it would examine whether the facts were "properly established," a task that it described as "determining whether the investigating authorities collected relevant and reliable information," which it said "goes to the investigative process." The Panel made clear that this first step does *not* "involve the question [of] whether all relevant facts were considered including those that might detract from an affirmative determination." Second, assuming that the establishment of the facts was proper, the Panel would "consider whether, based on the evidence before the US investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US investigating authorities reached on the matter in question." For this second step, the Panel recognized that it *would* consider "whether all the evidence was considered, including facts which might detract from the decision actually reached by the investigating authorities." (Para. 7.26)

The Panel next addressed Article 17.6(ii), which governs its standard of review with respect to questions of legal interpretation, and which provides:

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

The Panel explained that under this standard it first interprets the provisions of the AD Agreement in accordance with the principles set out in the Vienna Convention on the Law of Treaties ("VCLT"). Then, it evaluates whether the interpretation by the investigating authority is one that is "'permissible' in light of the customary rules of interpretation of international law." (Para. 7.27) (While these findings relating to

the standard of review were not appealed, in the appeal of this case, the Appellate Body offered a detailed discussion of its interpretation of both sub-provisions of AD Agreement Article 17.6, particularly as they relate to DSU Article 11. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

SUBSTANTIVE ISSUES

AD Agreement Articles 2, 6, and 9 and Annex II - Facts Available

Japan argued that the DOC's use of facts available with respect to all three respondents -- NSC, NKK and KSC -- failed to meet the requirements of the AD Agreement provisions governing facts available, namely Article 6 and Annex II. Moreover, it claimed that the DOC's choice of "adverse" facts available was also inconsistent with those provisions. Finally, Japan asserted that the application of facts available in this case violated AD Agreement Articles 2.3 and 2.4, and that the consequent application of a dumping margin calculated, in part, on the basis of these facts available, violated AD Agreement Article 9.3. (Para. 7.31) The Panel considered these claims with respect to the DOC's application of facts available to the individual respondents.

Application of Facts Available to NSC and NKK

The DOC's use of facts available as it pertains to NSC and NKK involves certain sales made by those companies on a "theoretical weight" basis. During the period of investigation, all three of the Japanese respondents made sales of hot-rolled steel on *both* an actual weight basis and a "theoretical weight" basis. Actual weight represents the weight of the steel as weighed on a scale, while "theoretical weight" is an estimated weight based, in part, on the dimensions of the product. In order to calculate the dumping margins in this case, the DOC needed to calculate the price per ton of steel on a *consistent* unit of measurement. Therefore, in its original questionnaire, the DOC requested that the Japanese respondents provide a weight-conversion factor between sales made on an actual weight basis and sales made on a theoretical weight basis, so that sales could be compared using one consistent unit of measurement. (Para. 7.32)

With respect to NSC, Japan explained that NSC originally replied in good faith that it could not submit a weight-conversion factor, because "lacking an actual weight, NSC has no way of calculating the requested theoretical-to-actual weight conversion factor." That is, NSC maintained that because it did not weigh the coils which were sold on a "theoretical weight" basis, it had no way of calculating a conversion-factor, or ratio, that would allow the DOC to convert those theoretical weights into actual weight. After the preliminary determination and while preparing for verification, however, NSC discovered that the actual weights for these sales did in fact exist and were kept in a production database separate from the main sales database maintained at corporate headquarters. Upon discovery of this information, NSC submitted a conversion factor to the DOC 14 days before verification. (Para. 7.33)

Similarly, with respect to NKK, Japan explained that NKK initially responded to the DOC questionnaire that it was impracticable or impossible for it to provide the DOC with a conversion factor for its theoretical weight sales. Nonetheless, after the preliminary determination, NKK discovered that KSC, the third investigated Japanese respondent, had used a "*best estimate*" as a surrogate for an actual weight-based conversion factor, and that this approach had been accepted by the DOC. Using this same best estimate methodology, NKK submitted its own surrogate weight-conversion factor 9 days before verification commenced. (Para. 7.34)

The DOC refused to accept the conversion factors submitted by NSC and NKK, and it applied facts available instead. Japan argued that the DOC's resort to facts available violated the AD Agreement in the following ways: the DOC could have used the information submitted "without undue difficulty"

under Annex II(3); the DOC violated Annex II(5) by "disregarding and rejecting information provided by the party acting to the best of its ability"; the DOC violated Annex II(7) by applying facts available, despite the fact that both parties cooperated with the investigating authority; the DOC improperly turned to facts available under Article 6.8, despite the fact that neither company withheld information and the fact that both companies cooperated with the authority. Moreover, Japan argued that NKK was not given proper notice of the need to supply a conversion factor, in violation of AD Agreement Article 6.1, and that the DOC failed to take into account difficulties faced by the companies and did not provide assistance to them as required by Article 6.13. In addition, Japan challenged the *choice* of *adverse* facts available applied in the context of the dumping calculation. (Paras. 7.33-39)

The Panel began by examining the text of AD Agreement Article 6.8 to determine under what circumstances an investigating authority is permitted to resort to the use of facts available. Article 6.8 provides:

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

The Panel observed that in addition to Article 6.8, other conditions and considerations relevant to the application of facts available are set forth in AD Agreement Annex II. (Para. 7.50) Then, the Panel explained that Article 6.8 "ensures that an investigating authority will be able to complete an investigation ... on the basis of *facts* even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period." (Para. 7.51)

The primary defense of the United States was that both companies submitted the information at issue *after* the pre-established *deadlines* set out in the DOC's general regulations, and, therefore, the companies failed to provide the information "within a reasonable period" under Article 6.8. The Panel rejected this argument, stating, "a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied." (Para. 7.54) In this regard, the Panel referred to Annex II(3), which provides:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, ... should be taken into account when determinations are made.

With respect to weight-conversion factors submitted by NSC and NKK, the Panel found, "it seems clear that the information could have been verified and used, but was instead rejected as untimely." In other words, this information had been submitted within a "reasonable period." Moreover, the Panel considered it significant that the information submitted by the two companies "was not new information concerning such matters as prices, costs, or adjustments that had never previously been provided, and which would require extensive verification." (Para. 7.55)

For these reasons, the Panel concluded that "an objective and unbiased investigating authority could not, on the basis of the evidence in this dispute, have reached the conclusion that NKK and NSC failed to provide necessary information within a reasonable period." Therefore, the DOC acted inconsistently with Article 6.8. (Para. 7.59) (On appeal, the Appellate Body modified the

Panel's reasoning, but it upheld the Panel's conclusion that the DOC acted inconsistently with AD Agreement Article 6.8. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*) As a result of this finding, the Panel found it unnecessary to examine the DOC's choice of adverse facts available, or the consistency of the DOC's actions with AD Agreement Articles 2.4, 6.1, 6.6, 6.13 or 9.3, or Annex II. (Para. 7.60)

Application of "Adverse" Facts Available to KSC

The DOC's use of facts available in its investigation of the Japanese respondent KSC arose from a different set of facts. In its original questionnaire, the DOC requested that Japanese producers who make sales of subject merchandise through *affiliated* purchasers in the United States provide information concerning resale prices and further manufacturing costs of those *affiliates* to be used in the calculation of a constructed export price pursuant to AD Agreement Article 2.3. KSC made a substantial portion of its sales to its affiliate, California Steel Industries ("CSI"), a company of which KSC owns 50% in a joint venture with the Brazilian company Companhia vale de Rio Doce ("CVRD"). Although CSI is an affiliate of respondent KSC, CSI was also a petitioner in the anti-dumping investigation. Asserting that it did not control CSI and that it was unable, therefore, to provide the requested resale and further manufacturing data, KSC repeatedly requested of the DOC that it be excused from providing CSI's resale and further manufacturing information, given the unusual circumstance that its affiliate was also a petitioner in the investigation. The DOC, however, concluded that KSC had failed to act to the best of its ability in obtaining this information. As a result, the DOC used adverse facts available as a substitute for KSC's sales to CSI. Specifically for all of KSC's sales to CSI, the DOC assigned the second highest product-specific margin that it had calculated on the basis of KSC's other sales to unaffiliated customers. (Para. 7.61)

Japan argued that the DOC violated AD Agreement Article 6.8 and Annex II when it determined that KSC had failed to cooperate or had withheld information. (Para. 7.62) Moreover, Japan argued that the DOC failed to provide assistance to KSC in obtaining this information, as required under Article 6.13 and Annex II(7). Finally, Japan claimed that the DOC's use of the second-highest margin from KSC's sales to unaffiliated customers as adverse facts available was inconsistent with Article 2.3, because the DOC had no justifiable reason to doubt KSC's sales prices to CSI in the first place. By improperly calculating export price under Article 2.3, Japan argued that the DOC inflated the dumping margin and therefore also violated AD Agreement Article 9.3. (Paras. 7.62-64)

The Panel found that the DOC's use of adverse facts available was not justified. In its analysis, the Panel first recognized that it is undisputed in this case that KSC did not provide the requested information regarding CSI's resale prices and further manufacturing costs. Therefore, the Panel found that under AD Agreement Article 6.8, the DOC was justified in deciding to apply facts available. As explained by the Panel, Article 6.8 establishes that "where a party 'otherwise does not provide' necessary information within a reasonable time, the investigating authorities may make their determination based on facts available." (Para. 7.69)

Therefore, as recognized by the parties, the issue here focused on the "adverse" nature of the facts available selected by the DOC and the language of Annex II(7). That provision states:

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

(Para. 7.70) The Panel considered that this provision makes clear that a "less favourable" result "may only be appropriate in the case of an interested party who does not cooperate."

Turning to the facts in this case, including confidential information, the Panel found that "an unbiased and objective investigating authority evaluating the evidence that was before the DOC could not reasonably have reached the conclusion that KSC had failed to cooperate and that relevant information was thus being withheld." The Panel defined the term "cooperate" as "work together for the same purpose or the same task." Here, the Panel recalled that CSI was a petitioner in the investigation, such that it had interests directly opposed to those of KSC. Similarly, KSC's Brazilian partner CVRD, although also a respondent in the U.S. hot-rolled steel investigation, was also a competitor of KSC's in the marketplace, such that it, too, had interests adverse to those of KSC. While the Panel recognized that KSC might have been able take additional action under CSI's Shareholder's Agreement, the Panel concluded, "such actions would have inevitably disrupted the on-going business relationships of the three companies." Therefore, the Panel held, "USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for information in this case went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II." (Paras. 7.72-73)

On this basis, the Panel concluded that the DOC's application of adverse facts available in making its determination of KSC's dumping margin violated AD Agreement Article 6.8 and Annex II(7). (On appeal, the Appellate Body upheld the Panel's finding. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*) Based on this conclusion, the Panel found it unnecessary to address Japan's claims under AD Agreement Articles 2.3 and 9.3. (Para. 7.74)

AD Agreement Article 9.4 - "All Others" Rate

Japan challenged "on its face" the applicable U.S. statute governing the DOC's calculation of the "all others rate" as inconsistent with AD Agreement Article 9.4, and it also challenged the DOC's application of this statute with respect to its calculation of the "all others" rate for Japanese exporters in the hot-rolled steel investigation. (Para. 7.75)

The Panel found a violation of both the statute "as such" and "as applied" in this investigation. It began by examining the text of AD Agreement Article 9.4, which it explained, "establishes a maximum level for anti-dumping duties to be applied to imports from exporters or producers not included in the investigation." Specifically, Article 9.4 provides:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) wbere the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

> *provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. ...*

(Para. 7.83, emphasis added by Panel) The Panel also noted the applicable U.S. statute challenged by Japan governing the calculation for determining the estimated "all others" rate. Specifically, Section 735(c)(5) of the Tariff Act of 1930, as amended, provides:

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

(Para. 7.84, emphasis added by Panel) The U.S. law, therefore, disregards in the calculation of the "all others" rate only those individual rates that are based "*entirely*" on facts available; it does not disregard individual rates that are *partially* based upon facts available. As applied in the hot-rolled investigation, the DOC calculated the "all others" rate by taking the weighted average of the margins calculated for the three investigated respondents, all of which were based, in part, on facts available. (Para. 7.85)

The Panel rejected the U.S. argument that Article 9.4 permits an interpretation that only margins based "entirely" on facts available must be disregarded. First, the Panel noted that Article 9.4 is mandatory and contains no exceptions. Second, it noted that the category of margins to be disregarded, *i.e.*, those established under Article 6.8 governing facts available, is not qualified in any way. The question, therefore, was "when is a margin 'established under the circumstances referred to in [Article 6.8]'" Examining Article 6.8, which governs the use of facts available, the Panel considered that it does not refer to the establishment of *margins*, but simply specifies certain circumstances in which a determination may be made on the basis of facts available. The Panel considered that the "establishment of a dumping margin is a complex calculation comprising many elements." In this way, it considered that the use of the term "margin" in Article 9.4 makes clear that it is intended to cover *all* of the *steps* of this calculation, such that margins determined under the circumstances referred to in Article 6.8 "includes a margin determined on the basis of a calculation in which *some element* was established on the basis of facts available." (Paras. 7.86-89, emphasis added)

For these reasons, the panel concluded that the U.S. statute is "on its face" inconsistent with AD Agreement Article 9.4, to the extent that it requires the inclusion of margins based *in part* on

facts available in the calculation of the all others rate. Having found the statute to be inconsistent with the AD Agreement, and given that it was undisputed that the DOC applied this statute in the hot-rolled investigation, the Panel also found that the DOC's calculation of the all others rate in the hot-rolled investigation violated Article 9.4. Moreover, having determined that the statute is inconsistent with the AD Agreement, the Panel also found that the United States acted inconsistently with AD Agreement Article 18.4 and WTO Agreement Article XVI:4 in maintaining that provision after the entry into force of the WTO Agreement. (Para. 7.90) (On appeal, the Appellate Body upheld the Panel's findings. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

AD Agreement Article 2 - Sales to Affiliates (Arm's Length Test and Downstream Sales)

In its calculation of a dumping margin, when a foreign exporter/producer under investigation makes home market sales to affiliated customers, the DOC engages in what is known as the "99.5 percent" or "arm's length" test. Specifically, for each product, the DOC compares the producer's average sales price to its affiliate with an average of the product-specific prices to its unaffiliated customers. If the average price to the affiliate is 99.5 percent or higher of that weight-averaged price to unaffiliated customers, then the DOC will use the prices to the affiliate in its price comparisons for purposes of calculation of the dumping margin. However, if the average price to the affiliate is less than 99.5 percent of the weight-averaged price to the unaffiliated customers, then the DOC considers sales to that affiliate to be "outside the ordinary course of trade," and it either disregards the sales or, if the affiliate is a re-seller, it replaces those sales with the *affiliates' downstream price* to an unaffiliated customer. That is, the DOC disregards or replaces prices on sales to affiliated customers that are, on average, more than 0.5 percentage points *below* average prices to unaffiliated purchasers (by contrast, the DOC's test does not mandate any action when average prices to an affiliated customer are *above* the average price to unaffiliated customers).

Japan challenged this practice both "on its face" and as applied in the hot-rolled investigation. (Para. 7.91) Specifically, Japan argued that the "arm's length" test is an unreasonable basis upon which to determine whether sales are made in the "ordinary course of trade" under AD Agreement Article 2.2. Moreover, Japan argued that Article 2.2 does not permit the replacement of home market sales to an affiliate with the affiliate's re-sales. Finally, Japan argued that the exclusion of sales that do not pass the "arm's length" test violates the "fair comparison" requirement of AD Agreement Article 2.4, because it is a statistically arbitrary rule that rejects low-priced home market sales from the calculation of normal value, "thereby artificially inflating the dumping margin." In this regard, Japan offered that a standard deviation analysis or some other statistically valid test could ensure a fair comparison. (Paras. 7.92-95)

The Panel first examined the use of the "arm's length" test, and then considered the replacement of sales to affiliates with re-sale prices.

Use of "Arm's Length" Test

At the outset, the Panel recognized that it would examine the DOC's arm's length test only *as applied* in the hot-rolled investigation, because, while Japan also challenged the DOC's arm's length test as a "general practice" in its first submission, the Panel stated that such a claim was not contained in Japan's panel request and was therefore outside its terms of reference. (Para. 7.107, footnote 83) The Panel found the "arm's length" test to be inconsistent with AD Agreement Article 2.1. It first observed that AD Agreement Article 2.1 "specifies that a product is to be considered as dumped if the export price is less than 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." In this regard, it noted that the phrase "outside the ordinary course" is not defined anywhere in the AD Agreement. Given that the parties agreed that sales to affiliated customers *may* sometimes fall outside the ordinary course of trade, the Panel considered it

"indisputable" that an investigating authority may "test" home market sales to affiliated customers to determine whether they are "outside the ordinary course of trade." The issue for the Panel, therefore, was whether the 99.5 percent "arm's length" test is an appropriate basis for making this determination. (Para. 7.108)

The Panel expressed several concerns with the "arm's length" test. First, the Panel observed that the "arm's length" test "does not, in fact, test for *differences* in prices of sales to affiliated customers as compared with unaffiliated customers, but, rather, it tests whether prices to affiliated customers are *lower*, on average, than prices to unaffiliated customers." While the United States argued that it would, if the situation arose, test for "aberrationally high" prices to affiliated customers, the Panel noted that no such consideration was given in the application of the arm's length test in the hot-rolled investigation. It concluded that, in the hot-rolled investigation and in general, the result of the "arm's length" test is to exclude prices that are, on average, lower from the determination of normal value, thereby skewing the normal value upward and making a finding of dumping more likely or leading to a higher dumping margin. It stated that this result "reinforces our view that the 'arm's length' test does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade.'" (Paras. 7.110-112)

Therefore, the Panel concluded that the "arm's length" test does not relate to a permissible interpretation of the term "sales in the ordinary course of trade," such that this practice, in general and as applied in the hot-rolled investigation, is inconsistent with AD Agreement Article 2.1. (On appeal, the Appellate Body upheld the Panel's finding that the arms' length test does not rest on a permissible interpretation of Article 2.1, although the Appellate Body reached this conclusion based on slightly modified reasoning. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*) As a result of this finding, the Panel found it unnecessary to also consider whether the test is consistent with the more general obligation to make a "fair comparison" under AD Agreement Article 2.4. (Para. 7.119)

Replacement of Excluded Sales with Re-Sale Prices

With regard to replacing excluded sales with affiliates' resale prices, the Panel again found a violation of Article 2.1. It began with the text of Article 2.1, which "establishes that normal value is the 'comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'" The Panel considered that re-sale prices from the affiliates to the first unrelated customer do not meet this definition. It first pointed to the overall object and purpose of the AD Agreement, which, according to the Panel, is expressed in part in the obligation contained in AD Agreement Article 6.10. That provision establishes the requirement for authorities to "determine an individual margin of dumping for each known *exporter* or *producer* concerned of the product under investigation." In this regard, the Panel considered that the "comparable prices" that investigating authorities are required to compare under Article 2.1, must, on the basis of the purpose reflected by Article 6.10, *come from the known exporters or producers*, and not from "replacement" prices of sales made by *affiliates* of the companies being investigated. Specifically, the Panel considered that these replacement sales cannot be considered "sales in the ordinary course" *of the companies under investigation.* (Paras. 7.113-114)

The Panel found support for its interpretation in the overall structure of Article 2, which sets forth detailed rules for the calculation of the dumping margin. It also pointed to the fact that Article 2.3, governing the calculation of a constructed export price expressly permits the use of a re-sale price, as compared with Article 2.2, which does not mention re-sale prices. In any event, even if the permissibility of the use of re-sale prices in the export price context under Article 2.3 supports the DOC's practice in the context of normal value, the Panel noted that in the hot-rolled investigation, the DOC made no attempt to use the re-sale price and *also* make the required allowances for costs, as is required when a re-sale price is used as the constructed export price under Article 2.3. Finally, the Panel noted that there was no

allegation that there were insufficient sales in the ordinary course of trade by the investigated companies to allow for the calculation of normal value on the basis of those sales alone, and neither party contended that there was a need to calculate normal value according to one of the alternative methods set forth in Article 2.2. (Paras. 7.115-118)

For these reasons, the Panel concluded that "the 'replacement' of excluded sales to affiliates with the sales by those affiliates to downstream purchasers in this case was not consistent with Article 2.1 of the AD Agreement." (Para. 7.118) As a result of this finding, the Panel considered it unnecessary to also examine this practice under AD Agreement Articles 2.2 and 2.4. (Para. 7.120) (On appeal, the Appellate Body reversed the Panel's finding; the Appellate Body held that the use of affiliates' re-sale prices is permissible under Article 2.1. However, the Appellate Body cautioned that when an investigating authority uses re-sale prices, it must ensure a "fair comparison" under Article 2.4 by making due allowances for price differences. Because the parties could not agree on the facts in the hot-rolled investigation in this respect, the Appellate Body was unable to complete the analysis under Article 2.4. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

AD Agreement Article 10 - Critical Circumstances

The factual background of the DOC's critical circumstances policy at the time of, and as applied in, the hot-rolled case was as follows. On October 8, 1998, the DOC issued a policy bulletin, which was not specific to this investigation, stating that the DOC would make a preliminary critical circumstances determination prior to a preliminary dumping determination, if adequate evidence of critical circumstances was available. Then, on November 30, 1998, the DOC issued an affirmative preliminary critical circumstances determination regarding imports of hot-rolled steel from Japan, although no measures "necessary to collect anti-dumping duties retroactively" were actually taken until the DOC's preliminary determination of dumping, effective February 19, 1999. The DOC reached its final affirmative critical circumstances determination on May 6, 1999, but the ITC, which under U.S. law has the final say in this regard, made a negative critical circumstances finding in its final injury determination of June 23, 1999. (Para. 7.134)

Japan argued that the DOC's preliminary critical circumstances determination in the hot-rolled investigation violated AD Agreement Articles 10.1, 10.6 and 10.7 for the following reasons: 1) the ITC had preliminarily found only a *threat* of injury to the industry, while Article 10.6 requires evidence of *current* injury in order for there to be a finding of critical circumstances, and 2) the DOC's preliminary finding of critical circumstances was not supported by sufficient evidence under Article 10.7. Moreover, Japan challenged the applicable U.S. statute on its face, alleging that the evidentiary standard contained in the statute is inconsistent with the "sufficient evidence" standard of Article 10.7 and that the statute fails to require evidence of all of the conditions set forth in Article 10.6. Finally, as a result of the inconsistencies alleged above, Japan also argued that the DOC's preliminary critical circumstances determination, in general and as applied in this case, inevitably violates Article 10.1, as it permits the possibility that anti-dumping duties will be levied retroactively without the requirements set forth in Articles 10.6 and 10.7 having been met. (Paras. 7.121-122)

The Panel rejected Japan's claims. It began by examining the text of the relevant provisions of AD Agreement Article 10, which provides:

> Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article

Articles 10.6 states:

> A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:
>
> (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
>
> (ii) 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 duty to be applied, provided that the importers concerned have been given an opportunity to comment.

Finally, Article 10.7 provides:

> The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

(Paras. 7.136-7) The Panel noted that Japan was challenging only the U.S. *preliminary* critical circumstances determination. The Panel examined each of Japan's claims individually under these provisions. (Para. 7.138)

Evidentiary Standard and Conditions Contained in U.S. Statute

The Panel began with Japan's challenges to the section of the U.S. statute governing the determination of critical circumstances. It examined the applicable U.S. statute, section 733(e)(1) of the Tariff Act of 1930, as amended, which provides:

> If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by [USDOC], then [USDOC] shall promptly (at any time after the initiation of the investigation under this part) determine, on the basis of the information available at that time, whether there is a *reasonable basis to believe or suspect* that—
>
> (A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
>
> (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the

> exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and
>
> (B) there have been massive imports of the subject merchandise over a relatively short period.

(Para. 7.139)

At the outset, the Panel recognized the applicability of the mandatory/discretionary doctrine, which it found to be "well established in GATT/WTO practice." It described the doctrine as follows: "a statute is inconsistent on its face with a Member's WTO obligations only if it is mandatory and requires WTO inconsistent action or prohibits WTO consistent action." Citing the Appellate Body's discussion of the doctrine in *U.S. - 1916 Act*, the Panel stated that it would, therefore, "consider whether the statute in question requires USDOC to take action which contravenes the US obligations under the WTO AD Agreement." (Para. 7.141)

The Panel examined the evidentiary standard contained in the U.S. statute, namely "a reasonable basis to believe or suspect." While it recognized that the words of this statutory standard differ from the "sufficient evidence" standard contained in Article 10.7, the Panel stated that it must examine the consistency of the U.S. statutory standard on the basis of *how the standard has been applied in practice.* In turn, the Panel found past U.S. practice to show that U.S. authorities apply the standard interchangeably with a standard expressed as "sufficient evidence." Therefore, the Panel concluded that the U.S. statute is not inconsistent with the "sufficient evidence" standard contained in Article 10.7. (Paras. 7.143-144)

Next, the Panel turned to Japan's argument that the U.S. statute does not require evidence that all of the *conditions* set forth in AD Agreement Article 10.6 are satisfied. In particular, Japan argued, "the statute does not require sufficient evidence of dumping, injury and causation, and that it does not require evidence that massive dumped imports are likely to seriously undermine the remedial effect of the duty." While the Panel recognized that the U.S. statute does not explicitly set out the same requirements as those contained in AD Agreement Article 10.6, it considered that this omission "does not imply that USDOC is precluded from taking these elements into consideration, in so far as necessary." Moreover, the Panel disagreed with Japan as to which "conditions" an investigating authority is required to examine in order to reach a determination. In particular, the Panel considered the requirement that "massive dumped imports are likely to seriously undermine the remedial effect of the duty" to simply establish the *conclusion* that an investigating authority must reach in order to justify retroactive application of the anti-dumping duties, but that it is not a "condition" for which sufficient evidence must be adduced at the time of the preliminary determination. In this regard, the Panel considered that authorities could not reasonably be expected to arrive at such a conclusion in the preliminary stages of an investigation and that it is a question more applicable to the end of an investigation. Moreover, because the DOC regulations require the DOC to reach a decision as to the effect of massive dumped imports on the basis of the exporters' knowledge of initiation or likelihood thereof, the Panel concluded that the DOC does in fact address whether massive imports are likely to seriously undermine the remedial effect of the duty. (Paras. 7.145-149) Therefore, the Panel concluded that the U.S. statute is not inconsistent with Article 10.6.

On the basis of these findings, the Panel concluded that the U.S. statute is not, on its face, inconsistent with AD Agreement Articles 10.1, 10.6 and 10.7. Having reached this conclusion, the Panel also found that the United States has not acted inconsistently with its obligations to bring its laws into conformity under WTO Agreement Article XVI:4 and AD Agreement Article 18.4. (Para. 7.150)

Consistency Of the DOC's Preliminary Critical Circumstances Determination In The Hot-Rolled Investigation

In the context of the hot-rolled investigation, Japan challenged the DOC's preliminary determination of critical circumstances on the basis that, under AD Agreement Article 10.6, a Member is precluded from making such a determination "in the absence of a preliminary determination of material injury to the domestic industry." Here, Japan argued, the ITC had found *threat* of injury to the industry, but not current material injury.

The Panel rejected Japan's claim. It began by observing that Article 10.6 actually governs *definitive* findings of critical circumstances, and not preliminary determinations, which are governed by Article 10.7. In this regard, it pointed out that the obligations in Article 10.7 and Article 10.6 are not identical. Referring to GATT/WTO precedent interpreting the phrase "sufficient evidence," particularly in the context of AD Agreement Article 5.3 governing initiation, the Panel considered that the phrase is to be interpreted on the "basis of the question being addressed," and, therefore, in light of the timing and effect of the measure imposed or the determination made. (Paras. 7.151-153)

The Panel read Article 10.7 as allowing the authority to take precautionary measures "which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6." In this regard, the Panel noted that preliminary measures under Article 10.7 could be taken at any time after initiation. As such, the Panel considered that the "sufficient evidence" standard contained in Article 10.7 does *not* require an authority to make a preliminary affirmative determination of dumping and consequent injury *before* reaching a preliminary determination of critical circumstances under Article 10.7. Otherwise, the Panel considered that the purpose of preserving the right to apply a provisional measure prior to the preliminary determination would be lost. The Panel found further support for its interpretation in the fact that, if a preliminary affirmative determination were a prerequisite to the Article 10.7 measures, then it would be impossible to reconcile the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation with the right, under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed. (Paras. 7.154-156)

The Panel next examined whether the DOC had sufficient evidence that all of the conditions of Article 10.6 had been satisfied before making its preliminary determination. In doing so, the Panel noted that Japan did not challenge initiation of the investigation, which, pursuant to Article 5.3, must be based on a determination that there was sufficient evidence of dumping, injury, and a causal link. In this regard, the Panel found no reason why that same information might not justify a determination of sufficient evidence of those elements in the context of Article 10.6. (Para. 7.157-158) In addition, the Panel recalled that two additional conditions must be met under Article 10.6:

> (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
>
> (ii) the injury caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other 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 duty to be applied, provided that the importers concerned have been given an opportunity to comment.

(Para. 7.159) As for the first element, the Panel found the DOC's determination to be sufficient based on: 1) its practice of imputing knowledge to exporters where dumping margins are above 25 percent, as were estimated based on the information contained in the petition, and 2) the ITC's preliminary determination of threat of material injury in conjunction with the information regarding injury to the domestic industry and press reports. (Paras. 7.160-161) Moreover, the Panel considered that sufficient evidence of *threat* of injury is enough to justify a determination to apply protective measures under Article 10.7, because Article 10.6 refers only to the term "injury," which, in AD Agreement Article 3, footnote 9, is defined to include threat of material injury. (Para. 7.162)

As for the second element, sufficient evidence that the injury is caused by massive dumped imports in a relatively short time, the Panel found sufficient the DOC's comparison of imports during a period of five months preceding and following April 1998, a date chosen based on press reports, which, according to the DOC, established that "importers, exporters and producers knew or should have known that an anti-dumping investigation was likely." The Panel rejected Japan's argument that the period for comparison should be three months before and after *initiation.* Specifically, Japan argued that the "remedial effect of the duty" could not be "undermined" more than 90 days prior to initiation because under AD Agreement rules, the duty cannot be applied more than 90 days prior to initiation. The Panel rejected the U.S. argument. Given that Article 10.7 permits precautionary measures "any time after initiation of the investigation," the Panel considered that investigating authorities must practically have the right to compare data in such a way that allows them to take these actions at any such time. Moreover, the Panel considered that it is not unreasonable to conclude, under Article 10.7, that massive imports that enter prior to initiation, but at a time at which it had become clear that an investigation was imminent, could undermine the remedial effect of the definitive duty, regardless of whether that duty is applied to that earlier time period. (Paras. 7.164-167)

For these reasons, the Panel concluded that "an objective and unbiased investigating authority could, on the basis of the evidence before the DOC, determine that there was sufficient evidence that the conditions set forth in Article 10.6 were satisfied," and its preliminary critical circumstances determination is therefore consistent with Article 10.7. As a result, the Panel concluded that the DOC's preliminary critical circumstances determination was not inconsistent with AD Agreement Article 10.1 either. (Para. 7.168)

AD Agreement Articles 3 and 4 - Captive Production

Japan argued that Section 771(7)(c)(iv) of the Tariff Act of 1930, the U.S. "captive production" provision, both on its face and as applied by the ITC in the hot-rolled investigation, is inconsistent with AD Agreement Articles 3 and 4 (and therefore also violates AD Agreement Article 18.4 and WTO Agreement Article XVI:4). (Para. 7.169)

The Panel first examined Japan's challenge of the U.S. statute on its face. Specifically, Japan argued that the captive production provision, a mandatory provision, impermissibly requires that the ITC focus its injury analysis on the *merchant market* sector, thereby allowing for the possibility that the ITC could find material injury on the basis of the merchant market sector *alone*, even if the whole domestic industry is not experiencing material injury. Japan asserted that AD Agreement Article 4.1, which provides a definition of "domestic industry," requires authorities to consider domestic producers "as a whole and their overall output." Moreover, Japan argued that the captive production provision exaggerates the market share of imports relative to all domestic production, inconsistently with AD Agreement Article 3.2, and that it violates AD Agreement Article 3.4 by requiring the U.S. authority to evaluate the impact factors listed in Article 3.4 based on a segment of the industry, rather than the industry as a whole. Japan also argued that, by "shielding" the effect of captive production, the captive

production provision violates the requirement to consider fully "all relevant evidence" under AD Agreement Article 3.5 in the context of demonstrating a causal link. Similarly, it argued that the captive production provision is inconsistent with the requirement to analyze the effect of imports on all domestic production under AD Agreement Article 3.6. Finally, Japan argued that the captive production provision does not allow for an "objective examination" under Article 3.1. On the basis of these flaws, Japan also claimed that the captive production provision violates WTO Agreement Article XVI:4, which requires that Members bring their laws into conformity with the WTO agreements. (Para. 7.170-174)

The Panel rejected Japan's claims against the captive production provision on its face. In doing so, the Panel first examined the U.S. statute at issue, which provides:

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

(Para. 7.184, footnote 117, emphasis added) The Panel explained that this statute, under certain specified circumstances and in cases in which domestic producers internally transfer significant production of the domestic like product for the production of a downstream article, requires the ITC to "focus primarily" in its injury analysis on the merchant market for the domestic like product in determining market share and factors affecting financial performance. (Para. 7.184)

The Panel then addressed the paragraphs of AD Agreement Article 3, titled "Determination of Injury," under which Japan had raised claims against the captive production provision. The relevant portions of these provisions provide:

> 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination ....
>
> 3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of

> capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
>
> 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. ...
>
> 3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(Para. 7.186) Moreover, AD Agreement Article 4.1 states in relevant part:

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

(Para. 7.187, emphasis added)

Based on these provisions, particularly Article 4.1, the Panel found it clear that an investigating authority must reach a final determination as to "injury" to the "industry as a whole." Therefore, the question, according to the Panel, was whether the captive production provision and its required "primary focus" on one market segment is consistent with this general obligation to reach a final injury determination with respect to the domestic industry *as a whole*. (Paras. 7.189-193)

The Panel stated that the key to answering this question lies in the ordinary meaning of the words "focus primarily." Based on definitions of those terms, the Panel considered that, literally speaking, the captive production provision requires the ITC "to concentrate in chief on the merchant market when considering market share and financial performance of the industry." The Panel then stated that, in its opinion, such a specific direction of focus does not necessarily imply that the overall injury analysis is not carried out with respect to the industry "as a whole," particularly given that the statute "does not require a *general and exclusive* focus." (Emphasis added) It found support for its consideration in the context of the captive production provision. Specifically, the Panel recognized that another section of the U.S. Code, which sets out the ITC's general obligations in its injury analysis, requires the ITC to consider factors affecting the industry "as a whole." It explained that the captive production provision is simply an analytic step that must be taken in certain circumstances "along the way to making the statutorily required determination of material injury to the domestic industry as a whole." It concluded, "[w]hile there is no guarantee that this analysis will result in a determination consistent with US obligations under the AD

Agreement, it does not require any action inconsistent with those obligations." Finally, the Panel pointed to the passage in the U.S. Statement of Administrative Action ("SAA") that states, "the captive production provision does not require USITC to focus exclusively on the merchant market." (Paras. 7.194-198)

For these reasons, the Panel concluded that the captive production provision does not on its face violate AD Agreement Articles 3 and 4, and, as a result, the United States also did not act inconsistently with its obligations to bring its laws into conformity under WTO Agreement Article XVI:4 and AD Agreement Article 18.4. (Para. 7.199) (On appeal, the Appellate Body upheld this conclusion, albeit for reasons which differ in part from those of the Panel. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

The Panel next examined whether the ITC acted inconsistently with AD Agreement Articles 3 and 4 in *applying* the captive production provision in the hot-rolled investigation. Specifically, Japan argued that three of the six ITC commissioners found the provision applicable and therefore focused primarily on the merchant market. Furthermore, according to Japan, a fourth Commissioner implicitly considered the merchant market data in parallel with data on the industry as a whole. Japan argued, "this focus on the merchant market fundamentally altered the results of the investigation and distorted the Commissioners' judgement." In particular, Japan argued that the ITC failed to make an "objective examination" under Article 3.1, and that the failure to examine all relevant evidence concerning the industry as a whole violates Articles 3.2, 3.4, 3.5 and 3.6. (Paras. 7.200-201)

The Panel rejected Japan's claims and found no violation. The Panel examined the ITC's report to determine the consistency of the ITC's analysis. It observed that the ITC defined the domestic industry as "all producers of hot-rolled steel in the United States." Moreover, it noted that the report contains data concerning both the merchant market and the industry as a whole, such that, "[o]n its face, the report sets out a complete and substantially motivated analysis of the state of the domestic industry as a whole." Moreover, the Panel found that the data supports the conclusions of the report that the trends in the merchant market appear to a sometimes less pronounced extent in the market as a whole. (Paras. 7.204-213)

Therefore, the panel concluded, "tbe analysis performed by USITC established injury with regard to the industry as a whole, in spite of, or regardless of, the application of the captive production provision ... ." As a result, it found the ITC's analysis to be consistent with AD Agreement Articles 3.1, 3.4, 3.5, 3.6 and 4.1. (Paras. 7.214-215) (On appeal, the Appellate Body reversed the Panel's finding and held that the United States violated Articles 3.1 and 3.4 in its application of the captive production provision in the hot-rolled investigation. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

AD Agreement Article 3 - Data to Be Examined for Injury Purposes

Japan claimed that the ITC impermissibly departed from its traditional three-year injury analysis and instead compared industry data for 1998 with those of 1997, effectively limiting its analysis to two years of data. Specifically, Japan argued that this manipulation of data violates the requirement to base a material injury determination upon "positive evidence" and an "objective examination" under AD Agreement Article 3.1. Moreover, it asserted that the failure to consider and "make apparent" a consideration of the data collected for the first year of the period of investigation violates AD Agreement Article 3.4. (Paras. 7.217-219)

The Panel rejected Japan's claims. It first observed that the AD Agreement does not specify the length of the period of investigation for anti-dumping investigations, and, therefore, it does not prescribe that data used in an authority's injury analysis must cover three years. Moreover, as recognized by Japan,

the Panel observed that the ITC did in fact collect data for a three-year period. While Japan argued that the ITC failed to consider data for the full three years in its analysis, the Panel found otherwise, in that the ITC's report discusses data for all three years, with the exception of financial performance data, for which the Panel found the ITC to have adequately justified its use of only two years of data. Moreover, the Panel recalled that under its factual standard of review as set forth in AD Agreement Article 17.6(i), it is not in the position to reweigh or re-evaluate the data that was before the ITC. (Paras. 7.226-235)

For these reasons, the Panel concluded that the ITC properly evaluated all relevant factors over the period investigated such that it did not violate AD Agreement Article 3.4 and such that it conducted an "objective examination" of the impact of the dumped imports on the domestic industry under AD Agreement Article 3.1. (Para. 7.236)

AD Agreement Article 3 - Causation

Next, the Panel turned to Japan's claim that the ITC failed to establish a causal relationship between the dumped imports and the injury to the domestic industry, as required under AD Agreement Article 3.5. Japan challenged two aspects of the ITC's causation analysis. First, it argued that the ITC failed to adequately analyze "other factors" affecting the industry, namely the increase in capacity of mini-mills and the ensuing expansion of U.S. steel supply, the strike at General Motors, declining demand for hot-rolled steel from the pipe and tube industry and the prices of non-dumped imports. Second, Japan claimed that the ITC "failed to ensure that injury caused by these other factors was not attributed to the dumped imports." (Paras. 7.237-238)

With respect to Japan's first argument, the Panel examined the ITC's report to determine whether and to what extent the ITC had or had not examined the alleged "other factors" that affected the domestic industry. The Panel found that the ITC had properly dealt with the increase in mini-mill capacity and the strike at General Motors. Moreover, while the ITC had not expressly examined the declining demand for hot-rolled steel from the pipe and tube industry, the Panel considered that this factor is "merely a *subset*" of a factor that *was* explicitly examined at length, namely overall consumption or demand for hot-rolled steel. As for the final factor, prices of non-dumped imports, the Panel disagreed with Japan that AD Agreement Article 3.5 requires that investigating authorities examine the volume and price effects of non-dumped imports. In particular, the Panel considered Article 3.5 to require consideration of only those other factors, which are "known" to be injuring the domestic industry at the same time as the dumped imports. Here, the Panel stated, Japan failed to present a *prima facie* case that the prices of non-dumped imports were such a factor or that they were otherwise relevant to the ITC's examination. (Paras. 7.239-247)

Next, the Panel examined Japan's second argument regarding *attribution* of the other factors. The Panel examined the text of Article 3.5, which provides:

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

> consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(Para. 7.249) The Panel considered that this language recognizes "that many factors may be injuring the industry in various ways." It interpreted the provision to require an authority to "examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of the dumped imports ... ." (Para. 7.251) The Panel referred to the GATT panel decision in *U.S. - Atlantic Salmon*, which examined an identical provision concerning non-attribution in Article 3.4 of the *Tokyo Round Anti-Dumping Code*. Here, the Panel observed, the ITC in fact examined other known factors, and the Panel considered that the ITC's conclusion that those other factors only had minimal or partial effects was supported by the facts. (Paras. 7.252-257) The Panel also found relevant the Appellate Body report in *U.S. - Wheat Gluten Safeguards*, which it interpreted to mean that it is not necessary that investigating authorities demonstrate that dumped imports alone have caused material injury. (Para. 7.260)

For these reasons, the Panel concluded that the ITC properly demonstrated the existence of a causal relationship between dumped imports and material injury to the industry under AD Agreement Article 3.5. (Para. 7.261) (On appeal, the Appellate Body reversed the Panel's interpretation of the non-attribution language contained in Article 3.5 and it therefore also reversed the Panel's findings that the ITC properly demonstrated the existence of a causal relationship in the hot-rolled investigation. Because it found the factual record to be insufficient, however, the Appellate Body was unable to complete the analysis of Japan's claim under a proper interpretation of Article 3.5. *See DSC for U.S. - Hot-Rolled Steel from Japan (AB).*)

GATT Article X:3(a)

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

The Panel rejected Japan's claims. Citing the Appellate Body reports in *EC - Bananas* and *EC - Poultry*, the Panel made certain general observations about the scope of GATT Article X. First, it considered that Article X:3(a) addresses the "*administration*" of laws, regulations, decisions and rulings, as opposed to the *substance* of those measures. Second, it noted that Article X is applicable only to laws, regulations, decisions and rulings of "general application," such that it does not apply, for example, to an import license issued to a specific company or applied to a specific shipment. Moreover, the Panel recognized the Appellate Body's decision in *EC - Bananas*, which holds that where another WTO Agreement deals specifically and in detail with the issue in question, "panels should apply the provisions of such agreement first," after which there would be no need to apply GATT Article X:3(a). (Paras. 7.266-267)

With these principles in mind, the Panel expressed general doubts as to the appropriateness of Japan's Article X:3 claims. First, the Panel found it unclear whether Japan's challenges in fact deal with the *administration* of a U.S. rule as opposed to the *substance* of that rule. In this regard, it questioned

whether it would be appropriate to find an Article X violation where a challenged action has already deemed to be consistent with the relevant provision of the AD Agreement. Moreover, the Panel noted that some of Japan's arguments concern alleged differences in the DOC's treatment as between the hot-rolled investigation and other investigations, or that the DOC's decision departed from controlling U.S. authority. In response, the Panel explained, "[i]t is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation." Moreover, with respect to Japan's arguments of inconsistencies in the U.S. Government's behavior *within* the hot-rolled investigation, the Panel expressed doubts whether the final anti-dumping measure in the hot-rolled investigation alone constitutes a measure of "general application," or that actions in this one instance can demonstrate evidence of a lack of uniform, impartial and reasonable administration of laws, etc., on the part of a WTO Member. (Paras. 7.267-268)

The Panel then examined each of Japan's claims individually. First, the Panel rejected Japan's argument regarding the alleged acceleration of the hot-rolled investigation, on the basis that the acceleration amounted to a total of 25 days, the burden of which, according to the Panel, was borne by the investigating authority and not the respondents. Moreover, the Panel observed that the investigation followed the timetable set out in the AD Agreement. (Paras. 7.269-270)

The Panel also found that the DOC's delay in correcting a ministerial error reported by a Japanese respondent did not rise to the level of a non-uniform, partial and unreasonable administration. The Panel considered significant in this regard the DOC's ultimate correction of the error and the fact that there is no obligation in the AD Agreement requiring an authority to make such a correction at the first possible opportunity. (Paras. 7.271-272)

With respect to Japan's arguments about the DOC's preliminary finding of critical circumstances, the Panel recalled that it had found no violation of the DOC's determination or practice under the AD Agreement. The Panel rejected the notion that a mere change in a policy that is not itself inconsistent with WTO obligations and that results in a determination that is similarly not inconsistent with WTO obligations could constitute a violation of GATT Article X. (Paras. 7.273-274)

The Panel next rejected Japan's argument concerning the differential treatment accorded petitioners by the ITC in the context of the application of "facts available" as compared to the treatment accorded to respondents in that context by the DOC. Here, the Panel accepted the U.S. argument that the ITC regulations governing the submission of factual information are different from those of the DOC's, such that petitioners, unlike respondents, had not failed to submit information in a timely manner. Therefore, the Panel considered that the factual predicate for Japan's claim of differential treatment as between the DOC and the ITC does not exist, and Japan therefore failed to establish its claim. (Para. 7.275)

Finally, the Panel examined Japan's claim concerning the ITC's alleged use of a two-year period of investigation. The Panel recalled its findings above that the ITC in fact collected data for a three-year period, and that the ITC's analysis and determination of injury were not inconsistent with its AD Agreement obligations. Because Japan's argument concerned the ITC's behavior in a single anti-dumping proceeding, the Panel found that Japan failed to make a *prima facie* case that these individual actions demonstrate that the United States administered its anti-dumping laws in a manner which was not uniform, impartial and reasonable. (Paras. 7.276-277)

For these reasons, the Panel concluded that the United States did not act inconsistently with GATT Article X:3 in making its determinations and imposing the final anti-dumping measure in dispute. (Para. 7.277)

DSU Article 19.1 - Request for Specific Suggestion

Japan made two requests for specific suggestions from the Panel as to how the United States should implement its findings of inconsistencies with its WTO obligations. First, Japan requested that the Panel provide the United States with a detailed "roadmap" as to how U.S. authorities can fulfill their international obligations in this case. Second, Japan requested that the Panel make a recommendation that, if the U.S. Government's reconsideration of the hot-rolled investigation in accordance with the Panel's findings should result in a finding that the imported product was not dumped or that it did not injure the domestic industry, or that dumping occurred to a lesser degree than found previously, then the United States should revoke the anti-dumping duty order and/or reimburse any anti-dumping duties collected over the amount found upon reconsideration. (Paras. 8.5 and 8.9)

The Panel denied Japan's requests. It first examined DSU Article 19.1, which provides that, in general, panels are to "recommend" that the Member bring its measure into conformity with its WTO obligations. Article 19.1 then also provides that panels may "suggest ways in which the member concerned could implement the recommendations." (Para. 8.6)

The Panel considered that the United States could appropriately implement its recommendation in differing ways, such that it is for the United States to determine "in the first instance the modalities of the implementation of [the Panel's] recommendation." With respect to the reimbursement for any duties collected, the Panel noted that the U.S. system operates such that duties are not actually collected in the amounts as determined in the investigation, but rather they are collected based on calculations in subsequent reviews, such that the Panel found it unclear as to whether there were any "duties collected" that could be reimbursed. Moreover, the Panel stated that Japan's request for reimbursement raises important systemic issues, which the Panel considered had not been fully explored in this dispute. (Paras. 8.11-13)

Therefore, the Panel declined Japan's request for specific suggestions regarding a roadmap, revocation or reimbursement. (Para. 8.14)

COMMENTARY

Evidentiary Scope of Review

This Panel elaborated upon the for determining what evidence, in its view, panels are permitted to review in the context of a challenge of an anti-dumping investigation under the AD Agreement. AD Agreement Article 17.5(ii) permits Panels to reach a finding only on the basis of facts made available during the underlying investigation. As such, the Panel in this case refused to consider certain affidavits and newspaper articles with respect to Japan's claims under the AD Agreement *to the extent that those documents purported to set forth facts that had not been before the U.S. authority during the investigation.* On the other hand, the Panel did not reject this evidence outright, in part because it considered that some of that evidence could be relevant to Japan's GATT Article X claims, which are not subject to the evidentiary limits imposed by AD Agreement Article 17.5(ii).

Although it is unclear that Article 17.5(ii) actually *precludes* panels from examining evidence that was not before the authorities (*i.e.*, evidence not on the record, or "non-record" evidence), many panels seem to assume that this is the correct approach. *See* Guatemala - Cement II and EC - Bed Linen. If this issue reaches the Appellate Body at some point, Article 17.5(ii) will undoubtedly be examined in respect of its relationship with DSU rules governing panels' consideration of evidence. It is now well-established that the DSU provides panels with broad authority to seek, accept and examine evidence. The Appellate

Body will have to decide the extent to which AD Agreement Article 17.5(ii) complements or contradicts the relevant DSU rules.

In the meantime, however, panels sometimes refuse to consider facts that were not before the authorities. Indeed, this Panel stated that it did not consider any of these new facts in the context of Japan's claims under the AD Agreement. Nonetheless, for complaining Members, while the additional evidence may not be necessary for the specifics of a claim, the evidence may be important for its "atmospheric" weight, in that it may help demonstrate the degree to which an investigating authority was biased in its analysis during the investigation. The *Hot-Rolled* case illustrates one way in which a Member challenging an anti-dumping measure in the context of a specific investigation can ensure that additional evidence that was not before the relevant authority during the investigation will be placed before the panel. If the complainant raises a claim under another WTO agreement, such as the GATT (in this case, Japan raised a claim under GATT Article X:3(a)), then AD Agreement Article 17.5(ii) does not apply to the GATT claim, and the panel will have to take into account the additional evidence.

GATT Article X:3(a)

The Panel demonstrated a great deal of reluctance to consider the GATT Article X:3 challenges raised by Japan in this case. First, it questioned whether Japan's challenges were directed at the *administration* of a U.S. rule as opposed to the *substance* of those rules. In this respect, it expressed "serious doubts" as to whether it would be appropriate to find an Article X:3 violation where it had already found that a particular action was consistent with a specific provision of the AD Agreement. These statements should be contrasted with those of the panel in *U.S. - Sheet/Plate from Korea*, which found that the DOC's determinations in the Sheet/Plate investigations against Korea fall within the scope of Article X:3 because a DOC determination is an "administration" of U.S. anti-dumping laws and regulations.

Second, the Panel expressed doubts as to whether it could rule on the internal consistency of a national authority's actions with its prior practice. An argument can be made, however, that internal consistency is one of the issues with which Article X:3 is intended to deal. The standards contained in Article X:3, "uniform, impartial and reasonable" administration of laws, suggest that this provision is a *comparative* task, such that a Member's administration of a law in one instance must be compared with its administration of that law in another instance. Here, Japan argued that the U.S. authority departed from its alleged prior practice. The Panel gave no reason for its reluctance to examine such a claim, other than the fact that it does not consider it to be a panel's "task" to review such issues. It should be noted that the panel in *U.S. - Sheet/Plate from Korea* expressed similar doubts with regard to this issue. *See DSC for U.S. - Sheet/Plate from Korea (Panel)*.

Given the Appellate Body's discussion of the principle of good faith in the appeal of this Panel Report and its focus on terms in the AD Agreement such as "objective" as the basis for finding that this principle is part of substantive AD Agreement rules, there appears to be a persuasive argument that GATT Article X:3 is similarly an expression of the principle of good faith. Indeed, the use of the three terms "uniform," "impartial" and "reasonable" presents strong support for such a conclusion. All three terms arguably reflect the concept of "good faith" and notions of fundamental fairness. In this regard, it could be argued that the internal consistency of a Member's administrative rulings is one test of whether that Member is carrying out its obligations in good faith. That is, an investigating authority's decision to depart from previous practice in a specific instance with no warning, could, depending upon the specific facts, be viewed as an instance in which that authority failed to exercise good faith.

AD Agreement Article 3 - Market Sector Analysis ("Captive Production")

See DSC for U.S. - Hot-Rolled Steel from Japan (AB).

AD Agreement Article 3.5 - Causation and Non-Attribution

See DSC for U.S. - Hot-Rolled Steel from Japan (AB).

Last Update: April 3, 2005

Appellate Body Report
United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan
(WT/DS184/AB/R) / DSR 2001:X, 4697

Participants
Appellant/Appellee: U.S.
Appellant/Appellee: Japan
Third Participants: Brazil, Canada, Chile, EC, Korea

Appellate Body Division
Taniguchi (Presiding Member), Feliciano, Lacarte-Muró

Timeline of Dispute
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Interim Report Issued: January 22, 2001
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Notice of Appeal: April 25, 2001
AB Report Circulated: July 24, 2001
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Key Findings

- The standards of review contained in AD Agreement Article 17.6 (i) and (ii) complement the "objective assessment" requirement in DSU Article 11. Under Article 17.6(ii), a "permissible interpretation is one that is found to be appropriate after the application of the rules of the Vienna Convention."
- Upheld, based in part of modified reasoning, Panel's findings that the U.S. Department of Commerce ("DOC") erred in applying "facts available" and therefore acted inconsistently with AD Agreement Article 6.8 and/or Annex II.
- Upheld Panel's finding that the U.S. statutory provision requiring the inclusion of margins based partially on "facts available" in the calculation of the "all others" dumping margin is inconsistent with Article 9.4.
- Upheld, based in part on modified reasoning, Panel's finding that the DOC's "arms' length" test for excluding sales to affiliates as "outside the ordinary course" is inconsistent with AD Agreement Article 2.1. Reversed Panel's finding, however, that the replacement of sales "outside the ordinary course" with downstream resales by the affiliates is inconsistent with Article 2.1.
- Upheld, based on modified reasoning, Panel's finding that the U.S. statutory requirement to "focus primarily" on the merchant market sector (the "captive production provision") is "not inconsistent" with AD Agreement Article 3. However, reversed Panel's finding that this provision was applied consistently with Articles 3.1 and 3.4 in the hot-rolled investigation.
- Reversed Panel's interpretation of the non-attribution standard in AD Agreement Article 3.5. Found that, under this standard, investigating authorities must "separate" and "distinguish" the injurious effects of other causal factors from the effect of dumped imports.

BACKGROUND

This dispute concerns the U.S. imposition of definitive duties on imports of certain hot-rolled flat-rolled-carbon-quality steel products ("hot-rolled steel") from Japan. The petition for this investigation was filed on September 30, 1998 with respect to imports from Brazil, Japan and Russia. The petition also alleged that critical circumstances existed for imports from Japan.

Upon the filing of the petition, the relevant U.S. anti-dumping authorities initiated an investigation. Specifically, the U.S. International Trade Commission ("ITC") instituted its injury investigation on September 30, 1998, and the U.S. Department of Commerce ("DOC") initiated an anti-dumping duty investigation on October 15, 1998. Finding it impractical to examine all of the relevant Japanese exporters, the DOC decided to conduct its investigation on the basis of a sample of three Japanese producers -- Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC") and NKK Corporation ("NKK").

Effective November 16, 1998, the ITC issued an affirmative preliminary determination of a "reasonable indication" that the U.S. industry was threatened with material injury. Then, effective November 30, 1998, the DOC issued its affirmative preliminary critical circumstances determination with respect to imports from Japan. Based on its preliminary finding that critical circumstances existed, the DOC stated that upon issuance of an affirmative preliminary dumping determination, it would direct the U.S. Customs Service to suspend liquidation of all entries of hot-rolled steel from Japan for a period of ninety days prior to the preliminary dumping determination. On February 19, 1999, the DOC issued its preliminary affirmative dumping determination, finding dumping margins for the three investigated respondents ranging from 25 to 67 percent.

On May 6, 1999, the DOC published its final determination of dumping, establishing the following dumping margins: KSC (67.14%), NSC (19.65%), NKK (17.86%), All Others Rate (29.30%). The DOC also made a final negative determination of critical circumstances with respect to NSC and NKK, but it continued to find that critical circumstances existed as to KSC and the "all others" companies.

On June 11, 1999, the ITC voted unanimously that the U.S. industry was materially injured or threatened with material injury hy reason of hot-rolled steel imports from Japan, and it published its final affirmative determination of injury on June 23, 1999. It also reached a negative critical circumstances determination.

On June 29, 1999, the DOC published an anti-dumping duty order imposing estimated dumping duties on imports from Japan at the rates announced in its final determination. Since the ITC had not found critical circumstances to exist, it ordered the refund of any cash deposits and/or release of any guarantees provided for the period of the preliminary critical circumstances finding.

(Panel Report, paras. 2.1-9)

Japan challenged the anti-dumping measures "as applied" in this case under AD Agreement Articles 2, 3, 4, 6, 9 and 10, and Annex II. It also challenged certain of the U.S. anti-dumping laws, regulations and administrative procedures "as such" under some of those same provisions. Finally, Japan challenged several actions taken by the DOC and the ITC in the course of the investigation under GATT Article X:3(a). The Panel reached the following conclusions: 1) the United States acted inconsistently with AD Agreement Article 6.8 and Annex II in its application of "facts available" to KSC, NSC and

NKK; 2) the U.S. statutory provision for calculating an "all others" rate is inconsistent with AD Agreement Article 9.4 on its face and as applied and, therefore, the United States also violated AD Agreement Article 18.4 and WTO Agreement Article XVI:4; 3) the United States violated AD Agreement Article 2.1 by excluding certain home-market sales to affiliated parties from the calculation of normal value and by replacing certain of those sales with re-sales by the affiliated customer to unaffiliated downstream purchasers; 4) the U.S. statutory provision governing the determination of critical circumstances does not violate AD Agreement Article 10 "as such" or as applied in the hot-rolled investigation; 5) the U.S. "captive production" provision does not violate AD Agreement Articles 3 or 4 "as such" or as applied in the hot-rolled investigation; 6) the United States did not act inconsistently with AD Agreement Article 3 in its examination and determination of a causal link between imports and injury; and 7) the United States did not act inconsistently with GATT Article X:3(a).

The United States appealed the Panel's decisions regarding the application of facts available to the three named respondents, the U.S. calculation of the all others rate, and the U.S. treatment of sales to affiliates in the home market. Japan cross-appealed with respect to the Panel's failure to find a violation regarding the U.S. captive production provision and the U.S. determination regarding a causal connection (non-attribution, in particular) in the hot-rolled investigation. Japan also raised five conditional appeals in the event that the Appellate Body were to reverse certain of the Panel's findings appealed by the United States (for four of those conditional appeals, the Appellate Body did not reverse the Panel's findings referred to by Japan, such that the conditions for Japan's appeals did not arise. For one of those appeals, relating to the DOC's treatment of downstream sales, as noted in the summary of the Appellate Body's findings below, the Appellate Body reversed the Panel's finding of a violation under Article 2.1, thereby triggering Japan's conditional appeal of the issue under Article 2.4. However, the Appellate Body was unable to complete the analysis due to the insufficiency of the factual record.).

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

AD Agreement Article 17.6 and DSU Article 11 - Standard of Review

The Appellate Body considered that it would be useful to address certain general aspects of the standard of review as regards a panel's examination of an anti-dumping investigation. The two provisions that affect such an examination are AD Agreement Article 17.6 and DSU Article 11. Article 17.6 provides:

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

> shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

(Para. 50) DSU Article 11 states:

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

(Para. 53, emphasis added by Appellate Body)

At the outset, the Appellate Body noted that Article 17.6 is listed in DSU Article 1.2 and Appendix 2 as one of the "special and additional rules and procedures" which prevail over the DSU "[t]o the extent that there is a difference" between those provisions and the provisions of the DSU. Citing its report in *Guatemala - Cement I*, the Appellate Body explained that the special or additional rules only prevail over the DSU rules when the different rules "cannot be read as complementing each other." The Appellate Body noted that, while Article 17.6 establishes rules relating to "matters" arising under *only the AD Agreement*, DSU Article 11 sets forth rules that apply to a panel's examination of "matters" arising under "*any* of the covered agreements." (Paras. 51-53)

Then, noting that Article 17.6 is divided into two sub-paragraphs, each applying to different aspects of the panel's examination of the matter, the Appellate Body first compared Article 17.6 and DSU Article 11 as they apply generally to the panel's "assessment of the facts." The Appellate Body could not find any conflict between the two provisions in this regard, stating that while Article 17.6(i) does not include the word "objective," as does DSU Article 11, "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective 'assessment of the matter.*'" As a result, the Appellate Body did not find a "conflict" as between Article 17.6(i) and DSU Article 11. (Para. 55)

The Appellate Body also focused on the additional requirements in Article 17.6(i) -- that a panel determine whether investigating authorities' "establishment of the facts was proper" and whether the authorities' "evaluation of those facts was unbiased and objective." The Appellate Body explained that these standards "in effect [define] when investigating authorities can he considered to have acted inconsistently with the Anti-Dumping Agreement in the course of the 'establishment' and 'evaluation' of the relevant facts." The Appellate Body explained:

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

(Para. 56, emphasis added by Appellate Body)

Next, the Appellate Body turned to Article 17.6(ii), which addresses issues of legal interpretation. The Appellate Body noted that the first sentence of this provision closely echoes DSU Article 3.2 in that it requires panels to interpret AD Agreement provisions "in accordance with customary rules of interpretation of public international law." Thus, the Appellate body explained that Article 17.6(ii) does not involve a "conflict" with the DSU, but, rather, it "confirms that the usual rules of treaty interpretation under the DSU also apply to the Anti-Dumping Agreement." (Para. 57) Turning to the second sentence of Article 17.6(ii), the Appellate Body recognized that this sentence "presupposes" that application of the

customary rules of interpretation could give rise to two or more interpretations of some provisions in the AD Agreement, and that any of those interpretations should then be considered "permissible." It emphasized, however, that "a permissible interpretation is one which is found to be appropriate *after* application of the rules of the Vienna Convention." Moreover, the Appellate Body considered that the second sentence of Article 17.6(ii), while not found in the DSU, supplements, rather than replaces, DSU Article 11. It noted that DSU Article 11 requires panels to make an "objective assessment" of the legal provisions at issue, and that nothing in Article 17.6(ii) suggests that panels should not conduct an "objective assessment" of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. (Paras. 58-62)

SUBSTANTIVE ISSUES

AD Agreement Article 6.8 - Facts Available

Application of Facts Available to NSC and NKK

Before the Panel, Japan argued that the DOC was not entitled to reject certain information submitted by NSC and NKK, and to therefore apply facts available, solely because this information was provided after the deadlines for questionnaire responses. (Para. 63) Specifically, both NSC and NKK had initially reported that weight conversion factors for certain sales made in a different unit of measurement were unavailable. However, later in the proceeding, while preparing for verification, NSC had discovered that the data required to calculate a weight conversion factor was kept in a database at a factory in south-western Japan, separate from the main sales database which is maintained at NSC's headquarters in Tokyo. Upon discovering the data, NSC submitted it to the DOC, 14 days before verification. Similarly, NKK submitted a "best estimate" weight conversion factor nine days before verification, upon its discovery that a third respondent had done so in its questionnaire response and that such a "best estimate" methodology had been accepted by the DOC when an actual weight conversion factor was not available. Petitioners in the investigation submitted letters requesting that the DOC reject the weight conversion factors submitted by NSC and NKK. The DOC did not verify the factor submitted by NSC, but it did verify the one submitted by NKK. Nonetheless, the DOC later rejected both parties' weight conversion factor submissions as untimely and expunged them from the record. It then applied adverse facts available in their place, thereby inflating the dumping margins found for NSC and NKK. The Panel concluded that, based on the evidence before the DOC, "an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that [NSC and NKK] had failed to provide necessary information *within a reasonable period*," and that the DOC's application of facts available was therefore inconsistent with AD Agreement Article 6.8. (Emphasis added) The United States appealed this finding, arguing that the DOC was entitled to reject the weight conversion factors "because they were submitted *after the deadlines for questionnaire responses*." (Paras. 63-71, emphasis added)

The Appellate Body upheld the Panel's finding. In doing so, it examined various provisions of the AD Agreement. First, the Appellate Body agreed with the Panel that under Articles 6.1.1, 5.10 and 6.14, the AD Agreement clearly contemplates that investigating authorities may impose appropriate time limits on interested parties for responses to questionnaires. On the other hand, the Appellate Body noted that under the second sentence of Article 6.1.1, time limits imposed by investigating authorities for questionnaire responses are "not necessarily absolute and immutable," such that in appropriate circumstances those limits "must be extended."

The Appellate Body then considered Article 6.1.1 together with Article 6.8 and Annex II, both of which pertain to the application of facts available, to determine when authorities may reject information. (Paras. 72-75) Article 6.8 states:

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

(Para. 76) The Appellate Body interpreted this provision to mean, "if information is, in fact, supplied 'within a reasonable period,' the investigating authorities cannot use facts available, but must use the information submitted by the interested party." (Para. 77) It found confirmation for this interpretation in paragraph 1 of Annex II which contains similar language -- "within a reasonable time."

Next, the Appellate Body considered that paragraph 3 of Annex II bears on the question of when investigating authorities are entitled to reject information. That provision states:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation *without undue difficulties, which is supplied in a timely fashion*, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

(Para. 80, emphasis added by Appellate Body) Under this provision, the Appellate Body stated that investigating authorities are directed to use information if certain conditions are satisfied, and it emphasized the condition of submission in a "timely fashion." If these conditions are met, then investigating authorities are *not* entitled to reject the information submitted. (Para. 81) With regard to the requirement that the submission be "supplied in a *timely* fashion," the Appellate Body stated that such "timeliness" must be read in light of the "collective requirements" of Articles 6.1.1, 6.8 and Annex II as discussed above, such that the phrase "in a timely fashion" should be read as a reference to the concept of a "reasonable period" or "reasonable time." In interpreting these phrases, the Appellate Body recognized that "[w]hat is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances," suggesting that these phrases should be interpreted on a case-by-case basis. It elaborated that "'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness,' and in a manner that allows for account to be taken of the particular circumstances of each case." Then, it set forth the type of factors that investigating authorities should consider:

> (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.

(Para. 85) It explained that Articles 6.1.1 and 6.8 and Annex II strike and require a balance between the legitimate interests of parties to submit information and to have that information taken into account, and the rights of investigating authorities to control and expedite the investigating process. (Paras. 82-86)

Turning to the facts in respect of the hot-rolled investigation, the Appellate Body observed that the DOC rejected the weight conversion factors "for the sole reason that they were submitted after the deadline for submission of the questionnaire responses," such that the DOC made no effort to determine whether the submissions were made "within a reasonable period," in spite of the DOC deadlines. It observed that the DOC relied on the fact that the deadlines had expired despite the fact that both parties had requested acceptance of the weight conversion factors as a "correction" to the information submitted in their questionnaire response. Moreover, it noted that the DOC in fact verified NKK's information, before subsequently rejecting it as "out of time." The Appellate Body characterized the U.S. approach as one that excluded the possibility of extending the time limits, and accepting the information, as might be required under Article 6 and Annex II. (Paras. 87-88)

On this basis, the Appellate Body concluded that the DOC acted inconsistently with Article 6.8 by failing to consider whether the information at issue was submitted within a reasonable period of time. The Appellate Body emphasized that it was not holding that the DOC, based on the facts, could not have rejected the weight conversion factors, but rather that the DOC was not entitled to do so *on the sole basis* that the information was submitted after the relevant deadline. The Appellate Body reached the following conclusion: **"For all of the above reasons, we, therefore, uphold, albeit for different reasons, the Panel's findings that the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in applying facts available to ... NSC and NKK."** (Paras. 89-90)

Application of "Adverse" Facts Available to KSC

During the period of investigation, the respondent company KSC made a significant portion of its export sales to its U.S. affiliate, California Steel Industries ("CSI") a joint venture company shared equally between KSC and a Brazilian Company, Companhia Vale de Rio Doce ("CVRD"). CSI was a petitioner in the underlying investigation. Based on their affiliation, the DOC declined to include KSC's prices to CSI in its calculation of the dumping margin, and instead opted to construct an export price for those sales. In order to do so, the DOC requested that KSC provide information concerning CSI's *resale* prices to downstream unaffiliated customers and CSI's further manufacturing costs. KSC, or its lawyers, met with a CSI representative and sent five letters to CSI over a period of thirteen weeks requesting CSI's cooperation in providing the required information. Although CSI initially indicated that it would assist KSC, CSI eventually refused to supply the information or to allow KSC's lawyers to visit CSI for purposes of collecting that information. KSC reported its difficulties in obtaining this information to the DOC, met with the DOC to discuss the issue, and requested several times to be excused from submitting the required information pertaining to CSI. The DOC did not take any steps to assist KSC in overcoming these difficulties, nor did it request CSI to supply the information to the DOC directly. Instead, the DOC continued to require KSC to submit the information. KSC never requested assistance from its joint venture partner CVRD in obtaining the information, nor did it seek to exercise certain rights available to it under its joint venture agreement that might have enabled KSC to compel CSI to produce the information. (Paras. 91-93) In its final determination, the DOC found that KSC failed to act "to the best of its ability" to obtain the CSI data, that KSC was not "fully cooperative," and that it did not make "every effort to obtain and provide the information." The DOC therefore applied "adverse" facts available in determining the portion of KSC's margin attributable to CSI. This application of facts available "significantly increased KSC's overall dumping margin." (Paras. 93-94)

Before the Panel, Japan conceded that the use of facts available in this situation was proper, but it contested the DOC's finding that KSC did not "cooperate" with the DOC and the DOC's subsequent application of "adverse" facts available. The Panel found that, under Annex II(7), a "less favourable result" may only be appropriate when an interested party does not "cooperate" in the investigation. Moreover, based on the facts in this case, the Panel found that an unbiased and objective investigating

authority could not have concluded that KSC failed to "cooperate," such that the DOC acted inconsistently with Article 6.8 and Annex II(7). (Para. 95) The United States appealed this finding, asserting that the factual record supports the DOC's finding that KSC failed to cooperate. (Para. 96)

At the outset, the Appellate Body disagreed with the United States' characterization of its appeal as a question of fact. Rather, the Appellate Body viewed it as a legal question, namely the meaning of the word "cooperate" in Annex II(7) and "the proper *legal* characterization of the uncontested facts in terms of that meaning." (Para. 97) The Appellate Body then examined the last sentence of Annex II(7), which provides:

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

(Para. 98, emphasis added by Appellate Body) The Appellate Body noted the Panel's reference to the dictionary meaning of "cooperate:" to "work together for the same purpose or in the same task." It explained that this meaning "suggests that cooperation is a process, involving joint effort, whereby parties work together towards a common goal." Under this definition, the Appellate Body considered it possible that while parties may "cooperate" to a high degree, the requested information may nevertheless ultimately not be obtained. As such, it stated that authorities should not find that a party has failed to cooperate simply because the party ultimately fails to furnish the requested information. (Paras. 99)

Next, the Appellate Body considered the "degree" of "cooperation" that investigating authorities are entitled to expect. Noting that the text of Annex II(7) does not answer this question, the Appellate Body examined the context found in Annex II. It found it relevant that Annex II(5) prohibits investigating authorities from discarding information that is "not ideal in all respects," provided that the interested party nevertheless acted "to the best of its ability." Based on this provision, the Appellate Body described the requisite degree of cooperation in paragraph 7 to be "a high one," such that interested parties must "act to the 'best' of their abilities." (Para. 100) On the other hand, it considered that Annex II(2) prohibits questionnaire requests that impose an "unreasonable extra burden" that would "entail unreasonable additional cost and trouble," thereby requiring investigating authorities "to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities." It added that Annex II(2) is an expression of "good faith," which restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not "reasonable." (Paras. 101-102) Moreover, the Appellate Body recognized that Article 6.13, which requires authorities to take "due account of any difficulties experienced by interested parties" and to "provide any assistance practicable," underscores the nature of cooperation as a "two-way process involving joint effort." (Paras. 103-104)

With these principles in mind, the Appellate Body examined the DOC's approach in the hot-rolled investigation. It observed the following facts: the information requested by the DOC "was not known to, nor in the possession of, KSC"; the information related to prices and costs of CSI; the information resulted from CSI's own operations, the information was known only to, and in the possession only of, CSI; KSC made several attempts to obtain the information from CSI; the DOC recognized that KSC "substantially cooperated" in respect of other issues and that KSC made some effort to obtain the data in question and that CSI "rebuffed these efforts"; KSC repeatedly reported to the DOC its difficulties in obtaining the information; the DOC took no steps to assist KSC or to make allowances for the resulting deficiencies; the DOC declined to allow KSC to attend a meeting with petitioners' counsel to discuss the issue; the DOC did not provide any specific guidance or assistance to KSC; the DOC did not take any

steps to secure the information directly from CSI (an approach the Appellate Body said is contemplated by Articles 6.1 and 6.11); in its initial responses CSI indicated that it would provide KSC with assistance, but it failed to do so as the deadlines approached; petitioners, of which CSI was one, urged the DOC not to excuse KSC from providing any of the required information; and the DOC appeared to expect KSC to go to considerable lengths in terms of exercising its shareholder rights over CSI and exhausting "all legal means," in contrast to the DOC's reluctance to take "any available step" to assist KSC. (Paras. 105-108)

Against this background, and in light of its own interpretation of the word "cooperate," the Appellate Body agreed with the Panel's finding that the DOC's conclusion that KSC failed to "'cooperate' in the investigation did not rest on a permissible interpretation of that word." **Therefore, the Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 6.8 and Annex II by applying "adverse" facts available to KSC's sales to CSI.** (Paras. 109-110)

AD Agreement Article 9.4 - Calculation of the "All Others" Rate

Before the Panel, Japan challenged the United States' statutory methodology for calculating an "all others" dumping margin for those exporters and producers who are not *individually* investigated by the DOC. Japan also challenged the DOC's application of that statute in the hot-rolled investigation. The Panel found a violation of AD Agreement Article 9.4 to the extent that the statute at issue requires the consideration of margins based "in part" on facts available. As a result of this violation, the Panel also concluded that the United States had failed to bring its laws into conformity with WTO rules pursuant to AD Agreement Article 18.4 and WTO Agreement Article XVI:4. Moreover, the Panel found that the application of this statute in the hot-rolled investigation violated AD Agreement Article 9.4. On appeal, the United States challenged the Panel's interpretation of Article 9.4. (Paras. 111-113)

The Appellate Body began its analysis by examining AD Agreement Article 9.4, which provides:

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

(Para. 114, emphasis added by Appellate Body) The U.S. appeal concerned the second type of margins that are to be disregarded in the calculation of the maximum "all others" rate, specifically "margins established under the circumstances referred to in [Article 6.8]". The United States argued that this phrase should be interpreted to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin -- normal value and export price -- are determined *exclusively* using facts available. (Para. 117)

The Appellate Body interpreted Article 9.4 as follows. Citing *EC - Bed Linen*, the Appellate Body first recalled an earlier interpretation of the word "margins," as it appears in AD Agreement Article 2.4.2: "the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation for that particular product." (Para. 118) Next, it examined the phrase

"margins established under the circumstances referred to in [Article 6.8]." It observed that Article 6.8 permits authorities to reach determinations on the basis of facts available, and it noted that the right to apply facts available is not limited to cases where the *entire* margin is established using facts available, but rather, such a right is available *whenever* an interested party fails to provide certain necessary information. As such, the Appellate Body reasoned that the term "circumstances" in Article 9.4 includes situations in which facts available are applied even if only to cure the lack of a "only a small amount of information." Finally, the Appellate Body could find nothing in the text of Article 9.4 to support the U.S. argument that the term "established" should be read as though it were modified by the word "entirely." (Paras. 119-122)

The Appellate Body found support for this interpretation in the purpose of the provision. Specifically, it stated that Article 9.4 "seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters." (Para. 123)

The United States expressed the concern that the Appellate Body's interpretation renders it impracticable to calculate an "all others" rate in investigations in which *all* of the individual margins are calculated using some element of facts available. The Appellate Body recognized that Article 9.4 does in fact create such a gap in the rules because, while it prohibits the use of certain margins for calculation of the "all others" rate, it does not the address how to calculate that rate in the event that *all* of the individual margins are excluded from the calculation under its prohibitions. Nonetheless, the Appellate Body stated that this appeal does not raise the issue of how such a gap might be overcome. (Paras. 124-126)

With this interpretation in mind, the Appellate Body examined the U.S. statute that governs the calculation of an "all others" rate -- section 735(c)(5)(A) of the United States Tariff Act of 1930. It noted that the statute is mandatory and requires that the "all others" rate be equal to a weighted average of the individual margins, excluding only those margins that are zero, *de minimis*, or determined "entirely" on the basis of facts available. As a result, the Appellate Body observed that the U.S. statute provides for the inclusion of margins that are based "in part" on facts available. **Therefore, to the extent that the U.S. statute requires the inclusion of margins based in part on facts available, the Appellate Body upheld the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930 is inconsistent with Article 9.4. As a result, it also upheld the Panel's "consequent findings" that the United States acted inconsistently with AD Agreement Article 18.4 and WTO Agreement Article XVI:4. Moreover, because the United States applied this statute in the hot-rolled investigation, and in fact included in the calculation of the "all others" rate margins established in part on the basis of facts available, the Appellate Body also upheld the Panel's finding that the United States acted inconsistently with its AD Agreement obligations in the context of the hot-rolled investigation.** (Paras. 127-129)

Finally, the Appellate Body addressed the U.S. argument that the Panel failed to apply the standard of review set forth in AD Agreement Article 17.6(ii), by failing to find that the U.S. interpretation of Article 9.4 is a "permissible" one. For the same reasons as its findings above, the Appellate Body stated that Article 9.4, under the customary rules of treaty interpretation, is not "susceptible" to the U.S. interpretation of the provision. **Therefore, it concluded that the Panel did not err in its application of the standard of review under AD Agreement Article 17.6(ii) when interpreting Article 9.4.** (Para. 130)

AD Agreement Article 2.1 - "Ordinary Course of Trade" ("Arm's Length" and Downstream Sales)

AD Agreement Article 2.1 establishes that a determination of dumping must be based on transactions made "in the ordinary course of trade." The United States treats home market sales by an exporter to an affiliated customer as within the ordinary course of trade, only so long as prices to that affiliated customer are, on average, at least 99.5 percent of the average prices charged to unaffiliated customers. This methodology is referred to as the "arm's length" or "99.5 percent" test. Specifically, the United States calculates the weighted average selling price for each product to *each affiliated* party. It also calculates a weighted average selling price for each product to *all non-affiliated* parties. Then, if the weighted average price for sales to an *individual affiliated party* is 99.5 percent or more, of the weighted average price of sales to *all non-affiliated parties*, all of the sales to that affiliated party are treated as being made "in the ordinary course of trade." By contrast, if the weighted average price for those sales to the *individual affiliated party* falls below the 99.5 percent threshold, then all of the sales to that affiliated party are treated as being made *outside* "the ordinary course of trade," and the DOC then *disregards* them in calculating normal value, or, in some cases, it *replaces* them with the first resale price between an affiliated party and an independent non-affiliated party. The Appellate Body noted that this test is not mandated by statute or regulation in the United States, hut it "constitutes a consistent practice of USDOC that is reflected in certain federal notices issued by the United States Government." (Paras. 131-133)

99.5 Percent Test

Before the Panel, Japan challenged, under AD Agreement Article 2.1, the application of the 99.5 percent test in the hot-rolled investigation. The Panel found that the 99.5 percent test does not rest on a permissible interpretation of the term "sales in the ordinary course of trade" because it excludes low-priced sales and skews the normal value upward. It also found that the test was applied in the hot-rolled investigation without any consideration of any particular factual circumstances as to whether the Japanese respondents' sales to affiliates were truly outside the ordinary course of trade. (Paras. 134-136) The United States appealed this finding, arguing that its automatic exclusion of only the low-priced sales is a permissible interpretation of Article 2.1 because it prevents the distortion of normal value, whereas there is no reason to "suspect" that high-priced sales might be artificial. In this regard, the United States asserted that if high-priced sales are "aberrationally high," then the DOC would exclude those sales from the calculation of normal value as well. (Para. 137)

The Appellate Body considered that as part of this appeal it must determine whether the Panel erred under AD Agreement Article 17.6(ii) in concluding that the 99.5 percent test does not rest upon a permissible interpretation of Article 2.1. (Para. 138) The Appellate Body observed that, under Article 2.1, investigating authorities must base normal value on sales made "in the ordinary course of trade," and, as such, must exclude sales that are *not* made "in the ordinary course of trade." Moreover, it noted that, while the AD Agreement does not provide a definition of "in the ordinary course of trade," it "envisage[d] many reasons" for which transactions might not be so, for example, where the parties to the transaction have common ownership. (Paras. 139-141)

Next, the Appellate Body stated that the process of determining whether a particular sales price is higher or lower than the "ordinary course" price, is not simply a matter of comparing *prices*. Rather, the price must be assessed "in light of the other terms and conditions of the transaction, such as the volume of the product involved and whether the seller undertook additional responsibilities like transport or insurance." Moreover, the Appellate Body observed that the simple fact of affiliation between buyer and seller also does not necessarily imply that a higher or a lower priced sale is "outside the ordinary course." (Paras. 142-144)

As a result, the Appellate Body stated that, under Article 2.1, the duties of investigating authorities are the same regardless of whether it is a higher or lower priced sale -- namely, *all* sales which are not in the "ordinary course" must be excluded. On the other hand, the Appellate Body explained that given the wide variety of the types of sales that could potentially be "outside the ordinary course," it is not necessary for investigating authorities to subject each and every potentially "outside the ordinary course" category of sales to *identical* rules. In this regard, it noted that Article 2.2.1 provides one method for determining whether sales are "in the ordinary course of trade" (namely, the methodology for determining whether sales were below cost), but it does not exhaust the range of possible methods. (Paras. 145-146)

While the Appellate Body recognized that the AD Agreement affords Members "discretion" to determine the appropriate methodology in this regard, it noted that this discretion "is not without limits." It stated, "... the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation." (Emphasis added by Appellate Body) It continued, "[i]f a member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'" (Paras. 147-148)

Turning to an examination of the DOC's approach under the 99.5 percent test, the Appellate Body observed that by excluding a great range of low-priced sales to affiliates, the test "minimize[s] to an extreme degree, possible downward distortion of normal value that might result from sales to affiliates." Moreover, it observed that the United States has no standard or guideline for its purported "aberrationally high" test. In this regard, it noted that the DOC does not "systematically" test for such high prices, but instead, exporters must request such an examination and they bear the burden of demonstrating the high price. Moreover, given that exporters are rarely apprised of the threshold price figure applied by the DOC, it would be extremely difficult for exporters to know which of the sales are "aberrationally high." Indeed, in the case at hand, the Appellate Body stated that it could not be sure that the exporters even knew about the existence of such a rule that allegedly applied to high-priced sales. In addition, it noted that under Article 2.1, the investigating authorities, and not the exporters, are to ensure that the calculation of normal value is based on sales made "in the ordinary course of trade." The Appellate Body concluded that under the "aberrationally high" test "a far smaller range of high-priced sales between affiliates can be excluded," as compared to the range of low-priced sales excluded under the 99.5 percent test. It described this result as a "lack of even-handedness" in the two tests applied by the United States in this case to establish whether sales made to affiliates were "in the ordinary course of trade." (Paras. 149-155)

On this basis, the Appellate Body upheld the Panel's finding that the *application* of the 99.5 percent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'" and is therefore inconsistent with AD Agreement Article 2.1, although it noted that it reached this result "for reasons which differ in part" from those of the Panel. (Para. 158)

Replacement of Sales to Affiliates by Downstream Sales

Before the Panel, Japan challenged the DOC's replacement of home market sales to affiliates that were excluded under the 99.5 percent test with the first downstream home market sale price between the affiliate and an independent buyer. The Panel found this practice to be inconsistent with Article 2.1 because the downstream prices were irrelevant to the dumping calculation, given that they were *not sales of the exporter or producer for whom a margin was being calculated.* The United States appealed the Panel's finding, arguing that the resale prices fall within Article 2.1 "because they are sales of the like product, in the ordinary course of trade, for consumption in the exporting country," and that *who* makes the sale is irrelevant to the dumping calculation. (Paras. 159-161)

The Appellate Body reversed the Panel's finding. It began with the text of Article 2.1. That provision defines normal value as:

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

The Appellate Body stated that this provision establishes four conditions on sales transactions before they may be used to calculate normal value. The sale must be "in the ordinary course of trade," and of the "like product." The product must be "destined for consumption in the exporting country," and the price must be "comparable." (Paras. 164-165)

Then, the Appellate Body noted that Article 2.1 is "silent as to *who* the parties to relevant sales transactions should be," such that it does *not* expressly mandate that the sale be made by the *exporter*. (Emphasis added) As a result, the Appellate Body concluded, "[the identity of] the seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value." (Para. 166)

On the other hand, the Appellate Body noted that the identity of the seller is not *irrelevant* in calculating normal value, because investigating authorities must ensure that the prices are "comparable." Specifically, the Appellate Body noted that the use of downstream sales might affect the "comparability of normal value and export price." In this regard, it pointed to Article 2.4 as providing a mechanism "which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party." In particular, Article 2.4 requires that a "fair comparison" be made between export price and normal value," and it mandates that "due account be taken of 'differences which affect price comparability,' such as differences in the 'levels of trade' at which normal value and export price are calculated." Thus, the Appellate Body concluded that the use of downstream prices on which to calculate normal value may impose a duty on the investigating authorities to "ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison." (Paras. 167-168)

Turning to the facts in the hot-rolled investigation, the Appellate Body recalled that the parties agreed that the downstream sales at issue met all four conditions imposed under Article 2.1. As a result, the Appellate Body found that the U.S. reliance on downstream sales was, "in principle, 'permissible.'" **Therefore, the Appellate Body reversed the Panel's finding that the DOC's reliance on downstream sales was inconsistent with Article 2.1.** (Paras. 172-173)

Japan requested, as a conditional appeal, that the Appellate Body rule on its claim under Article 2.4 that the DOC failed to make the proper "allowances" in respect of its use of the downstream prices. The Panel had declined to address this claim given its finding of a violation of Article 2.1. (Paras. 174-175)

In response, the Appellate Body first made some general observations about Article 2.4. It noted that the provision lists some specific examples of factors that may affect comparability, but that it also requires that "allowances" be made for "any other differences which are also demonstrated to affect price comparability." Based on this language, the Appellate Body stated that "[t]here are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance.'" It also emphasized that the obligation to ensure a fair comparison "lies on the investigating authorities, and not the exporters." (Paras. 176-178) Finally, the Appellate Body stated that a conclusion under Article 2.4 depends on the facts surrounding the dumping calculation. **However, because the Panel did not make a finding on this issue, and because the parties could not agree on the relevant**

facts, the Appellate Body concluded, "there is not an adequate factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the Anti-Dumping Agreement." (Paras. 179-180)

AD Agreement Articles 3.1 and 3.4 - "Captive Production" Provision

Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended (the "captive production" provision), provides that, when performing an injury analysis, in certain circumstances, the ITC "shall focus primarily" on a particular segment of the "domestic industry" when "determining market share and the factors affecting financial performance." Specifically, the ITC is required to "focus primarily" on the so-called "merchant market," or the open market, for the like product, the segment of the market into which imports are generally sold. The merchant market should be distinguished from the "captive market," which covers internal transfers of the like product that generally do not enter the open market, because the product is used by an integrated producer to manufacture a downstream product. The Appellate Body explained, "[d]omestic producers whose production is captive do not, therefore, compete *directly* with importers, as imports are not generally used in the captive production of the downstream product." (Para. 181, emphasis added by Appellate Body)

Before the Panel, Japan challenged this provision "*as such*," arguing that it prevents a balanced assessment of the situation of the domestic industry as a whole under AD Agreement Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1. It also claimed that the *application* of the measure in the hot-rolled investigation was inconsistent with those same provisions of the AD Agreement. With respect to Japan's challenge of the statute on its face, the Panel did not find a violation of the AD Agreement, concluding that the captive production provision does not eliminate the general requirement under U.S. law that the ITC make a determination regarding material injury to the domestic industry *as a whole*. The Panel also found that the captive production provision was applied consistently with the AD Agreement in the hot-rolled investigation. Japan appealed these findings, arguing that the captive production provision distorts the ITC's analysis of the domestic industry as a whole, because only one part of the market (*i.e.*, the merchant market) is the subject of special examination. Specifically, it argued that such an examination is not "objective" within the meaning of Article 3.1. (Paras. 182-188)

The Appellate Body began with certain general observations about the injury analysis as mandated by the AD Agreement. It noted that under footnote 9 of the Agreement, the focus of an injury determination is the state of the "domestic industry," a term which is defined in Article 4.1 as the "domestic producers as a whole of the like products" or "[domestic producers] whose collective output of the products constitutes a major proportion of the total domestic production." As a result, the Appellate Body explained that the investigation and examination of injury "must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry." (Paras. 189-190)

The Appellate Body also considered the meaning of the "positive evidence" and "objective examination" standards contained in Article 3.1, which, it explained, "informs the more detailed obligations" in the other sub-provisions of Article 3. It said that the term "positive evidence" means that "the evidence must be of an affirmative, objective and verifiable character, and that it must be credible." As for "objective examination," the Appellate Body explained that this term "is concerned with the investigative process itself," relating to "the way in which the evidence is gathered, inquired into and, subsequently, evaluated." It further stated that "the word 'examination' ... indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness." In this regard, it pointed out in footnote 141 that "[t]his provision is yet another expression of the general principle of good faith in the Anti-Dumping Agreement." The Appellate Body summed up its statements as follows:

> In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.

(Paras. 191-193)

In this context, the Appellate Body noted that Article 3.4 establishes one aspect of the "objective examination," by requiring investigating authorities to consider "all relevant economic factors," including, but not limited to, those expressly listed in Article 3.4. As such, the Appellate Body said that nothing in the AD Agreement prevents a Member from requiring its investigating authorities to examine the potential relevance of a particular "other factor," including an evaluation of particular parts, sectors or segments within a domestic industry. However, in evaluating such relevant factors, the Appellate Body cautioned that investigating authorities must "respect the fundamental obligation ... to conduct an 'objective examination.'" It explained, "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured." (Paras. 194-197)

With these principles in mind, the Appellate Body examined the measure at issue. While it noted that it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it noted that it is essential "to conduct a detailed examination of that legislation in assessing its consistency with WTO law." Based on explanations given by the United States, the Appellate Body accepted that, as yet, there is no definitive interpretation of the captive production provision. Moreover, based on those explanations, it observed that the required focus under the measure is "*not per se* exclusive" and that other portions of the U.S. statute direct the ITC to examine the domestic industry "as a whole." (Paras. 200-203) The Appellate Body recalled its earlier findings that, under Article 3.1, investigating authorities must evaluate relevant factors in an "objective" manner, meaning that if they examine one part of an industry, they must examine all of the other parts that make up the industry as well. In this regard, it noted that the captive production provision does not require an exclusive focus on the merchant market, but rather it allows the ITC to examine both the merchant market and the captive market. As a result, the Appellate Body stated that, to the extent the measure is interpreted in a manner consistent with this reasoning, there is no necessary inconsistency between the captive production provision on its face and the AD Agreement. (Paras. 204-208)

For these reasons (which the Appellate Body said differ in part from those given by the Panel), the Appellate Body upheld the Panel's conclusion that the captive production provision is not, on its face, inconsistent with AD Agreement Articles 3 and 4. (Para. 209)

Next, the Appellate Body turned to the question of the application of the captive production provision in the hot-rolled investigation. The Panel found the ITC's actions to be consistent with the AD Agreement because the ITC had ultimately examined injury with respect to the industry as a whole. (Para. 210)

The Appellate Body reversed the Panel's finding. In doing so, it first recalled its interpretation of Article 3 above, that authorities cannot examine parts of the domestic industry on a selective basis. Next, it observed that the ITC report in the hot-rolled investigation contains data for only the *merchant* market or the *overall* market, but it does not refer to data for the *captive* market. In this regard, the United States

argued that the data for the captive market is "subsumed" in the data for the overall market. The Appellate Body, however, considered this fact insufficient because, without further analysis disaggregating the overall data, the data relating to the captive market remains unknown. Moreover, it stated that the overall data could not overcome the fact that the ITC report "discloses no *analysis* of the significance of the data for the captive market."

On this basis, the Appellate Body reversed the Panel's finding that the United States did not act inconsistently with the AD Agreement in its application of the captive production provision in the hot-rolled investigation. Instead, the Appellate Body held that the United States acted inconsistently with Articles 3.1 and 3.4. (Para. 215)

AD Agreement Article 3.5 - Causation and Non-Attribution

Before the Panel, Japan challenged two aspects of the ITC's causation analysis. First, it argued that the ITC did not adequately examine "other factors," other than dumped imports, which were also causing injury to the domestic industry. Second, it argued that the ITC failed to ensure that injury caused by those other factors was not attributed to the dumped imports. Japan focused on four other factors: increase in production capacity of mini-mills, the effects of a strike at General Motors in 1998, declining demand for hot-rolled steel from the U.S. pipe and tube industry, and the effects of prices of non-dumped imports. As for Japan's first argument, the Panel concluded that the ITC did not fail to adequately examine these four factors. As for the second argument, the Panel interpreted the non-attribution standard in Article 3.5 to mean that investigating authorities must ensure that the other factors "do not break the causal link" that appeared to exist between dumped imports and material injury to the domestic industry. It subsequently upheld the ITC's causation analysis in this regard. (Paras. 216-219)

Japan appealed the Panel's interpretation of the non-attribution language in Article 3.5. Citing to the Appellate Body reports in *U.S. - Wheat Gluten Safeguards* and *U.S. - Lamb Safeguards*, Japan argued that the non-attribution requirement means that the effects of the "other" causal factors must be "separated" and "distinguished," and that their "bearing" on the domestic industry must be assessed. (Para. 220)

The Appellate Body began its analysis by examining the text of Article 3.5, which provides:

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

(Para. 221, emphasis added by Appellate Body) The Appellate Body observed that the non-attribution language applies "solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*." (Emphasis added by Appellate Body) Moreover, it explained, to ensure non-attribution, investigating authorities must "appropriately assess the injurious effects of those other factors," a step which involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports." In this regard, the Appellate Body noted that the AD Agreement does not prescribe the *process* by which Members choose to engage in separating and distinguishing the relevant effects. (Paras. 223-224)

The Appellate Body then turned to the Panel's analysis of this standard. It noted that the Panel relied on the GATT panel report in *U.S. - Atlantic Salmon*, where the panel found that the non-attribution language *did not* mean that the investigating authority should have "identified the extent of injury caused by [the] other factors" in order to isolate the injury caused by the other factors from that of the dumped imports. The Appellate Body stated that it is "clear" that the *Atlantic Salmon* approach is "at odds" with the interpretive approach it has set forth for Article 3.5. By following the *Atlantic Salmon* approach, the Panel had in effect taken the view that the ITC was *not* required to separate and distinguish the injurious effects of the other factors. The Appellate Body noted that such a view directly contradicts the language in Article 3.5. The Appellate Body recognized the U.S. concern that the process of separating and distinguishing the effects may not be easy, but it emphasized that such an analysis is necessary to ascertain whether "the injury ascribed to dumped imports was, in reality, caused by other factors." (Paras. 225-228) Citing its reports in *U.S. - Wheat Gluten Safeguards* and *U.S. - Lamb Safeguards*, the Appellate Body found support for this interpretation of Article 3.5 based on its similar findings with respect to the non-attribution language contained in the causation standard of Article 4.2(b) of the Safeguards Agreement. (Paras. 229-232)

On this basis, the Appellate Body concluded that the Panel erred in its interpretation of the non-attribution language of Article 3.5. As a result, the Appellate Body also reversed the Panel's findings that the ITC properly ensured that the injurious effects of the other factors had not been attributed by the ITC to the dumped imports. (Paras. 233-234)

Having reversed the Panel's finding, the Appellate Body considered whether it was appropriate for it to complete the analysis for Japan's claim based on a proper interpretation. It noted that it could only do so if there was a sufficient basis of factual findings by the Panel, or undisputed facts in the panel record, upon which to complete the analysis. **Here, the Appellate Body considered that the factual record pertaining to the four "other factors" identified by Japan was insufficient, such that it had no basis upon which to complete the analysis of Japan's claim.** (Paras. 235-236)

COMMENTARY

Standard of Review

The Appellate Body's statements in this case help clarify the application of the special standard of review contained in Article 17.6. With respect to the factual standard of review in Article 17.6(i), the Appellate Body made clear that this provision complements, and does not conflict with, DSU Article 11, such that the standards should be interpreted in a similar manner -- as requiring an "objective assessment" of the facts. The Appellate Body appeared to be saying that the Anti-Dumping Agreement simply provides *additional* standards that must also be met by panels when examining measures taken by anti-dumping authorities, such as whether the establishment of the facts was "proper" and whether the investigating authorities' evaluation of the facts was unbiased and objective.

With respect to the standard of review for legal interpretations, the Appellate Body again stated that DSU Article 11 informs this provision, such that panels are required to make an "objective assessment" of the legal provisions at issue. In addition, the Appellate Body made clear the *process* by which panels are to examine a Member's legal interpretation of the AD Agreement. It emphasized that panels are *first* to interpret the relevant AD Agreement provision under the customary rules of treaty interpretation. Only *after* a panel has rendered its own interpretation should it determine whether the interpretation relied upon by the Member in question was "permissible" under Article 17.6(ii).

These standards can be compared with those established under the Safeguards Agreement. *See DSC for U.S. - Lamb (AB).*

For further reading, see:

Philip A. Akakwam, "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations," 5 Minnesota Journal of Global Trade 2 (1996).

Peggy Clarke and Gary Horlick, *Standards for Panels Reviewing Antidumping Determinations under the GATT and WTO*, in *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed.), at 313 (1997).

AD Agreement Article 3 - Market Sector Analysis ("Captive Production")

Prior to this case, it had been fairly well established in panel reports that some kind of market sector analysis is permitted under AD Agreement Article 3. In fact, one might argue that in certain cases a sectoral analysis might be *required* as a "relevant factor" under Article 3.4. The *Mexico - HFCS* case made clear, however, that investigating authorities should not base an injury determination on data pertaining to *only one sector* of a domestic industry. Rather, pursuant to Articles 3 and 4, injury determinations must always be made on the basis of the domestic industry "as a whole." There, Mexico completely ignored the situation of the sector of the domestic industry that sold sugar to the household sector in its injury analysis, and, therefore, the panel found a violation. *See DSC for Mexico - HFCS (Panel).*

The *Hot-Rolled* case added a different twist to the issue. Here, in the context of the underlying investigation, the ITC, under the U.S. captive production provision, examined data concerning the *merchant market sector* for hot-rolled steel *and* data regarding the domestic industry "*as a whole*," but it did not examine separately the *captive production sector*. The Appellate Body found that this application of the captive production provision violated Article 3. Specifically, because the ITC examined data for the *merchant market sector* in isolation, it also should have examined data for the *captive production sector*.

The issue of captive production was also considered by the panel and Appellate Body in *U.S. - Cotton Yarn*. There, the Appellate Body upheld the Panel's conclusion that the United States violated Article 6.2 of the Agreement on Textiles and Clothing by excluding captively produced combed cotton yarn from the scope of the domestic industry in a safeguard investigation. *See DSC for U.S. - Cotton Yarn (AB).*

AD Agreement Article 3.5 - Causation and Non-Attribution

The Appellate Body made clear that its interpretation, as set forth in *U.S. - Wheat Gluten Safeguards* and *U.S. - Lamb Safeguards*, of the non-attribution standard contained in Article 4.2(b) of the Safeguards Agreement applies equally to the non-attribution language contained in AD Agreement Article 3.5. In particular, investigating authorities are required to "separate" and "distinguish" the injurious effects of "other" causal factors from the effects of the dumped imports. In reaching this conclusion, the Appellate Body specifically rejected the contrary approach taken by the GATT panel in *U.S. - Atlantic Salmon*.

In *U.S. - Line Pipe Safeguards*, the Appellate Body expressed the view that interpretations of AD Agreement Article 3.5 provide guidance for an interpretation of the similar causation/non-attribution

standard contained in Safeguards Agreement Article 4.2(b). Furthermore, in *Line Pipe*, the Appellate Body elaborated on the type of explanation that is required of competent authorities to demonstrate that they followed the non-attribution requirement in the safeguards context. *See DSC for U.S. - Line Pipe Safeguards (AB)*.

The Principle of Good Faith / Fundamental Fairness

The Appellate Body invoked the principle of "good faith" twice in its examination of this case (when interpreting Annex II(2) in paragraph 101 and when interpreting "objective examination" in Article 3 in paragraph 193). This principle is becoming increasingly important in the interpretation of Members' substantive obligations under various WTO agreements. Indeed, citing to its reliance on this principle in *U.S. - Shrimp* and *U.S. - FSC*, the Appellate Body confirmed that "good faith" is "a general principle of law and a principle of general international law, that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements." Here, the Appellate Body appeared to focus on terms such as "reasonable" and "objective" in the AD Agreement as expressions of this principle. Because these terms are commonly used throughout the various WTO agreements, there can be no doubt that this principle will continue to play an important role in defining the scope of Members' WTO obligations.

It is interesting to note that, as its "source" in international law for this principle, the Appellate Body appeared to rely solely on the fact that the concept of "good faith" is a principle of general international law. Thus, it chose not to rely on the Vienna Convention on the Law of Treaties ("VCLT") as an additional source for this principle. In particular, VCLT Article 26, titled "Pacta Sunt Servanda," requires that parties to a treaty implement their obligations in good faith. Several panels have in fact referred to VCLT Article 26 and the concept of "pacta sunt servanda." *See Korea - Government Procurement* (para. 7.93), *U.S. - Shrimp* (para. 7.41) and *India - Patents (EC)* (para. 7.69).

We also note that the Appellate Body appeared to rely on principles of fundamental fairness as they apply to the AD Agreement, outside the specific context of the principle of "good faith." Specifically, in rejecting the United States' 99.5 percent test, the Appellate Body recognized that Article 2.1 affords Members "discretion" in determining the proper methodology to determine when sales are "in the ordinary course." However, the Appellate Body cautioned that such discretion "is not without limits," and it stated that such discretion "must be exercised in an *even-handed* way that is *fair to all parties* affected by an anti-dumping investigation." The fact that the Appellate Body did not rely on specific language in Article 2.1 as support for these statements suggests that this principle applies throughout the AD Agreement (and perhaps other agreements as well). This finding, therefore, indicates that the exercise of discretion by investigating authorities under the AD Agreement must generally be carried out fairly as between the interested parties to an investigation.

For further reading, see:

Thomas Cottier and Krista N. Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in *New Directions in International Economic Law* (M. Bronckers and R. Quick, eds.) (Kluwer Law International) (2000).

Last Update: April 3, 2005

Exhibit 28

Panel Reports

United States - Definitive Safeguard Measures on Imports of Certain Steel Products

(WT/DS248,249,251,252,253,254,258,259/R)

Parties

Complainants: Brazil, China, EC, Japan, Korea, New Zealand, Norway, Switzerland

Respondent: U.S.

Third Parties: Canada, Chinese Taipei, Cuba, Mexico, Thailand, Turkey, Venezuela

Timeline of Dispute

Panel Requests - EC: May 7, 2002
Japan, Korea: May 21, 2002
China: May 27, 2002
Switzerland, Norway: June 3, 2002
New Zealand: June 27, 2002
Brazil: July 18, 2002
Panels Established - EC: June 3, 2002
Japan; Korea: June 14, 2002
China; Switzerland; Norway: June 24, 2002
New Zealand: July 8, 2002
Brazil: July 29, 2002
Panel Composed: July 25, 2002
Interim Reports Issued: March 26, 2003
Final Reports Issued: May 2, 2003
Final Reports Circulated: July 11, 2003
Notice of Appeal: August 11, 2003
AB Report Circulated: November 10, 2003
Adoption: December 10, 2003

Panelists

Mr. Stefán Jóhannesson (Chairperson), Mr. Mohan Kumar, Ms. Margaret Liang

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Key Findings

- On the issues of increased imports, causation and "parallelism," the Panel made the following findings for the specific measures under consideration [the Appellate Body's treatment of the findings is indicated where the issue was appealed]:

Measure	*Increased Imports*	*Causation*	*Parallelism*
CCFRS	Violation **[Upheld]**	Violation **[No Finding]**	Violation **[Upheld]**
Tin mill products	Violation **[Reversed]**	Violation **[Reversed]**	Violation **[Upheld]**
Hot-rolled bar	Violation **[Upheld]**	Violation **[No Finding]**	Violation **[Upheld]**
Cold-finished bar	No Violation	Violation **[No Finding]**	Violation **[Upheld]**
Rebar	No Violation	Violation **[No Finding]**	Violation **[Upheld]**
Welded pipe	No Violation	Violation **[No Finding]**	Violation **[Upheld]**
FFTJ	No Violation	Violation **[No Finding]**	Violation **[Upheld]**
Stainless steel bar	No Violation	Violation **[No Finding]**	Violation **[Upheld]**
Stainless steel wire	Violation **[Reversed]**	Violation **[Reversed]**	Violation **[Upheld]**
Stainless steel rod	Violation **[Upheld]**	No Violation	Violation **[Upheld]**

Key Findings Continued on Next Page.

Key Findings Continued

- Concluded that the explanation by the U.S. ITC as to how "unforeseen developments" resulted in increased imports causing serious injury was not "reasoned and adequate"; therefore, all safeguard measures at issue are inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Article 3.1. **[Upheld by Appellate Body; challenges under DSU Articles 11 and 12.7 rejected.]**
- Said that the ITC "should have offered a more comprehensive and coherent explanation as to how the unforeseen developments *resulted in* increased imports into the United States, their origin and their extent." In particular, stated that the ITC's rationale called for "a more elaborate demonstration and supporting data," namely the amount of foreign steel that was displaced by the unforeseen developments in total and, more specifically, into the United States.
- In the context of increased imports, for the measures concerning tin mill products and stainless steel wire, in light of the fact that the three Commissioners voting in the affirmative had based their determinations on data concerning differently defined product groupings, the Panel found that the ITC Report failed to provide an "reasoned and adequate explanation," in violation of Safeguards Agreement Articles 2.1 and 3.1. In particular, the Panel said that "a Member is not permitted under those provisions to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other." **[Reversed by Appellate Body.]** For similar reasons, the Panel also found violations of the causation requirement for these products. **[Reversed by Appellate Body.]**
- In the context of "parallelism," in response to an argument that any excluded imports should be considered an "other factor" in the sense of Article 4.2(b), the Panel emphasized that a competent authority must "account for the fact that excluded imports may have some injurious impact on the domestic industry." **[Upheld by Appellate Body.]**
- In the context of causation, the Panel said that, assuming the non-attribution requirement is fulfilled, when "clear coincidence" of trends exists, no further analysis is required of the competent authority. Where the coincidence analysis does not fully demonstrate the existence of a causal link, however, the Panel will examine both the coincidence analysis and any other analysis undertaken by the competent authority (*e.g.*, conditions of competition). In addition, where coincidence does not exist or the authority does not undertake a coincidence analysis, the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide a "compelling explanation" as to why a causal link exists notwithstanding the absence of coincidence.
- In the context of causation, the Panel said that while the Safeguards Agreement does not require "quantification" (*e.g.*, the use of econometric models), the Agreement and the relevant jurisprudence "anticipate that quantification may occur."
- In response to a U.S. request for separate panel reports for each complainant, pursuant to DSU Article 9.2, the Panel explained that its report is "deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute."

BACKGROUND

This dispute involves safeguard measures imposed by the United States on a wide range of steel products. On June 22, 2001, the United States Trade Representative's Office ("USTR") requested that the U.S. International Trade Commission ("ITC") initiate a safeguard investigation on certain steel products. Four broad groups of products were covered by the request: certain carbon and alloy flat products; certain carbon and alloy long products; certain carbon and alloy pipe and tubes; and stainless steel and alloy tool steel products. (A number of products from within these groups were excluded.) The ITC initiated an investigation on June 28, 2001.

To collect data, the ITC split the four broad product categories into 33 "product classes," made up of the following: seven classes of carbon and alloy flat products; ten carbon and alloy long products; five carbon and alloy pipe and tube products; and 11 stainless steel and alloy tool steel products. From these 33 "product sub-categories" for which data had been collected, the ITC defined 27 separate "domestic industries," made up of: three domestic industries producing carbon and alloy flat products; ten domestic industries producing carbon and alloy long products; four domestic industries producing carbon and alloy pipe and tube; and ten domestic industries producing stainless steel products.

On October 22, 2001, the ITC voted on injury and made negative determinations for 15 product groups; affirmative injury determinations for eight product groups; and "divided" determinations for four product groups.

On December 19, 2001, after public comments had been received and hearings held, the ITC made its remedy recommendations, together with its injury determinations, in a report to the U.S. President (the "ITC report"). For the eight products for which affirmative injury determinations had been made, the ITC recommended a four-year program of tariffs and tariff-rate quotas. With respect to Canadian and Mexican imports, this remedy was to be applied only to certain products but not others. In addition, no remedy was to apply to products from Israel, Jordan, or the beneficiaries of the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act. Certain sub-product groups from with these eight products were also excluded.

On January 3, 2002, USTR requested "additional information" from the ITC on: (i) unforeseen developments; (ii) economic analysis of remedy options; and (iii) "injury for imports from all sources other than Canada and Mexico for the products for which the []ITC recommended the application of the remedy to Canada and/or Mexico." The ITC produced supplementary information on these issues on January 9, 2002 and February 4, 2002 (information on the first and third points was contained in the latter document, which the Panel referred to as the ITC's Second Supplementary Report.)

Under Proclamation No. 7529 of March 5, 2002, titled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products," the U.S. President imposed definitive safeguard measures on imports of certain steel products. The products subject to these measures were the eight for which the ITC reached affirmative determinations, as well as two of the four products for which the ITC reached "divided" determinations. The Proclamation lists 11 distinct safeguard measures applicable to 15 steel products, effective as of March 20, 2002. (The U.S. Customs Service published a notice indicating that the deposit of estimated duties on imports would be deferred until April 19, 2002.)

On the basis of the ITC's Second Supplementary Report, the President decided to exclude imports from Canada, Mexico, Israel and Jordan from the application of all of the safeguard measures. Imports from developing country Members of the WTO whose share of total imports "allegedly [did] not exceed"

3% individually and 9% collectively were also exempted. Finally, the Proclamation provided for additional product exclusions, and various other products were subsequently excluded by USTR as well.

(Paras. 1.1-47, 10.5-7)

The complainants made a number of claims that these safeguard measures violated WTO rules, under both the Safeguards Agreement and GATT Article XIX. In this regard, they referred, *inter alia*, to the issues of: unforeseen developments, causation, increased imports and parallelism (a number of claims on other issues under the safeguards provisions -- such as serious injury, application of the measure and the developing country provisions -- were not considered due to judicial economy). The measures considered were those related to the following ten products: certain carbon flat-rolled steel (CCFRS); tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; fittings, flanges and tool joints (FFTJ); stainless steel bar; stainless steel wire; and stainless steel rod. (In addition, claims were made under GATT Articles I, X:3(a), XIII, certain provisions of XIX, and XXIV, but these claims were not examined due to judicial economy.)

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

DSU Article 9.2 - Separate Panel Reports

The DSB originally established multiple panels to examine the similar matters raised by the various complainants. Pursuant to agreements with the complainants in June and July 2002, the United States accepted the establishment of a single panel, under DSU Article 9.1, to hear the matter. Later in the proceedings, on January 28, 2003, the United States requested that the Panel issue "eight separate panel reports rather than one single report." This request was made "in light of the fact that during the previous DSB meeting [in the context of the *U.S. - Offset Act ("Byrd Amendment")* case] ... some complainants expressed the view that 'in the case of multiple complaints for which a single panel report was issued, individual parties could not seek adoption of the report only in respect of the panel requested by an individual complainant.'" The stated basis for the U.S. request was to protect the United States' rights under the DSU, "including the right to seek a solution with one or more of the complainants without adoption of a report or without an appeal ... ." The complainants opposed the request for a number of reasons, including: "the request had not been made in a timely fashion, ... complying with the request would result in additional delays and ... had the complainants known that multiple reports would be issued, they would have presented their arguments differently." (Paras. 2.18, 10.716-718)

In addressing the issue, the Panel began by setting forth the text of DSU Article 9.2, which provides in relevant part:

> The ... panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned.

The Panel then noted the conclusion of the Appellate Body in paragraph 311 of *U.S. - Offset Act ("Byrd Amendment")* that the right contained in Article 9.2 is "not unqualified," in that it cannot justify a request for a separate panel report "at any time during the panel proceedings." Here, the Panel said, the U.S. request for separate panel reports "was *not necessarily* made in an *untimely* fashion." The Panel found

that the request "did not come too late in order to adopt the approach that we have chosen in the issuance of this report" and "did not necessarily prevent the Panel from settling the dispute in a prompt fashion." Furthermore, the Panel recalled that the United States "did express a reason for its request for separate Panel Reports," that is, to protect its right "to seek a solution to one or more of the individual complaints," and "claimed that it might otherwise suffer prejudice." (Paras. 10.721-723)

Referring to the Appellate Body's statement in paragraph 315 of *U.S. - Offset Act ("Byrd Amendment")* regarding the "margin of discretion" a panel has under DSU Article 9.2, and "taking into account the particularities of this dispute," the Panel decided "to issue its Reports in the form of one document constituting eight Panel Reports," with "a common cover page and a common Descriptive Part." It then noted: "For WTO purposes, this document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute." This document, it said, contains "a common set of Findings" in relation to the claims that the Panel addressed, and also contains Conclusions and Recommendations "that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant." (Paras. 10.724-725)

The Panel stated that this approach "seeks to protect the rights of both sides to the dispute." In particular, it said, "the approach protects the rights of the complainants who, in the present dispute, with the apparent agreement of the United States, referred to and relied upon each other's arguments and demonstrations, cross-referenced each other's written submissions and written answers, and explicitly stated as much"; and it "also protects, the right of the United States, by allowing it to respond to all arguments and allegations made with regard to each measure in a more coherent and comprehensive manner and to seek a solution with one or more of the individual complaints without adoption of that complainant's report or without an appeal, should this right at all depend on the existence of separate reports." Accordingly, the Panel concluded that this approach "respects the principles of judicial economy and the rights of all parties." (Paras. 10.726-728)

Time Perlod for Data on which ITC Was to Rely

In the context of the issue of "increased imports" under Safeguards Agreement Article 2.1, the complainants argued that the ITC ignored import trends in the "most recent past," pointing in particular to the last six months that *followed* the end of the period of investigation (*i.e.*, the last half of 2001). In this regard, the complainants argued that import data for the full-year of 2001 were available when the ITC "updated its Report" and "completed its determination" in February 2002. (Para. 10.172)

The Panel rejected the complainants' argument. At the outset, the Panel said that it agreed with the United States "that a competent authority cannot be requested to take into account data and evidence that is not available at the time it made its determination." Here, according to the Panel, the ITC made its determination on increased imports in October 2001, at a time when full-year 2001 data could not possibly have been available. As for the President's proclamation in 2002, the Panel explained that this action was not a "determination" within tbe meaning of Article 2, "because the President made no determination that increased imports were causing serious injury to tbe relevant domestic producers." On this basis, the Panel said that it would evaluate the ITC's findings on increased imports on the basis of data through June 2001 (and it would not take into account data from the second half of 2001). (Paras. 10.173-174)

Judicial Economy

Relying on the principle of judicial economy, the Panel decided not to rule on a number of claims and sub-claims. In this regard, the Panel referred to the Appellate Body report in *U.S. - Shirts and Blouses* as support for the proposition that panels are not "required" to address all claims. At the same

time, though, the Panel noted the Appellate Body's statement in *Australia - Salmon* that judicial economy may not be exercised where only a "partial resolution" of a dispute will result. (Paras. 10.700-703) Applying these principles here, the Panel noted its conclusion that each safeguard measure at issue is inconsistent with various provisions of the Safeguards Agreement and the GATT. Therefore, it said that it need not examine these measures under the other cited provisions, noting that it had "effectively resolved the dispute" since the measures were "deprived of a legal basis." (Paras. 10.704-711) The Panel considered that this approach should apply even in the case of claims under Safeguards Agreement Article 9.1, which requires special and differential treatment for developing country Members in the application of safeguard measures. Given that there was no legal basis to impose any safeguard measures, it said, there was also no basis to apply such measures to China. Therefore, making recommendations and rulings on claims relating to Article 9.1 would not have had "any different practical effects on the WTO-compatibility of these safeguard measures." (Paras. 10.712-714)

SUBSTANTIVE ISSUES

GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 - Unforeseen Developments

China, the European Communities, New Zealand, Norway and Switzerland claimed that the ITC Report was issued without the requisite examination of the issue of unforeseen developments, and/or that it did not provide an adequate and reasoned explanation of those developments and the manner in which they resulted in increased imports. In this regard, New Zealand also argued that the competent authority failed to demonstrate the existence of unforeseen developments as a matter of fact. In addition, China, the European Communities, New Zealand, Norway and Switzerland claimed that no opportunity was provided by the ITC to interested parties to present evidence and views on the issue of unforeseen developments. For all of these reasons, these complainants asserted that the United States failed to comply with GATT Article XIX:1(a) and the Safeguards Agreement Article 3.1. (Para. 10.32)

The Panel began its analysis by citing the relevant provisions. GATT Article XIX:1(a) states in relevant part:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free ... to suspend the obligation in whole or in part or to withdraw or modify the concession.

In turn, Safeguards Agreement Article 3.1 provides, in relevant part: "This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." (Paras. 10.34-35)

Recalling the Appellate Body reports in previous cases under the Safeguards Agreement, the Panel explained, "[i]t is now clear that the circumstances of unforeseen developments ... must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied."

(Para. 10.37) In determining whether the United States met the "unforeseen developments" requirement, the Panel, again citing previous Appellate Body reports, said that its standard of review would require it to examine whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made." (Paras. 10.38-39) (On appeal, the Appellate Body upheld the Panel's findings regarding the standard of review. *See DSC for U.S. - Steel Safeguards (AB).*)

Legal Sub-Issues

Before directly addressing whether the ITC provided a reasoned and adequate explanation related to "unforeseen developments," the Panel examined various legal sub-issues raised by the parties: 1) what can constitute an unforeseen development? 2) when, where and how to demonstrate unforeseen developments; and 3) the obligation to consult interested parties.

As to the question of what can constitute an unforeseen development, citing the Appellate Body reports in *Argentina - Footwear Safeguards* (at para. 91) and *Korea - Dairy Safeguards* (at para. 84), the Panel explained that an "unforeseen development ... is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers." The parties agreed that the legal standard defining what constitutes an unforeseen development is "at least in part, subjective." That is, the standard is based on what the Member *itself* had not foreseen or expected when it incurred its obligation under the GATT. On the other hand, though, the Panel also recognized that the legal standard for unforeseen developments "may also be said to have an objective element." In this regard, it explained, "[t]he appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind." (Paras. 10.41-43) In addition, since the unforeseen developments prerequisite must be satisfied for each safeguard measure, the Panel added, "the factual demonstration of unforeseen developments must also relate to the specific product(s) covered by the specific measure(s) at issue." (Para. 10.44) (On appeal, the Appellate Body upheld the Panel's findings that "unforeseen developments" must be demonstrated for each of the measures. *See DSC for U.S. - Steel Safeguards (AB).*)

Next, the Panel addressed the issue of the demonstration of "unforeseen developments" as a "matter of fact," that is, "when, where and how" the issue must be demonstrated. At the outset, the Panel noted the finding in paragraph 72 of the Appellate Body report in *U.S. - Lamb Safeguards* that the demonstration of unforeseen developments must be found in the competent authority's report. (Para. 10.48) Here, the complainants challenged the fact that the ITC only discussed the issue of unforeseen developments in a *supplementary* report. As an initial matter, the Panel agreed with the United States that nothing in the requirement to publish a report dictates the *form* that the report must take, such that it is left to the discretion of the Members to determine its format, including whether the report is published in parts. **In particular, the Panel found it acceptable to issue a report in different parts, as long as it "provide[s] for a coherent and integrated explanation proving satisfaction with the requirements of [GATT Article XIX and the Safeguards Agreement].**" (Paras. 10.48-50, 10.57)

Also related to the issue of "when, where and how" the issue must be demonstrated, the complainants argued that the timing of the ITC's demonstration of unforeseen developments did not meet the requirements of GATT Article XIX and the Safeguards Agreement. (Para. 10.51) At the outset, citing paragraph 72 of the Appellate Body report in *U.S. - Lamb Safeguards*, the Panel noted that the demonstration of unforeseen developments is a "prerequisite for the application of a safeguard measure," such that it must be made *before* the safeguard measure is applied. In turn, since Safeguards Agreement Article 3.1 requires that all findings and conclusions be included in the published report of the competent authority, the Panel said that it follows that the demonstration of unforeseen developments must appear in

the report of the competent authority which is "completed and published prior to the application of the safeguard measures." (Paras. 10.52-53) Turning to the steel investigation, the Panel noted that it was the ITC's Second Supplementary Report of February 4, 2002 that dealt most specifically with the issue of unforeseen developments. The U.S. safeguard measures then came into effect on March 20, 2002, pursuant to a proclamation by the President issued on March 5. **As a result, the Panel found no violation, stating, "the demonstration of unforeseen developments was not necessarily made in an untimely fashion, since this later report was published before the measure was applied."** (The Panel assumed *arguendo* that the Second Supplementary Report formed part of the competent authority's report.) (Paras. 10.54, 10.58)

Finally, China, the European Communities, New Zealand and Norway argued that, contrary to Safeguards Agreement Article 3.1, the interested parties were not given an opportunity to comment on the issue of unforeseen developments, because the issue was discussed only in the Second Supplementary Report, which was issued after the conclusion of the investigation. (Para. 10.60) Citing paragraph 54 of the Appellate Body report in U.S. - Wheat Gluten Safeguards, the Panel recognized that the opportunity for interested parties to present evidence and their views is a necessary part of the investigation, and "it must be reflected in the published report." The Panel then emphasized that an ITC questionnaire given to importers, producers and purchasers requested them to identify "developments" during the last ten years that resulted in increased imports. The Panel found that, by inviting responses to this question and addressing the issue during its public hearings, the United States complied with the obligation to provide means for interested parties to present evidence and their views. In this regard, the Panel rejected the EC argument that there should have been provisional reasoning on this issue on which the parties could comment, explaining that Article 3.1 does not require the competent authorities to issue "draft findings" in order to allow interested parties to comment prior to the publication of the authority's report. (Paras. 10.61-65) **On this basis, the Panel rejected the claims that the United States violated Article 3.1 "in refusing to provide to interested parties an opportunity to present evidence and share their views on unforeseen developments."** (Para. 10.66)

Reasoned and Adequate Explanation

The Panel then considered whether the ITC offered a reasoned and adequate explanation as to "why and how" the unforeseen developments resulted in increased imports causing serious injury. In this regard, the Panel examined, first, whether there was "some discussion by the competent authority as to how the developments were unforeseen at the appropriate time," and, second, "why conditions in the second clause of Article XIX:1(a) occurred as a result of circumstances in the first clause." (Para. 10.67)

As for the "discussion" of unforeseen developments, the Panel noted that the United States pointed to certain factors cited by the ITC -- the Russian crisis, the Asian crisis and the continued strength of the U.S. market together with the persistent appreciation of the U.S. dollar. Moreover, the United States argued that the "confluence, or simultaneous occurrence, of these three events amounted to an unforeseen development." (Para. 10.72) The Panel also noted the parties' agreement that the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. (Para. 10.74)

The Panel then examined the ITC reports for its discussion of these alleged developments. It first noted the identification of the Asian crisis in the ITC's initial report. While the statement in this report did not explain why the development was unforeseen, given that the crisis began in 1997 (after the end of the Uruguay Round in 1994), the Panel assumed that it could not have been foreseen by U.S. negotiators in 1994. Moreover, statements in the ITC's Second Supplementary Report also identified the crisis and explained that the development was not foreseen. Therefore, the Panel concluded that the United States demonstrated that the Asian crisis and its effects on the world steel market "could constitute" an

"unforeseen development." (Paras. 10.78-80) As for the Russian crisis, the Panel noted statements in the initial ITC Report and the Second Supplementary Report identifying "unanticipated financial difficulties" resulting from the crisis. In this regard, the Panel made clear that "there may be instances when an event which is already known will develop into a situation initially unforeseen." Here, the Panel said that it would accept *arguendo* "that there may have been, between 1996 and 1999, unforeseen financial disruptions and currency fluctuations linked to the USSR dissolution that were thus unforeseen at the conclusion of the Uruguay Round." (Paras. 10.81-85) In respect of the strength of the U.S. economy and the appreciation of the U.S. dollar, the Panel noted that the explanation by the ITC indicated that the robustness of the U.S. economy was not an "unforeseen development" in and of itself, but rather it viewed the strength of the U.S. economy and the appreciation of the dollar in the context of turmoil in other markets as *together* constituting unforeseen developments. (Paras. 10.88-93) As a result, the Panel said that it would not consider these two factors as distinct developments, but would consider them as part of a "confluence of developments that together caused turmoil in these markets." (Para. 10.95)

Turning to a consideration of the "confluence of developments," the Panel found that GATT Article XIX "does not preclude consideration of the confluence of a number of developments as 'unforeseen developments.'" Moreover, it stated that just because changes in steel markets were more pronounced in 1991 after the dissolution of the former Soviet Union, this fact does not mean that a subsequent financial crisis also resulting somehow from the dissolution cannot, with other developments, be considered part of a "confluence of unforeseen developments" in 1997. (Paras. 10.99-100)

Turning to the main issue -- whether serious injury occurred "as a result of unforeseen developments and tariff concessions" -- the Panel recalled that the first clause of GATT Article XIX states, "[i]f, as a result of unforeseen developments and ... tariff concessions ... ," and that the Appellate Body, in paragraph 92 of *Argentina - Footwear Safeguards* and paragraph 85 of *Korea - Dairy Safeguards*, interpreted this phrase as requiring a "logical connection" between the elements of that first clause and the conditions set forth in the second clause -- "increased imports causing serious injury." (Paras. 10.103-104). The Panel later explained, "[i]n some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports ... ." It added that it is the "nature," including the complexity, of the facts that will dictate the extent to which this relationship needs to be explained. Moreover, it said that the "timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate." (Para. 10.115) (On appeal, the Appellate Body upheld this statement by the Panel. *See DSC for U.S. - Steel Safeguards (AB).*)

The Panel then set forth excerpts from the initial ITC Report and the Second Supplementary Report (*see* paras. 10.105-111) that contained references to the Russian crisis, the Asian crisis and exchange rates, and it considered whether the ITC's explanation of the relationship between these developments and increased imports was reasoned and adequate. First, as to the ITC's initial report, the Panel found references to the Asian and Russian crises to be "ad hoc" and noted that they failed to address the issue of "unforeseen developments" *per se*. Moreover, the Panel stated that there "is no adequate discussion of the linkage between unforeseen developments and increased imports causing serious injury in relation to each of the specific safeguard measures at issue[] in this dispute." (Paras. 10.116-118)

As for the ITC's Second Supplementary Report, the Panel observed that this report was created as a response to USTR's request that the ITC identify any unforeseen developments, thus perhaps acknowledging that this was, in fact, the first time that the ITC formally identified "unforeseen developments." Moreover, the Panel observed the ITC's statement that an assessment of "unforeseen developments" is in many respects "outside the purview" of the ITC, as it relates to the expectations of negotiators of the relevant tariff concessions, which is within the responsibility of the USTR and relevant

Executive Branch agencies. (Paras. 10.119-120) While the Second Supplementary Report identified the overall effects of the identified unforeseen developments on "other markets," in the Panel's view, the Report "falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers." That is, according to the Panel, even if large volumes of foreign steel production were displaced from foreign consumption, "this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments." In other words, the Panel considered that the ITC's explanation failed to link these steel market displacements to the specific increased imports into the United States. Moreover, in the few instances in which the ITC did state that imports had increased, the Panel found there to be a lack of supporting evidence. While the Panel considered the ITC's scenario to be a "plausible explanation," it concluded that the ITC "did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute." It added, "in light of the complexity of the matter, a more sophisticated and detailed economic analysis was called for," pointing out that the ITC's explanation relates to steel production in general rather than describing "how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue." In particular, the Panel noted that the ITC made no attempt to differentiate between the impact that the alleged unforeseen developments had on different product sectors, and this was true in spite of the fact that it had received different information for different products in the questionnaire responses. (Paras. 10.121-134)

On this basis, the Panel concluded, "in light of the complexities deriving from the confluence of unforeseen developments that the ITC referred to, coupled with the complexity of the case at hand, "the explanation provided by the ITC how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the specific steel products that are the subject of the safeguard measures at issue." (Para. 10.135) (On appeal, the Appellate Body upheld the Panel's findings. *See DSC for U.S. - Steel Safeguards (AB).*)

Finally, the Panel turned to the issue of the "logical connection between a Member's tariff concessions and increased imports causing serious injury." In this regard, GATT Article XIX provides, *inter alia*, that the increased imports causing injury must occur "*as the result of* unforeseen developments *and the effect of* the obligations incurred by a contracting party under this Agreement, including *tariff concessions*." The complainants argued that a Member cannot invoke a safeguard measure in order to protect its industry from increased imports coming from a non-WTO Member, that is, from a country with which the Member has no relevant WTO obligations or tariff concessions. (Paras. 10.138, 10.141) The Panel agreed with the parties that "safeguard measures are to be used against imports of products for which WTO tariff concessions have been granted." However, examining the ITC reports in the steel investigation, the Panel found it unclear whether the ITC had concluded that the confluence of unforeseen developments led to increased imports from the former Soviet Republics *per se* (*i.e.*, non-WTO Members), or whether the developments together "led generally to world displacement of steel markets that resulted in increased imports of steel into the United States from various and numerous foreign sources" (including WTO Members). While the Panel recognized that the geographical location of the unforeseen developments (*i.e.*, the Russian and Asian crises) could differ from the origin of the increased imports, it said that such a "hypothesis calls for a reasoned and adequate explanation of such correlation of events and effects." (Paras. 10.142-143) Here, it found the ITC's explanation in this regard to be "not sufficiently supported and explained." The Panel therefore found it unnecessary to examine the complainants' argument that increased imports from Russia are not relevant on the grounds that the United States has no WTO tariff concessions with Russia. (Para. 10.144)

Conclusion

In sum, the Panel said that the ITC "should have offered a more comprehensive and coherent explanation as to how the unforeseen developments *resulted in* increased imports into the United States, their origin and their extent." In particular, the Panel said that the ITC's rationale called for "a more elaborate demonstration and supporting data," namely the amount and source of foreign steel that was displaced by the unforeseen developments in total and, more specifically, into the United States. The Panel summed up its findings as follows: "in light of the complexity of the allegations made by USITC, including its reliance on a confluence of economic factors, the USITC failed to provide a reasoned and adequate explanation of how the confluence of unforeseen developments it pointed to had resulted in increased imports into the United States of the specific steel products at issue -- causing serious injury to the relevant domestic producers." **It concluded, "... all safeguard measures at issue in this dispute are inconsistent with the requirements" of GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 with regard to the demonstration of unforeseen developments.** As a result, the Panel said that there was no need for it to examine the remainder of the complainants' arguments, including "whether the facts supported" the ITC's unforeseen developments finding. (Paras. 10.145-150) (On appeal, the Appellate Body upheld the Panel's findings. The Appellate Body also rejected challenges to the Panel's findings under DSU Articles 11 and 12.7) *See DSC for U.S. - Steel Safeguards (AB).*)

Safeguards Agreement Articles 2.1 and 3.1 - Increased Imports

Safeguards Agreement Article 2.1, which sets forth the conditions for the application of a safeguard measure, provides in part:

> A Member may apply a safeguard measure to a product only if that Member has determined ... that such product *is being imported* into its territory in such *increased quantities*, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products. (emphasis added; footnote omitted)

In turn, as described by the Panel, Safeguards Agreement Article 4.2(a) sets forth the "operational requirements for determining whether the conditions identified in Article 2.1 exist." That provision states, in relevant part:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate ... the rate and amount of the increase in imports of the product concerned in absolute and relative terms ... .

The complainants raised claims under these provisions in respect of each of the U.S. safeguard measures individually, alleging that the ITC's determinations on "increased imports" for each product were not consistent with these provisions.

Before addressing the specific claims, however, the Panel considered certain legal arguments raised by the parties in respect of the interpretation and application of these provisions. In particular, the parties disagreed as to "whether Article 2.1 imposes any threshold for [the] 'increased imports' requirement whether quantitative and/or qualitative." The complainants referred to paragraph 131 of the Appellate Body report in *Argentina - Footwear Safeguards*, where the increased imports requirement was interpreted to mean "that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause

'serious injury.'" The United States, however, took issue with the interpretation by the Appellate Body in that case, emphasizing that the standards cited by the Appellate Body do not appear in the provisions themselves. As a result, the United States argued that whether the imports are recent, sudden, sharp and significant enough to cause injury are questions that are answered as an authority proceeds through its investigation, but "these analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry." (Paras. 10.155-157)

In considering the appropriate legal standard, the Panel stated, at the outset, that a determination of whether imports have increased "would normally call for a comparison of levels of imports in different periods or at different points in time." While the GATT and Safeguards Agreement are silent on the points in time that are to be compared, as well as on the length of the period to be investigated, the Panel noted that the complainants were not challenging the five-year period of investigation used by the ITC. In order to determine whether imports have "recently" increased, the Panel said that "an identification of the relevant recent period as well as an assessment of the situation of imports during that recent period, on a case-by-case basis," would be required. In this regard, given that there is no defined period of investigation or prescribed periods which must be compared, the Panel explained that "a competent authority must conduct a quantitative and qualitative analysis of the features of the development of import numbers over the entire period of investigation and assess whether, overall, imports have increased recently." (Paras. 10.158-161)

In terms of "*how* recently" imports must have increased, the Panel cited to paragraph 7.207 of the panel report in *U.S. - Line Pipe Safeguards* for the proposition that "'recent' does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation." Moreover, again citing the panel decision in *Line Pipe*, the Panel added that while the most recent data must be the focus, it should not be considered "in isolation" from the data pertaining to the less recent portion of the period of investigation. Nonetheless, the Panel emphasized that given the language "are being," "there is an implication that imports, in the present, remain at higher (i.e. increased) levels." As a result, it explained that whether a decrease at the end of the period would preclude a finding of "increased imports" will depend on whether a previous increase nevertheless results in the product still being imported in "increased quantities." In short, in the case of a decrease at the end of the period of investigation, the Panel explained that the key factors that "must be taken into account are the duration and the degree of the decrease ... , as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand." (Paras. 10.162-164)

As further explanation, the Panel stated, "competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by Article 4.2(a)." However, it added that the rate of the increase need not always accelerate or need not always be positive at each point in time during the period of investigation. In addition, given the requirement in GATT Article XIX that the purpose of a safeguard measure is to address "unexpected events," the Panel stated that the increased imports must therefore be "sudden." Recognizing the standard set forth by the Appellate Body in paragraph 131 of *Argentina - Footwear Safeguards*, the Panel explained, "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." (Paras. 10.165-167) (On appeal, the Appellate Body upheld the Panel's statement. *See DSC for U.S. - Steel Safeguards (AB).*)

As a result of these considerations, the Panel said that it would "focus its analysis on the situation of imports in the more recent period that preceded the end of the period of investigation, keeping in mind that the situation of imports in the earlier part of the period of investigation may also shed light on the movements of imports." (Para. 10.175)

Finally, the Panel addressed a couple of systemic issues before turning to the facts in this case. First, as noted above in the section of this DSC covering Procedural and Systemic Issues, the Panel said it would evaluate the ITC's findings on increased imports for each product at issue on the basis of the data that was available to the ITC at the end of the period of investigation (*i.e.*, by the end of June 2001). Second, the Panel recalled that the standard of review is "whether the published report on the investigation contains an adequate and reasoned explanation of how the facts before the ITC support the determination made with respect to increased imports." (Paras. 10.174, 10.176)

With these considerations in mind, the Panel examined the ITC's findings on increased imports for each of the product groups at issue, namely: CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel wire and stainless steel rod. In its findings, the Panel set forth the ITC's reasoning in respect of each specific product group, as well as graphs for each product depicting the data relied upon by the ITC in respect of absolute imports and imports relative to production levels (the Panel referred to these two comparisons as "absolute imports" and "relative imports"). Of the ten product groups considered, the Panel found that the ITC failed to provide an adequate and reasoned explanation of increased imports in five instances (CCFRS, tin mill products, hot-rolled bar, stainless steel wire and stainless steel rod).

Brief discussions of the Panel's findings under the increased imports requirement in respect of each product group are provided below.

CCFRS

In respect of both absolute and relative imports, while the ITC recognized that the sharpest increase took place during the period until 1998, it then failed to account for the significant decrease that took place later in the period. In particular, the Panel found that the increase, which occurred until 1998, "was no longer recent enough at the time of the determination," such that it was an insufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in ... increased quantities." Therefore, the Panel concluded that the ITC Report failed to provide an "adequate and reasoned explanation" in respect of "increased quantities," in violation of Article 2.1. (Paras. 10.181-186) (On appeal, the Appellate Body upheld the Panel's findings. *See DSC for U.S. - Steel Safeguards (AB).*)

Tin Mill Products

The Panel noted that in the context of the ITC Report, four of the six ITC Commissioners made findings on tin mill as a "separate product," while the other two Commissioners "treated tin mill products as part of the larger CCFRS category." Of the four who treated it as a separate product, only one Commissioner ultimately reached an affirmative determination. On the other hand, both of the Commissioners who considered tin mill products as part of the CCFRS category reached affirmative determinations. Together, these three affirmative determinations resulted in an overall affirmative determination for tin mill products. The Panel considered that, "[o]n its face, the USITC (the three Commissioners voting in the affirmative) made divergent findings relating to tin mill and these different findings are impossible to reconcile, given that they are based on differently defined products." In this regard, the Panel stated: "The Panel believes that a Member is not permitted under Articles 2.1 and 3.1 of the Agreement on Safeguards to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other." Here, the Panel concluded, "[t]here is no indication of how interested parties (and the Panel for that matter) can identify which of the various and inconsistent findings by various Commissioners is the basis for the imposition of the safeguard measure on tin mill." As a result, the Panel found that the ITC Report failed to provide an "adequate and reasoned explanation" in respect of "increased quantities," in violation of Articles 2.1 and 3.1, "since the explanation consists of alternative explanations partly departing from each other which,

given the different product bases, cannot be reconciled as a matter of their substance." (Paras. 10.191-200) (On appeal, the Appellate Body reversed the Panel's findings related to the ITC's "alternative explanations" with respect to increased imports. *See DSC for U.S. - Steel Safeguards (AB).*)

Hot-Rolled Bar

For both absolute and relative imports, the Panel found that the ITC relied on amounts in 2000 that it considered to be higher than in any previous year, but then failed to account for the most recent data in interim 2001, which demonstrated a sharp decrease. As a result, the Panel found that the ITC Report failed to provide an "adequate and reasoned explanation" in respect of "increased quantities" in violation of Article 2.1. (Paras. 10.204-209) (On appeal, the Appellate Body upheld the Panel's findings. *See DSC for U.S. - Steel Safeguards (AB).*)

Cold-Finished Bar

The Panel noted that the data on relative imports demonstrated an "up-and-down" movement between 1996 and 1999, with a 40.6 percent increase occurring at the end of the period. As a result, the Panel concluded that the ITC's determination on increased imports relative to domestic production contains an adequate and reasoned explanation of how the facts support the determination. Given its finding regarding relative imports, the Panel found there to be "no need to make findings on absolute imports, since such findings could not change the overall result." Therefore, the Panel concluded that the ITC's determination of imports in "increased quantities" "is not inconsistent" with Article 2.1. (Paras. 10.214-220)

Rebar

The Panel noted that the data in respect of absolute imports supported a finding of increased quantities. In particular, absolute imports more than tripled from 1996 to 1999 and then "declined relatively insignificantly" in 2000 and in interim 2001. The Panel stated that "the increase until 1999 is recent enough and the subsequent decrease -- in comparison -- small enough in order to support" a finding of increased quantities. Given its finding regarding absolute imports, the Panel found there to be "no need to make findings on relative imports, since such findings could not change the overall result." Therefore, the Panel concluded that the ITC's determination of imports in "increased quantities" "is not inconsistent" with Article 2.1. (Paras. 10.224-228)

Welded Pipe

The Panel found that "[t]he USITC took into account the import data for each of the years of the period of investigation and conducted a satisfactory analysis of the developments of imports." In particular, the data demonstrated that absolute imports declined from 1998 to 1999 but increased for all other years. Moreover, the increases were more significant than the decreases, such that imports remained at "increased levels even in the most recent past." The Panel rejected an argument by Switzerland that the increase of imports was "steady" and "gradual," such that the domestic industry could adjust, finding this to be a question that should be addressed within the context of serious injury and causation. It also rejected Switzerland's argument that the increase between 1996 and 1998 was stronger yet no safeguard measure was imposed. Given its finding regarding absolute imports, the Panel found there to be "no need to make findings on relative imports, since such findings could not change the overall result." Therefore, the Panel concluded that the ITC's determination of imports in "increased quantities" "is not inconsistent" with Article 2.1. (Paras. 10.232-239)

FFTJ

The Panel considered that the following facts supported a finding of "increased quantities" in respect of relative imports: the amount by which relative imports increased during the entire period of investigation; the end of the period of examination showed the most significant increases; only the period from 1996-1997 showed a decrease and this decrease was less significant than each of the year-to-year increases; and the increase shows a "certain degree of sharpness, suddenness and significance, particularly in the very recent past." Given its finding regarding relative imports, the Panel found there to be "no need to make findings on absolute imports, since such findings could not change the overall result." Therefore, the Panel concluded that the ITC's determination of imports in "increased quantities" "is not inconsistent" with Article 2.1. (Paras. 10.243-249)

Stainless Steel Bar

The Panel found the following factual account given by the ITC to be a "satisfactory explanation" of how the facts supported its finding of "increased quantities" in respect of relative imports: the relative imports increased significantly during the overall period of investigation; the largest single percentage increase occurred in 2000; and the slight decrease in the most recent past was insignificant and did not detract from a finding that levels remained at high levels. The Panel was also "satisfied" that the sharp increase from 1999 to 2000 "shows a certain degree of recentness, suddenness and significance." Given its finding regarding relative imports, the Panel found there to be "no need to make findings on absolute imports, since such findings could not change the overall result." Therefore, the Panel concluded that the ITC's determination of imports in "increased quantities" "is not inconsistent" with Article 2.1. (Paras. 10.253-257)

Stainless Steel Wire

The Panel noted that the situation in respect of this category is equivalent to the situation encountered in the context of tin mill products. Here, the United States relied on findings by one Commissioner who made findings for stainless steel wire specifically, while two others made affirmative findings only with regard to a broader product category (namely, stainless steel wire and rope). For the same reasons as set forth in respect of tin mill products, the Panel said that the Safeguards Agreement "does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products." As a result, the Panel found a violation of the requirement in Articles 2.1 and 3.1 to provide a "reasoned and adequate explanation of how the facts support the determination," because the ITC's explanation "consists of alternative explanations departing from each other and which, given the different product basis, cannot be reconciled as a matter of substance." (Paras. 10.261-263) (On appeal, the Appellate Body reversed the Panel's findings related to the ITC's "alternative explanations" with respect to increased imports. *See* DSC for U.S. - Steel Safeguards (AB).)

Stainless Steel Rod

The Panel found the ITC's explanation in respect of both absolute and relative imports to be inadequate. In particular, while focusing on the increases that took place between 1996 and 2000, the ITC then only "acknowledged" the decline between interim 2000 and interim 2001 but never explained why the significant decrease (particularly sharp in terms of absolute imports) did not detract from the previous increases. In this regard, in the context of absolute volumes, the Panel criticized the ITC's reference to the "nearly stable market share of imports," explaining that market share is not related to absolute import volumes. On this basis, the Panel concluded that the ITC Report failed to provide an "adequate and reasoned explanation" in respect of "increased quantities" in violation of Article 2.1. (Paras. 10.267-277) (On appeal, the Appellate Body upheld the Panel's findings. *See* DSC for U.S. - Steel Safeguards (AB).)

Additional Issues

Finally, we note some additional arguments addressed by the Panel. First, in respect of CCFRS and FFTJ, the Panel refused to consider arguments by the complainants with regard to the question of whether imports of the various products comprised in CCFRS, taken individually, have increased. In particular, the Panel noted that the ITC's determination addressed increased imports only with regard to a category defined as "CCFRS products," and it is that determination which is subject to review in this dispute. (Paras. 10.187, 10.243) For similar reasons, the Panel refused to address arguments by certain complainants in the context of welded pipe that the ITC was supposed to make findings on specific products they referred to as "certain tubular products." (Paras. 10.232)

Second, in the context of cold-finished bar, rebar, welded pipe, FFTJ and stainless steel bar the Panel stated that the question of whether a particular increase is "sudden, sharp, recent and significant *enough as to cause serious injury* is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made." (emphasis added by Panel) It concluded, therefore, that the Panel's increased imports finding "must be read together" with its subsequent findings on the other Article 2.1 conditions. (Paras. 10.217, 10.226, 10.236, 10.255)

Next, the Panel rejected certain arguments as to how the competent authority should have considered particular evidence regarding trends in imports. In the context of cold-finished bar, the Panel dismissed an argument by the European Communities that an *absolute* decrease in imports from 2000 to interim period 2001 "detracts" from the ITC's finding of increased quantities in respect of relative imports. In response, the Panel noted that the Safeguards Agreement makes clear that the increased imports requirement is one of an increase in *either* absolute or relative terms. Moreover, the Panel explained, "if absolute imports decrease, but imports, relative to domestic production, are on the increase, this means that the decrease of domestic production is stronger than that of imports (in absolute levels)." (Para. 10.218) Also, in the context of welded bar, the Panel rejected the EC argument that the ITC failed to examine *all* trends by failing to provide and compare annual percentage increases. In response, the Panel stated that the Safeguards Agreement does not require the presentation of data "in all kinds of possible ways," but rather the requirement is to explain how the facts support the authority's conclusion. (Para. 10.237)

Finally, in the context of the ITC's analysis of relative imports of stainless steel rod, the Panel noted that all of the underlying data supporting the ITC's conclusion had been eliminated from the ITC Report on the basis of confidentiality. While recognizing a Member's right, pursuant to Safeguards Agreement Article 3.2, to maintain and rely on confidential data for its findings, the Panel emphasized that authorities are still required, pursuant to Article 3.1, to explain their reasoning through means other than full disclosure, "i.e. an explanation in words and without numbers," and they are also required to explain "why there was no possibility of presenting any facts in a manner consistent with the obligation of protecting confidential information." The Panel noted that no such explanation was provided by the ITC in the context of its findings on stainless steel rod. (Paras. 10.271-275)

Safeguard Agreement Articles 2.1, 3.1 and 4.2(b) - Causation and Non-Attribution

The complainants claimed that, contrary to Safeguards Agreement Articles 2.1 and 4.2(b): (i) the ITC determinations failed to establish the necessary causal link between increased imports and serious injury for each of the measures; and (ii) the ITC failed to comply with the obligation that injury from other factors not be attributed to imports (claims were also made under GATT Article XIX, but the Panel considered it unnecessary to address this provision.) (Para. 10.279) Article 2.1 provides in part:

> A Member may apply a safeguard measure to a product only if that Member has determined ... that such product is being imported into its territory in such increased quantities ... and under such conditions as to *cause or threaten to cause* serious injury to the domestic industry that produces like or directly competitive products. (emphasis added)

Article 4.2(b) then states:

> The [injury] determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

In addressing these claims, the Panel first set out the legal standards for the causation issue. Then, it applied these standards to each of the measures at issue.

Turning first to the legal standards, the Panel began by noting the Appellate Body's interpretation in paragraph 69 of *U.S. - Wheat Gluten Safeguards* that the reference to "the causal link" in Article 4.2(b) effectively requires a finding of a "genuine and substantial relationship of cause and effect" between increased imports and serious injury. However, it said, "questions arise as to what is entailed in such a requirement," in particular, "how should the first and second sentences of Article 4.2(b) be operationalized to meet this requirement"? In this regard, the Panel addressed three issues. First, what is "the standard or threshold that should apply in determining whether or not a 'genuine and substantial relationship of cause and effect' exists." Second, there is the issue of "how (that is, using which analytical tools) a causal link can be established for the purposes of Article 4.2(b)." And third, there is the question of how the non-attribution requirement provided for in the second sentence of Article 4.2(b) "is to be performed and its relationship with the overall demonstration of a causal link." (Para. 10.287) The Panel considered each of these issues in turn.

First, with regard to the "standard for assessment" (*i.e.*, the "standard or the threshold that should apply") in determining whether a "causal link" exists, the Panel recalled the Appellate Body's conclusion in paragraph 67 of *Wheat Gluten* that it is not necessary for the competent authority to show that increased imports *alone* must be capable of causing serious injury. Rather, a causal link may be demonstrated if the increased imports have "contributed" to "bringing about," "producing" or "inducing" the serious injury, and the causation requirement can still be met where serious injury is caused by the "interplay of increased imports and other factors." In this regard, it said, "the contribution must be sufficiently clear as to establish the existence of 'the causal link' required." (Paras. 10.288-290) In addition, the Panel noted the U.S. argument that by requiring the ITC to find that increased imports are an "important" cause of injury and as important as any other cause, the U.S. safeguards statute ensures that the ITC finds a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding. On this point, the Panel considered that "the mere fact that the literal definitions of 'important' and 'substantial' may be considered by some to be 'equivalent' is not necessarily relevant." Instead, it said, "what is important for this Panel is whether the test *applied* by the USITC meets the standard or threshold prescribed by the requirement that there be a 'genuine and substantial' relationship of cause and effect between the increased imports and the serious injury." (Paras. 10.291-292)

The Panel then considered the question of "how a causal link can be demonstrated for the purposes of Article 4.2(b) ... ." At the outset, it stated, given that Article 4.2(b) does not prescribe any particular "methods or analytical tools," "it is for the competent authority to decide the method it considers most appropriate in making a causal link determination." Of course, "the competent authority should be encouraged to perform this analysis as thoroughly as the circumstances require" and "[w]hatever tool or method is used, it must be capable of determining whether or not a genuine and substantial relationship of cause and effect exists between the increased imports and the serious injury suffered by the relevant domestic producers." (Para. 10.294) In addition, the Panel considered that this dispute "raises the issue of whether a competent authority *must* undertake a coincidence analysis when determining whether a causal link exists between increased imports and serious injury." In addressing this issue, the Panel "developed an analytical framework to assess whether, in light of the circumstances of the causation determinations for each of the measures, the USITC demonstrated, through a reasoned and adequate explanation, that the facts supported its findings that causation existed." In this regard, the Panel examined the role of five specific factors discerned from the provisions themselves, WTO jurisprudence and factors actually examined by the ITC (one additional factor was considered in the context of the parallelism analysis):

1. *Coincidence of trends*: On this point, the Panel cited to the panel and Appellate Body reports in *Argentina - Footwear Safeguards*, noting the Appellate Body's statement in paragraph 144 that "it is the relationship between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination." The Panel concluded that the term "coincidence" refers to the "temporal" relationship between the movements in imports and movements in injury factors (*i.e.*, generally speaking, for coincidence to exist, upward movements in imports should normally occur at the same time as downward movements in injury factors.) In addition, the Panel noted the statement of the Appellate Body that "coincidence" plays a "central" role in the causation inquiry. Therefore, the Panel said, a competent authority should "normally" perform a "coincidence analysis" when examining causation. In this regard, the Panel stated that it is an "overall" coincidence that matters, rather than a showing of coincidence or absence thereof for a "few select factors." It added, an absence of coincidence (*i.e.*, where coincidence does not exist or no coincidence analysis has been undertaken) would "tend to detract from" a finding of causation.

   Elaborating on this point, the Panel stated: "In our view, there may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving a causal link." Then, the Panel stated that a competent authority must provide a reasoned and adequate explanation of its causal link findings, as follows: "In the first case (i), assuming fulfilment of the non-attribution requirement, when clear coincidence exists, no further analysis is required of the competent authority and the Panel will confine its review to the coincidence analysis. In the second case (ii), the Panel will examine both the coincidence analysis and the other analysis undertaken by the competent authority with a view to assessing whether the competent authority has provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury." Furthermore, "[i]n cases (iii) and (iv), the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide, in particular, a compelling explanation as to why a causal link exists notwithstanding the absence of coincidence."

Lastly, with regard to any "temporal lag" between increased imports and injury, the Panel considered that an argument for a lag "may have merit in certain cases." However, it noted that there are "limits in temporal terms on the length of lags," noting the *Egypt - Rebar* panel's statement that, at most, a lag of one year could be acceptable. The Panel explained that a "rigid market structure" is more likely to exhibit lag effects in certain factors, especially employment, while such effects would be less likely in a more "competitive market." (Paras. 10.297-312)

2. *Conditions of competition*: The Panel noted that where there is an absence of an analysis of, or the existence of, a coincidence of trends, "reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists." (In addition, it said, "[t]here may also be cases where a competent authority considers that it is necessary to *support* its coincidence analysis with another analysis because, for example, coincidence cannot be established with a sufficient degree of certainty.") The Panel noted that an examination of the conditions of competition between imports and domestic products may "generally prove insightful" with regard to causation. In this regard, the Panel said that the factors in Article 4.2(a) are relevant for this inquiry, especially the following: price, volume of imports, imports' market share, changes in the level of sales and profit and losses. Finally, the Panel said, "the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration." (Paras. 10.313-324)

3. *Non-Attribution*: The Panel emphasized that where factors other than increased imports have caused injury to the domestic industry, a "non-attribution" exercise must be undertaken. On this issue, the Panel agreed with the Appellate Body's statement in *U.S. - Lamb Safeguards* that the ITC's "substantial cause" test does not necessarily conflict with the obligation to "separate and distinguish" the effects of other causes on the state of domestic industry. (Paras. 10.325-334)

4. *Quantification*: With regard to the question of whether "quantification" or the use of "econometric models" is required, the Panel noted that the Safeguards Agreement does not require "quantification." However, it stated that the Agreement and the relevant jurisprudence "anticipate that quantification *may* occur." In addition, the Panel said that quantification "may be particularly desirable in cases involving complicated factual situations where qualitative analyses may not suffice to more fully understand the dynamics of the relevant market." The Panel considered that quantification "could help in identifying the share of the overall injury caused by increased imports, as distinct from the injury caused by other factors, which would in turn yield a 'benchmark' for ensuring that the safeguard measure is imposed only to the extent necessary to prevent or remedy serious injury and allow for adjustments." Furthermore, a "competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward." On the other hand, the Panel recognized that quantification "may be difficult and is less than perfect," and therefore, the results of such analysis may not be determinative. As to the *form* that quantification should take, again, the Panel said it would depend on the complexity of the situation. Whichever approach or model is adopted, the Panel said, "it should be applied in good faith and with due diligence." (Paras. 10.335-342)

5. *Sequence of assessment*: With regard to the "sequence of assessment" of the elements of a causation analysis, the Panel said that the Safeguards Agreement "does not prescribe any order." In particular, the "non-attribution exercise" need not precede a consideration of coincidence/conditions of competition. In this regard, it said: "Provided that the various

elements entailed in a causation analysis are considered and analysed in coming to a conclusion on the existence or otherwise of a 'causal link,' this should suffice." (Paras. 10.343-347)

The Panel then examined, for most of the safeguard measures, the issues of coincidence of trends and/or conditions of competition, and non-attribution, based on the analytical framework it developed (for two measures, however, the Panel's analysis focused on the use of different product definitions by different Commissioners.) For each measure, the Panel set out the relevant reasoning by the ITC, and then considered the consistency of the measure with the Safeguards Agreement. In the summary below, we describe briefly the Panel's treatment of each of these issues. For most of the measures, we focus on the Panel's consideration of the three key issues: coincidence of trends, conditions of competition and non-attribution. With one exception, the Panel's ultimate conclusion for each measure was that the ITC's analysis was inconsistent with the causation requirement in Safeguards Agreement Articles 4.2(b), 2.1 and 3.1. The one exception was stainless steel rod, for which the Panel found the ITC's analysis to he consistent with the Safeguards Agreement. (On appeal, the Appellate Body rejected one U.S. claim made under DSU Article 11 in respect to causation. *See DSC for U.S. - Steel Safeguards (AB).*)

CCFRS

- *Coincidence of trends*: Panel concluded that coincidence "did not exist between imports trends for CCFRS and the serious injury ... ," noting that the indicators that would "ordinarily be assumed to react shortly after an increase in imports did not display coincidence with the increased imports ... ." Therefore, the ITC's finding that coincidence existed was not supported. (Paras. 10.363-375)
- *Conditions of competition*: Panel concluded that the ITC's analysis was flawed in terms of its consideration of CCFRS as a single product and its use of data. In particular, it questioned the validity of the ITC's price analysis, given the breadth of the CCFRS category. (Paras. 10.377-381)
- *Non-Attribution*: Panel concluded that the ITC failed to analyze adequately certain factors as part of its non-attribution analysis: declining domestic demand; domestic capacity increases; intra-industry competition; and legacy costs. The Panel noted that the ITC dismissed, without adequate examination, these factors "even though it acknowledged that those factors were causing injury to the industry." That is, it failed to "properly separate, distinguish and assess the nature and extent of the injurious effects" of these other factors. (Paras. 10.383-410)

In addition, the Panel recalled that the ITC "disregarded the effect of increases in domestic capacity, intra-industry competition and legacy costs because 'they were not a cause of serious injury that was equal to or greater than the injury caused by increased imports.'" In response, the Panel considered that "such an approach is problematic if the cumulative effects of individual factors are not analysed or assessed in cases where, individually, each of them are acknowledged to have caused some injury to the relevant domestic industry." (Para. 10.409)

Finally, the Panel noted that under Article 4.2(b), a causal link must be established between increased imports of the product concerned and serious injury or threat thereof suffered by producers of the like or directly competitive products. If, it said, "the imported products or the like or directly competitive products are defined in such a way that prevents the proper application of the causation requirements contained in Article 4.2(b), the causation determination will necessarily be inconsistent with the prescriptions of Article 4.2(b)." Here, it concluded, CCFRS was defined in such a way that "prevents the proper application of the causation requirements" of Article 4.2(b). In particular, data for "items that constituted CCFRS" were sometimes used rather than data for CCFRS "as a whole," without a sufficient explanation. In addition, it said, the ITC itself "admitted that the reliance on combined data for "the five types of certain carbon flat-rolled steel ... may involve double-counting.'" (Paras. 10.412-417)

Tin Mill Products

With regard to tin mill products, the Panel addressed the issue of "divergent findings" by individual ITC Commissioners. Specifically, four Commissioners made findings on tin mill as a separate product, with only one of these four reaching an affirmative determination. By contrast, two Commissioners treated tin mill products as part of the larger CCFRS category, both reaching an affirmative conclusion for this broader category. In spite of these "divergent product definitions," the ITC Report concluded that three Commissioners made "an affirmative determination regarding imports of carbon and alloy tin mill products." (Para. 10.420)

In the Proclamation imposing safeguard measures in March 2002, the President considered the "determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products ...] to be the determination of the ITC." Thus, the President's decision was based on the findings of the three Commissioners reaching an affirmative determination, even though these Commissioners "did not perform their analysis on the basis of the same like product definition." (Para. 10.421)

For the same reasons as stated under the increased imports claim, the Panel found that the approach taken by the United States was not consistent with the Safeguards Agreement. In particular, the Panel found that a Member "is not permitted to base its safeguard measures on an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance." Thus, it said, the ITC Report does not contain a reasoned and adequate explanation of how the facts support the determination that increased imports of tin mill products caused serious injury to the relevant domestic industry, as required by Safeguards Agreement Articles 2.1, 4.2(b) and 3.1. (Para. 10.422) (On appeal, the Appellate Body reversed the Panel's findings related to the ITC's "alternative explanations" with respect to causation. *See DSC for U.S. - Steel Safeguards (AB).*)

Hot-rolled bar

- *Coincidence of trends*: No coincidence analysis conducted.
- *Conditions of competition*: Concluded that the ITC's analysis of conditions of competition, which was based on the premise of "price-based" competition between imports and domestic products, was "compelling in providing indications of the existence of a causal link between increased imports of hot-rolled bar and serious injury ... ." (Paras. 10.426-430)
- *Non-Attribution*: The Panel rejected the complainants' claims with respect to three alleged factors: competition among domestic producers, inefficient producers, and declines in demand. For these factors, the Panel concluded that the ITC had not, in fact, considered these as possible causes of injury, and therefore did not need to separate, distinguish and assess their effects. However, with regard to a fourth factor, changes in input costs, the Panel concluded that the ITC's dismissal of the effect of increases in costs of goods sold was "not adequately reasoned." In particular, the ITC "merely stated that the only reason why the domestic industry did not increase prices to recoup growing [cost of goods sold] was the import surge that occurred in the year 2000." According to the Panel, this statement did not constitute a reasoned and adequate explanation. (Nonetheless, the Panel did note that other facts on the record "appear to support the USITC's conclusion regarding increases in [cost of goods sold]," although this conclusion did not alter its finding of a violation.) (Paras. 10.431-443)

Cold-finished bar

- *Coincidence of trends*: No coincidence analysis conducted.
- *Conditions of competition*: At the outset, the Panel noted that the "essential premise" for the ITC's conclusion on this point was that "aggressive" pricing by imports caused the domestic industry to lose market share and revenues. In this regard, the Panel noted that the ITC relied on quarterly data, even though annual data was available and had been used for other products. This annual data, the Panel said, indicated that imports did not "undersell" domestic products, calling into question whether import pricing was "aggressive." In addition, the Panel noted that throughout the period of investigation, import prices were always higher than domestic prices. Ultimately, the Panel concluded that the ITC had not provided a reasoned and adequate explanation of how the facts supported its conclusion. (Paras. 10.449-458)
- *Non-Attribution*: Panel noted that the ITC "clearly acknowledged that decline in demand contributed to injury that was being suffered by the domestic industry." However, there was nothing in the ITC Report to show how injury caused by this factor was not attributed to increased imports (*i.e.*, that its effects were separated and distinguished). (Paras. 10.461-469)

Rebar

- *Coincidence of trends*: No coincidence analysis conducted.
- *Conditions of competition*: Panel concluded that the data supported the ITC determination that increased imports "exerted downward pressure on domestic prices and that this, in turn, had an impact upon the financial performance of domestic producers." Therefore, the Panel found, the ITC "provided a compelling explanation indicating the existence of a causal link between increased imports and serious injury ...." (Paras. 10.473-477)
- *Non-Attribution*: With regard to domestic capacity increases, the ITC had stated: "[T]he domestic industry's capacity increases cannot be deemed to be an alternative cause of injury because capacity increased far less than did US apparent consumption of rebar during the period examined; ..." The Panel therefore considered that the ITC provided a reasoned and adequate explanation as to why domestic capacity increases were not a cause of serious injury. On the other hand, with regard to changes in input costs, the Panel said that the ITC should have explained why certain increases in costs and expenses were not a cause of injury. Therefore, it concluded that the ITC failed to separate, distinguish and assess the nature and extent of these factors. It was not enough, the Panel noted, to dismiss the effects of these increases on the "mere basis" that they could not account for domestic price declines. (Paras. 10.480-485)

Welded Pipe

- *Coincidence of trends*: No claims of violation.
- *Conditions of competition*: No claims of violation.
- *Non-Attribution*: With regard to domestic industry overcapacity, the Panel noted that the ITC dismissed this factor by stating that it did not contribute to injury in "more than a minor way." However, the Panel stated that the ITC's determination "should have specifically identified what it considered to be the 'minor' contribution that domestic industry over-capacity played in causing serious injury to the industry." As to the aberrational performance of one member of the industry, the Panel considered that the ITC's characterization of the company's poor financial performance due to imports required "further explanation." (Paras. 10.492-503)

FFTJ

- *Coincidence of trends*: Examining the facts on the record, the Panel concluded that "overall, clear coincidence exists between the upward trend in imports and the downward trend in the injury factors, except for productivity." Nonetheless, examining the ITC's analysis in this regard, the Panel found that the ITC did not provide a "reasoned and adequate explanation of how the facts support the finding that that coincidence existed," as nothing in the ITC Report demonstrates this coincidence. (Paras. 10.507-516)
- *Conditions of competition*: Referring to the ITC's statements regarding the growing share of imports in the domestic market, the relevance of average unit values, and the existence of price underselling by imports, the Panel concluded that the ITC provided a "compelling explanation" that a causal link between increased imports and serious injury existed. (Paras. 10.517-521)
- *Non-Attribution*: With regard to increased capacity, the Panel noted that although the ITC "acknowledged the role played by this factor ..., it appeared to dismiss it in its non-attribution analysis." Explaining that *all* relevant factors, even those with "limited" injurious effect, must be "identified, distinguished and assessed," the Panel found that a reasoned and adequate explanation had not been carried out. As to purchaser consolidation, the Panel found that the only ITC statement on this issue was insufficient to provide the requisite explanation. (Paras. 10.524-536)

Stainless Steel Bar

- *Coincidence of trends*: Panel concluded that coincidence does not exist between import trends and trends in production, employment, productivity and capacity utilization. However, Panel was unable to consider trends in operating margin and net commercial sales because that data "had been redacted from the USITC Report on the ground of confidentiality." Therefore, the Panel was unable to come to a conclusion as to whether coincidence existed. (Paras. 10.540-546)
- *Conditions of competition*: Certain data was not provided in the ITC Report due to confidentiality concerns. However, the Panel examined the non-confidential version of the Report, and found that import market share had increased "quite significantly during the period of investigation, which would be consistent with a finding of import underselling." Therefore, it said, the ITC had provided a "compelling explanation" that a causal link existed. (Paras. 10.547-553)
- *Non-Attribution*: Panel found that even though the ITC acknowledged that downturn in demand and increases in energy costs "played a role" in causing injury, the ITC "dismissed," without adequate explanation, these factors in its non-attribution analysis. In particular, the Panel explained that the ITC could have further explored the effects of these factors on operating margins. Therefore, Panel found that the ITC failed to comply with the non-attribution requirement. (Paras. 10.556-569)

Stainless Steel Wire

With regard to stainless steel wire, the Panel addressed the issue of "divergent findings" by individual ITC Commissioners. Specifically, one Commissioner made affirmative findings on stainless steel wire as a separate product, while two others made affirmative findings on stainless steel wire and rope, a broader category. (Para. 10.570)

In the Proclamation imposing safeguard measures in March 2002, the President considered the "determinations of the groups of commissioners voting in the affirmative with regard to [... stainless steel wire] to be the determination of the ITC." Thus, the President's determination was based on the findings of the three Commissioners reaching an affirmative determination, even though these Commissioners "did not perform their respective analyses on the basis of the same like product definition." (Para. 10.571)

The Panel found that the approach taken by the United States was not consistent with the Safeguards Agreement. Referring to its earlier conclusions related to tin mill products, the Panel concluded that the Safeguards Agreement "does not permit the combination of findings reached on the basis of differently defined products." Such findings, it said, "cannot be reconciled with each other and they cannot simultaneously form the basis of a determination." Thus, the Panel found that "an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance, amounts to a violation of the obligations under Articles 2.1, 4.2(b) and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of causation." (Para. 10.572) (On appeal, the Appellate Body reversed the Panel's findings related to the ITC's "alternative explanations" with respect to causation. *See DSC for U.S. - Steel Safeguards (AB).*)

Stainless Steel Rod

- *Coincidence of trends*: Although the ITC performed a coincidence analysis, Panel was "unable to assess the complainants claims regarding the existence or otherwise of coincidence because of the redaction of relevant confidential information." (Para. 10.576)
- *Conditions of competition*: Panel noted that the "essential premise" of the ITC's finding is that imports undersold domestic products. Panel concluded that the facts available "tend to support" the ITC's conclusion. Therefore, Panel found that the ITC provided a "compelling explanation" that a causal link existed between increased imports and serious injury. (Paras. 10.576-582)
- *Non-Attribution*: Panel noted that while the ITC "discussed" increases in capacity and declines in capacity utilization in its report, it did not "acknowledge" that these factors played a role in causing injury. Referring to its conditions of competition analysis above, Panel concluded that the facts "tend to support" the ITC's conclusion that import underselling, rather than capacity increases, caused injury. Therefore, capacity increases was not one of the "other factors" which the ITC was required to have separated, distinguished and assessed as part of its causation analysis. (Paras. 10.584-585)

The Panel concluded: "The facts that are available to the Panel tend to support the conclusions reached by the USITC. Accordingly, the Panel finds that the USITC's causation analysis for stainless steel rod was not inconsistent with the requirements of the Agreement on Safeguards." (Para. 10.586)

Safeguards Agreement Articles 2 and 4 - Parallelism

In imposing the safeguard measures at issue, the United States excluded imports from certain countries from the scope of application of the measures (pursuant to the NAFTA, imports from Canada and Mexico were excluded; imports from Israel and Jordan were excluded under FTAs with those countries). Based on these exclusions, the complainants claimed that the United States failed to meet the requirement of "parallelism" with regard to the safeguard measures at issue. That is, they argued that because the *determinations* by the ITC made under Articles 2.1 and 4.2 *included imports* from all sources, the *application of the measures* under Article 2.2 should not have *excluded imports* from the four countries mentioned. (Para. 10.587)

At the outset, the Panel referred to past case law on this issue, noting that the "parallelism" requirement is "derived from the parallel language" in the first paragraph of Safeguards Agreement Article 2 (which sets out the conditions for a determination that a safeguard measure may be imposed) and the second paragraph of Article 2 (which governs the application of a safeguard measure). It then stated the "parallelism" requirement as follows: "the imports included in the determination and those covered by the measure should correspond." If they do not correspond, the Panel said, "i.e. if there is a 'gap' between imports covered by the determination and imports falling within the scope of the measure,

the competent authorities must establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards." (Paras. 10.589-591)

The Panel observed that the importing Member is entitled to make and publish these findings *subsequent* to the publication of the report setting out the determination. Thus, it said, in this case "both the findings made in the initial USITC Report and those contained in the Second Supplementary Report issued in February 2002, are able to satisfy the requirement of establishing explicitly that imports covered by the measure satisfy the conditions of Articles 2.1 and 4.2." (However, because the requirement must be fulfilled before the application of the safeguard measure, an explanation provided after the start of the application of the safeguard measure could not be used.) (Paras. 10.592-593)

In addition, the Panel recalled that the requirement of parallelism is that the competent authorities must establish *explicitly* that imports covered by the safeguard measure satisfy the conditions for its application, and that this "implies that the competent authorities must provide a reasoned and adequate explanation of how the facts support their determination." In this regard, it noted the Appellate Body's clarification in paragraph 194 of *U.S. - Line Pipe Safeguards* that, "to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous." (Para. 10.595)

Finally, the Panel addressed the argument that any excluded imports should be considered an "other factor" in the sense of Article 4.2(b). In response, the Panel emphasized that "it [is] necessary ... to account for the fact that excluded imports may have some injurious impact on the domestic industry." (Paras. 10.597-598)

The Panel then examined the ten separate safeguard measures at issue here. For each one, it examined the ITC's reasoning in relation to the parallelism issue, and then considered whether this reasoning justified the measure imposed. (The Panel's analysis for eight of these measures was nearly identical. As a result, we address these eight measures as a group. We then address the other two measures jointly as well.)

Measures applying to CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod

With regard to the findings for each of these eight measures, the Panel's analysis proceeded as follows. First, for most of the measures, the Panel began by noting that the ITC's Second Supplementary Report states "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis" and that the "exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners." The Panel then quoted extensively from the sections of the Report which served as the basis for the ITC's reasoning on this issue, and it noted the ITC's conclusions (which were similar for all of the eight measures): "Consequently, the same considerations that led us to conclude that increased imports of [the product at issue] are a substantial cause [or threat thereof] of serious injury ... are also applicable to increased imports of [the product at issue] from all sources other than Canada and Mexico." (Paras. 10.599, 10.624, 10.634, 10.654, 10.661, 10.671) For two of the measures, the conclusion differed slightly, stating: "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated" and "our injury analysis would not be changed in any way by [the] exclusion [of Canadian and Mexican imports]." (Paras. 10.644-645,10.693-694)

According to the Panel, the issue is "whether the competent authorities ... have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards." (Paras. 10.601, 10.626, 10.636, 10.648, 10.656, 10.663, 10.673, 10.696)

Referring to the relevant portions of the ITC determinations discussed above, the Panel noted "two legal flaws" in the ITC's findings, which caused the Panel to conclude that the determinations do not "establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure." (Para. 10.603, 10.628, 10.638, 10.649, 10.657, 10.664, 10.674)

First, with regard to the question of whether imports from non-NAFTA sources cause serious injury, the ITC had found that, similar to its analysis of all imports, non-NAFTA imports increased and that the average unit values of non-NAFTA imports declined. Nonetheless, according to the Panel, the causation requirement was not satisfied for certain products. In particular, it explained that one cannot conclude that the fact that *all* imports and *non-NAFTA* imports have these same characteristics (*i.e.*, increased imports and decline in average unit values) means that they have "identical effects," particularly because *non-NAFTA imports* are, "at least in quantity, less than *all imports*." (emphasis added) Thus, due to the smaller amount of imports to be considered, *i.e.*, total imports after excluding Canadian and Mexican imports, the Panel concluded that the United States' explanation does not address the possibility that, unlike all imports, non-NAFTA imports are *not* a cause of serious injury in the sense of having a genuine and substantial relationship of cause and effect. (Para. 10.603, 10.650, 10.657, 10.664-667, 10.674-677)

In addition, it said, the requirement of non-attribution was not satisfied for certain products. The obligation of non-attribution, it said, "comprises the obligation to separate and distinguish the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury." However, it said, "the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors." It concluded by stating that the competent authority "is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury." (Paras. 10.604-606, 10.628-630, 10.638-640, 10.664-667, 10.674-677) (On appeal, the Appellate Body upheld the Panel's findings in this regard. *See DSC for U.S. - Steel Safeguards (AB).*)

Finally, in the context of its examination of the measure on stainless steel rod, the Panel noted that it was "unable to identify in the statements [at issue] the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards." (Para. 10.697) (On appeal, the Appellate Body upheld the Panel's findings in this regard. *See DSC for U.S. - Steel Safeguards (AB).*)

Second, the Panel noted that imports from Israel and Jordan were also excluded from the measure. Accordingly, imports from sources covered by the measure are not "non-NAFTA imports," as stated in the Report, but imports other than those from Canada, Mexico, Israel and Jordan. With regard to "such imports," the Panel said, the ITC did not establish explicitly that they satisfied the requirements of Article 2.1. While imports from Israel and Jordan may have been so small that they could not affect the

ITC's findings, the Panel explained, an explicit finding is nonetheless required that such imports are not included in the determination of causation. (Paras. 10.607-608, 10.631-632, 10.641-642, 10.651-652, 10.658-659, 10.668-669, 10.678-679, 10.698)

On this basis, the Panel concluded that the United States acted inconsistently with the parallelism requirement under Safeguards Agreement Articles 2 and 4 by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure. (Paras. 10.609, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.699) (On appeal, the Appellate Body upheld the Panel's conclusions with respect to a violation of the "parallelism" requirement. *See DSC for U.S. - Steel Safeguards (AB).*)

Measures applying to tin mill products and stainless steel wire

With regard to tin mill products and stainless steel wire, the complainants argued that the ITC's determination "includes all imports," and that neither the initial ITC Report nor the Second Supplementary Report establishes explicitly that imports from sources covered by the measure satisfy the conditions of Safeguards Agreement Articles 2.1 and 4.2. In response, the United States contended that, "when performing the analysis of all imports, Commissioner Miller made the necessary findings on non-NAFTA imports of tin mill products and Commissioner Bragg on non-NAFTA imports of CCFRS, comprising tin mill products"; and that "when performing the analysis of all imports, Commissioners Bragg and Koplan made the necessary findings on non-NAFTA imports of stainless steel wire." (Paras. 10.610-611, 10.681-682)

The Panel then noted that the safeguard measures on tin mill products and stainless steel wire *exclude* imports from Canada, Mexico, Israel and Jordan, whereas the determination made by the ITC "covered imports from all sources." According to the Panel, the issue here is "whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure" as set out in Safeguards Agreement Article 2.1 and elaborated in Article 4.2. (Paras. 10.612, 10.683)

With regard to Commissioner Bragg's (and Devaney's) findings for tin mill products and stainless steel wire, the Panel noted that these findings were made on "broader" categories of products, of which tin mill products and stainless steel wire were one part. As a result, the Panel stated that findings on a product category *other than* tin mill products or stainless steel wire cannot support a measure relating to tin mill products or stainless steel wire as a separate product category, unless there is a reasoned and adequate explanation "relating the two product categories." Finding no such explanation, the Panel concluded that the findings here do not meet the requirements of parallelism in relation to tin mill and stainless steel wire products. (Paras. 10.612-615, 10.684-685)

As to Commissioner Miller's findings on tin mill products, the reasoning was very similar to that for the eight product groups described above. Commissioner Miller examined imports from Canada and Mexico, and found that the same conclusion on injury would have been reached had these imports been excluded. In addition, she found that imports from Israel, Jordan and certain developing countries benefiting from trade preferences were "small and sporadic," and therefore not a substantial cause of serious injury or threat thereof. (Paras. 10.616-617)

The Panel concluded that these statements by Commissioner Miller do not satisfy the parallelism requirement. In particular, the Panel said that it was "unable to identify in these statements any finding

that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards." According to the Panel, "none of the footnotes relied upon by the United States addresses the consequences of excluding imports from Canada, Mexico, Israel and Jordan." Rather, "[t]hey only address the exclusion of imports from one Member, respectively." In addition, the Panel said, "these findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same." While it may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors, the Panel emphasized that "the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same." Thus, it said, "a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-Canadian sources and serious injury." (Paras. 10.619-621) (On appeal, the Appellate Body upheld the Panel's findings in this regard. *See DSC for U.S. - Steel Safeguards (AB).*)

Furthermore, while imports from Mexico, Israel and Jordan may have been small, it is still required that the competent authorities actually express the findings required under parallelism with regard to increased imports. For this finding, the Panel said, it is not sufficient to conclude that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. While it is true that if imports from an excluded source were "small and sporadic," "(virtually) non-existent" or "miniscule," it is "very possible" that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. However, the Panel said, this "still needs to be established explicitly and supported with a reasoned and adequate explanation." (Para. 10.622)

With regard to Commissioner Koplan's findings on stainless steel wire, this Commissioner concluded that "increased imports from all sources other than Canada and Mexico are a substantial cause of the threat of serious injury to the domestic industry." In this regard, he noted: "Imports of stainless steel wire from Canada and Mexico accounted for a small and decreasing share of domestic apparent consumption over the period of investigation." As a result, he stated: "the conclusions I have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated." In addition, the ITC's Second Supplementary Report states that exclusion of imports from Israel and Jordan "would not change the conclusions of the Commission or of individual Commissioners." (Paras. 10.686-687)

The Panel concluded that these statements do not establish explicitly, with a reasoned and adequate explanation, that increased imports from sources other than Canada, Mexico, Israel and Jordan, alone, satisfy the requirements of Safeguards Agreement Article 2.1 as elaborated in Article 4.2. It noted that the findings relied upon by the United States "do not take account of the portion of the threat of serious injury caused by NAFTA imports" and do not establish a genuine and substantial relationship of cause and effect between non-NAFTA imports and the threat of serious injury in the light of the threat attributable to other factors. Rather, the Panel said, "[t]hey examine an increase in imports merely in a rudimentary fashion and otherwise focus on market share developments before stating that the conclusions made concerning the effects of increased imports are equally applicable even when NAFTA imports are excluded." (On appeal, the Appellate Body upheld the Panel's findings in this regard. *See DSC for U.S. - Steel Safeguards (AB).*) In addition, the Panel noted that Israel and Jordan were also excluded from the measure. Accordingly, imports from sources covered by the measure are not merely "non-NAFTA imports," but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the Panel said, the ITC did not establish explicitly that they satisfied the requirements of Article 2.1. While imports from Israel and Jordan may have been small, the Panel noted,

an explicit finding is nonetheless required that such imports are not included in the determination of causation. (Paras. 10.688-691)

On this basis, the Panel concluded that the United States acted inconsistently with the parallelism requirement under Safeguards Agreement Articles 2 and 4 by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measures on tin mill products and stainless steel wire, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure. (Paras. 10.623, 10.692) (On appeal, the Appellate Body upheld the Panel's conclusions with respect to a violation of the "parallelism" requirement. *See DSC for U.S. - Steel Safeguards (AB).*)

COMMENTARY

Reasoned and Adequate Explanation - "Divergent Findings"

See DSC for U.S. - Steel Safeguards (AB).

Last Update: March 15, 2004

Appellate Body Report
United States - Definitive Safeguard Measures on Imports of Certain Steel Products
(WT/DS248.249.251.252.253.254.258.259/AB/R) / DSR 2003:VII, 3117

Participants

Appellant/Appellee: U.S.

Appellants/Appellees: Brazil, China, EC, Japan, Korea, New Zealand, Norway, Switzerland

Third Participants: Canada, Chinese Taipei, Cuba, Mexico, Thailand, Turkey, Venezuela

Timeline of Dispute

Panel Requests - EC: May 7, 2002
Japan, Korea: May 21, 2002
China: May 27, 2002
Switzerland, Norway: June 3, 2002
New Zealand: June 27, 2002
Brazil: July 18, 2002
Panels Established - EC: June 3, 2002
Japan; Korea: June 14, 2002
China; Switzerland; Norway: June 24, 2002
New Zealand: July 8, 2002
Brazil: July 29, 2002
Panel Composed: July 25, 2002
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Notice of Appeal: August 11, 2003
AB Report Circulated: November 10, 2003
Adoption: December 10, 2003

Appellate Body Division
Bacchus (Presiding Member), Abi-Saab, Lockhart

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Key Findings

- Upheld Panel's conclusion that all safeguard measures at issue in this dispute are inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 with regard to the demonstration of "unforeseen developments" because no "reasoned and adequate" explanation was provided.
- Upheld Panel's finding that investigating authority must provide a "reasoned conclusion" in relation to "unforeseen developments" for *each specific safeguard measure at issue.*
- Upheld Panel's conclusions that the safeguard measures on CCFRS, hot-rolled bar and stainless steel rod are inconsistent with Safeguards Agreement Articles 2.1 and 3.1 because the United States failed to provide a "reasoned and adequate" explanation of how the facts support the determination with respect to "increased imports."

Key Findings Continued on Next Page.

Key Findings Continued

- Upheld Panel's findings that the "parallelism" requirement had not been satisfied for the measures at issue. In this regard, Appellate Body said that the Panel "did not err by requiring the competent authority to 'account for the fact that excluded imports may have some injurious impact on the domestic industry,' to ensure that the effects of these excluded imports are not attributed to the imports included in the safeguard measure"; also stated, "rather than making *two separate determinations*—excluding either Canada and Mexico, or, alternatively, Israel and Jordan—from the underlying data on which it based its overall determination, the USITC should have, as the Panel found, provided *one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada, Israel, Jordan, and Mexico*, by themselves, satisfied the conditions for the application of a safeguard measure."
- The Panel had found that the ITC determination does not contain a "reasoned and adequate" explanation of "increased imports" for tin mill products and stainless steel wire because the explanation consists of "alternative explanations" partly departing from each other "which cannot be reconciled as a matter of substance." Appellate Body reversed the Panel's finding and stated that the Safeguards Agreement does not necessarily "preclude the possibility of providing multiple findings instead of a single finding in order to support a determination under" Articles 2.1 and 4. (For similar reasons, Appellate Body reversed Panel's findings on tin mill products and stainless steel wire under the causation requirement.)
- Found that the standard of review applied by the Panel in the context of "unforeseen developments" -- under which the Panel examined whether there was a "reasoned and adequate" explanation for the investigating authority's determination -- was appropriate.
- Stated that investigating authorities are required by Article 3.1, last sentence, to "give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form," "distinctly, or in detail."

BACKGROUND

This dispute involves safeguard measures imposed by the United States on a wide range of steel products. On June 22, 2001, the United States Trade Representative's Office ("USTR") requested that the U.S. International Trade Commission ("ITC") initiate a safeguard investigation on certain steel products. Four broad groups of products were covered by the request: certain carbon and alloy flat products; certain carbon and alloy long products; certain carbon and alloy pipe and tubes; and stainless steel and alloy tool steel products. (A number of products from within these groups were excluded.) The ITC initiated an investigation on June 28, 2001.

To collect data, the ITC split the four broad product categories into 33 "product classes," made up of the following: seven classes of carbon and alloy flat products; ten carbon and alloy long products; five carbon and alloy pipe and tube products; and 11 stainless steel and alloy tool steel products. From these 33 "product sub-categories" for which data had been collected, the ITC defined 27 separate "domestic industries," made up of: three domestic industries producing carbon and alloy flat products; ten domestic industries producing carbon and alloy long products; four domestic industries producing carbon and alloy pipe and tube; and ten domestic industries producing stainless steel products.

On October 22, 2001, the ITC voted on injury and made negative determinations for 15 product groups; affirmative injury determinations for eight product groups; and "divided" determinations for four product groups.

On December 19, 2001, after public comments had been received and hearings held, the ITC made its remedy recommendations, together with its injury determinations, in a report to the U.S. President (the "ITC report"). For the eight products for which affirmative injury determinations had been made, the ITC recommended a four-year program of tariffs and tariff-rate quotas. With respect to Canadian and Mexican imports, this remedy was to be applied only to certain products but not others. In addition, no remedy was to apply to products from Israel, Jordan, or the beneficiaries of the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act. Certain sub-product groups from with these eight products were also excluded.

On January 3, 2002, USTR requested "additional information" from the ITC on: (i) unforeseen developments; (ii) economic analysis of remedy options; and (iii) "injury for imports from all sources other than Canada and Mexico for the products for which the []ITC recommended the application of the remedy to Canada and/or Mexico." The ITC produced supplementary information on these issues on January 9, 2002 and February 4, 2002 (information on the first and third points was contained in the latter document, which the Panel referred to as the ITC's Second Supplementary Report.)

Under Proclamation No. 7529 of March 5, 2002, titled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products," the U.S. President imposed definitive safeguard measures on imports of certain steel products. The products subject to these measures were the eight for which the ITC reached affirmative determinations, as well as two of the four products for which the ITC reached "divided" determinations. The Proclamation lists 11 distinct safeguard measures applicable to 15 steel products, effective as of March 20, 2002. (The U.S. Customs Service published a notice indicating that the deposit of estimated duties on imports would be deferred until April 19, 2002.)

On the basis of the ITC's Second Supplementary Report, the President decided to exclude imports from Canada, Mexico, Israel and Jordan from the application of all of the safeguard measures. Imports from developing country Members of the WTO whose share of total imports "allegedly [did] not exceed" 3% individually and 9% collectively were also exempted. Finally, the Proclamation provided for additional product exclusions, and various other products were subsequently excluded by USTR as well.

(Panel reports, paras. 1.1-47, 10.5-7; AB report, paras. 12-13)

The complainants made a number of claims that these safeguard measures violated WTO rules, under both the Safeguards Agreement and GATT Article XIX. In this regard, they referred, *inter alia*, to the issues of: unforeseen developments, causation, increased imports and parallelism (a number of claims on other issues under the safeguards provisions -- such as serious injury, application of the measure and the developing country provisions -- were not considered due to judicial economy). The measures considered were those related to the following ten products: certain carbon flat-rolled steel (CCFRS); tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; fittings, flanges and tool joints (FFTJ); stainless steel bar; stainless steel wire; and stainless steel rod. (In addition, claims were made under GATT Articles I, X:3(a), XIII, certain provisions of XIX, and XXIV, but these claims were not examined due to judicial economy.)

The Panel found a number of violations: it found that the "unforeseen developments" requirement had not been met for any of the measures; that the causation requirement had not been met for nine of the measures; that the "parallelism" requirement had not been met for any of the measures; and that the "increased imports" requirement had not been met for five of the measures. On appeal, the United States challenged all of these findings of violation, and also alleged that certain of the Panel's findings were inconsistent with DSU Articles 11 and 12.7. (In addition, the complaining parties filed "other appellant's" submissions that contained "conditional appeals" on certain issues, but the Appellate

Body did not address these appeals, either because the relevant "conditions" had not been met or for reasons of judicial economy.)

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Amicus Submission

The Appellate Body received an *amicus curiae* brief from the American Institute for International Steel. The European Communities requested the Appellate Body to inform the parties whether the Appellate Body intended to accept and take account of the *amicus curiae* brief; Brazil requested that the brief be disregarded. The Appellate Body responded to these requests by stating that a determination on whether it would accept the brief or take account of it would be made after the Division had considered all submissions by the participants in this appeal, including submissions at the oral hearing. (Paras. 9-10)

At the oral hearing, Brazil requested that the Appellate Body disregard the *amicus curiae* brief "for legal and systemic concerns." Similarly, Mexico stated at the oral hearing that it opposed the acceptance of the brief, and Cuba and Thailand agreed that the brief should be disregarded. In response, the Appellate Body stated the following in its report: "We note that the brief was directed primarily to a question that was not part of any of the claims. We did not find the brief to be of assistance in deciding this appeal." (Para. 268)

Completing the Analysis

In the context of the findings on "increased imports" for tin mill products and stainless steel wire, the Appellate Body reversed the Panel's findings. After doing so, the Appellate Body considered whether it would be appropriate to "complete the analysis" for this issue. (Para. 430)

The Appellate Body noted that in past appeals, it had completed the legal analysis "with a view to facilitating the prompt settlement of disputes." In this case, however, the Appellate Body said that based on its findings under other GATT and Safeguards Agreement provisions, "the Panel's finding that the safeguard measures applied to tin mill products and stainless steel wire are both 'deprived of a legal basis' remains undisturbed." As a result, the Appellate Body found it unnecessary to complete the analysis and determine whether the ITC report provided a "reasoned and adequate" explanation that imports of tin mill products and stainless steel wire had "increased" within the meaning of Article 2.1. (Para. 431)

Similarly, in the context of "causation," in light of its earlier findings that all ten safeguard measures are inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Articles 2.1, 3.1 and 4.2, the Appellate Body concluded, "it is not necessary, for purposes of resolving this dispute, to make further rulings on causation related to tin mill products and stainless steel wire." (Para. 493)

SUBSTANTIVE ISSUES

GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 - Unforeseen Developments

The Panel found a violation of GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 based on the ITC's failure to "demonstrate, through a reasoned and adequate explanation, that 'unforeseen developments' had *resulted* in increased imports of *each of the products* on which the United States imposed safeguard measures ... ." (Para. 269) On appeal, the Appellate Body addressed several U.S.

arguments relating to this finding, as follows: (1) arguments relating to the Panel's identification and application of the appropriate standard of review for claims arising under GATT Article XIX; (2) the appropriate interpretation of Safeguards Agreement Article 3.1; (3) whether GATT Article XIX:1(a) "requires a demonstration that 'unforeseen developments' *resulted* in increased imports for *each specific* safeguard measure"; and (4) whether, in the context of unforeseen developments, the Panel was "required" to consider certain data from other sections of the ITC's report. Each issue is addressed separately below.

Appropriate Standard of Review

In setting out its standard of review relating to the determination of "unforeseen developments," the Panel cited to the Appellate Body reports in *Argentina - Footwear Safeguards* and *U.S. - Lamb Safeguards* and then stated, in paragraph 10.38: "the Panel must examine whether the United States demonstrated in its published report, *through a reasoned and adequate explanation*, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers." (Para. 273, emphasis in original) Because the Panel had derived this standard from earlier cases dealing with Safeguards Agreement Articles 2 and 4, and emphasizing the differences between the obligations contained in those provisions and GATT Article XIX, the United States argued that the "reasoned and adequate explanation test" is "inappropriate" for claims arising under Article XIX. (Para. 274)

The Appellate Body rejected the U.S. argument, on the following basis. First, given the Appellate Body's past statement that GATT Article XIX and the Safeguards Agreement must be read as an "inseparable package of rights and disciplines," it said that the U.S. call for a separate and different standard is "unfounded." In this regard, it referred to its earlier discussions of the standard of review under Safeguards Agreement Article 4.2(a) in paragraph 103 of *U.S. - Lamb Safeguards* and paragraph 217 of *U.S. - Line Pipe Safeguards*, and it said that those cases "did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 ... ." Thus, it stated, "[w]e see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994." It continued, citing paragraph 76 of *U.S. - Lamb Safeguards*, "the existence of 'unforeseen developments' is a 'pertinent issue of fact and law' under Article 3.1, and 'it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments." Moreover, it said that the U.S. argument is inconsistent with the "objective assessment" requirement of DSU Article 11. In particular, the Appellate Body stated, "[w]e do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on 'unforeseen developments.'" (Paras. 275-279) **Thus, the Appellate Body concluded that the Panel "applied the proper standard of review in determining how it should assess the matter before it under Article XIX of the GATT 1994."** (Para. 280)

Interpretation of Safeguards Agreement Article 3.1

Safeguards Agreement Article 3.1 states, in relevant part:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

According to the United States, the key consideration under this provision is whether the authorities present a "logical basis" for their conclusions. That is, the United States argued, "the Safeguards Agreement does not explicitly require an 'explanation,'" but rather it merely implies an explanation only

to the extent that it requires "reasoned conclusions on all pertinent issues of fact and law." During questioning from the Appellate Body, the United States affirmed its view that it is possible to have "a 'reasoned conclusion' without a 'reasoned and adequate explanation.'" (Paras. 282-285)

The Appellate Body expressed its "misgivings" about the U.S. approach. Rather than focusing on the term "reasoned," as did the United States, the Appellate Body said that an appropriate interpretation would examine the ordinary meaning of "all of the words" in Article 3.1. Examining dictionary definitions of the various terms in the provision, the Panel paraphrased the relevant portion of Article 3.1 as follows: "the competent authorities are required ... to 'give an account of' a 'judgement or statement which is reached in a connected or logical manner or expressed in a logical form,' 'distinctly, or in detail.'" (Paras. 286-287) Moreover, as context, the Appellate Body noted that Safeguards Agreement Article 4.2(c) requires prompt publication of a detailed analysis "in accordance with the provisions of Article 3." Given that Article 4.2(c) is an elaboration of Article 3, and given that "unforeseen developments" in Article XIX is one of the "pertinent issues of fact and law" to which the last sentence of Article 3.1 refers, the Appellate Body concluded that Article 4.2(c) also applies to the competent authorities' demonstration of "unforeseen developments." (Paras. 289-290)

On this basis, the Appellate Body concluded that the U.S. interpretation, requiring only a presentation of a "logical basis," does not meet the requirements of Article 3.1. (Para. 291)

The Panel's Findings on "Unforeseen Developments" under Article 3.1

In the context of its analysis of the ITC's determination on "unforeseen developments," the Panel made the following statements in paragraph 10.115: "The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate." The United States challenged this finding, arguing that there is no basis in the Safeguards Agreement for "finding that 'timing' or 'extent' are relevant to whether the competent authorities' explanations are reasoned and adequate." (Para. 293)

The Appellate Body rejected the U.S. challenge, as follows. First, the Appellate Body noted that the United States understood the Panel's reference to the term "extent" to mean that the competent authority's explanation should have been a certain "length." The Appellate Body disagreed, explaining that the Panel was simply articulating its view that the ITC failed to provide a reasoned and adequate explanation. (Para. 294) Similarly, while the United States understood the Panel to be requiring an explanation in a certain "form" (*i.e.*, with references to particular data or reasoning), the Appellate Body disagreed that the Panel was setting out any such requirement, and considered, rather, that the Panel was simply assessing whether the ITC had provided a reasoned and adequate explanation. (Para. 295) **The Appellate Body concluded that the Panel's approach was consistent with Article 3.1, as well as with the Panel's standard of review.** It emphasized that the "reasoned conclusions," "detailed analysis," and "demonstration of the relevance of the factors examined" as contained in a competent authority's report, "are the only bases on which a panel may assess whether a competent authority has complied with its obligations" under the Safeguards Agreement and GATT Article XIX:1(a). This, it said, "is all the more reason why they must be made explicit by a competent authority." (Paras. 296-299)

In this context, in light of the Panel's findings that the ITC report failed to provide a "reasoned and adequate explanation," the United States also argued that the Panel should only have found violations of Article 3.1 and not also of Articles 2 and 4. The Appellate Body disagreed with this argument, citing its statement in paragraph 107 of *U.S. - Lamb Safeguards* that a conclusion by a panel that a competent authority failed to provide a reasoned or adequate explanation for its determination is also a conclusion

that the determination is inconsistent with the specific requirements of the relevant Safeguards Agreement provision. Moreover, it said, given that a panel may not conduct a *de novo* review of the evidence before the competent authority, "it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance ... ." (Paras. 301-303)

Unforeseen Developments in Relation to Each of the Safeguard Measures at Issue

In paragraph 10.44 of its reports, the Panel found that GATT Article XIX requires a demonstration that the unforeseen developments resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue. (Para. 306) Because the Panel found that the ITC's report failed to link the unforeseen developments to increased imports, it found a violation of GATT Article XIX:1(a) and Safeguards Agreement Article 3.1. In making this finding, the Panel emphasized the ITC's failure to link the unforeseen developments to *each specific product that was subject to a safeguard measure.* (Paras. 307-311) The United States appealed this finding, arguing that Article XIX "does not specify a particular type of analysis, nor does it require any differentiation by the competent authority of the impact of various 'unforeseen developments' on *each* product that is subject to the relevant safeguard measures." (Para. 312)

The Appellate Body rejected the U.S. challenge. It began its analysis by examining the text of Article XIX:1(a), which states:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of *such product*, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Emphasizing the phrase "such product," the Appellate Body found that Article XIX:1(a) "clearly requires that safeguard measures be applied to the product that 'is being imported in such increased quantities ... ." It elaborated, stating, "*any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged 'unforeseen developments' *result* in increased imports of that *specific product* ('such product')." Thus, the Appellate Body said that it agreed with the Panel that competent authorities are required to demonstrate that the unforeseen developments have resulted in increased imports for "each safeguard measure at issue." It continued, "when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority." (Paras. 314-319)

In any event, the United States argued that the Panel was not entitled to make an "across-the-board" dismissal of the ITC's explanations simply because the ITC's analysis applied to a broad group of product categories. The Appellate Body, however, disagreed with this characterization of the Panel's findings. In particular, the Appellate Body noted the Panel's conclusion in paragraph 10.145 that the "complexity" of the unforeseen developments cited to by the ITC "called for a more elaborate demonstration and supporting data than that provided ... ." (Paras. 320-322) **As a result, and in light of the fact that the ITC did not provide an explanation for each specific safeguard measure at issue, the Appellate Body found "no error" in the Panel's conclusions that the application of each of those**

safeguard measures was inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Article 3.1. (Para. 323)

Alleged Failure to "Link" Certain Data

Before the Panel, the United States had argued that, in various sections of the ITC report, particularly those dealing with increased imports, there were data to support the ITC's finding regarding "unforeseen developments." The Panel had found that while the data referred to by the United States "could" have been used to explain how unforeseen developments resulted in increased imports, the ITC never did so. The United States acknowledged that the ITC did not refer to these data in connection with "unforeseen developments," but, nevertheless, it argued that the Panel "was *required* to consider [those data] in evaluating whether the unforeseen developments finding was consistent with Article 3.1." (Paras. 324-325)

The Appellate Body rejected the U.S. challenge. Recalling that under Article 3.1 it was for the ITC to provide a "reasoned conclusion" on "unforeseen developments," the Appellate Body explained that "[a] 'reasoned conclusion' is not one where the conclusion does not even refer to the facts that may support that conclusion." It cautioned, "it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report." The Appellate Body distinguished this situation from that in paragraphs 161-163 of *EC - Pipe Fittings* where, according to the United States, despite an investigating authority's failure to mention a particular factor, "the Appellate Body determined, by virtue of a close reading of the remainder of the report, that the investigating authority had in fact 'considered' the enumerated factor." In this regard, the Appellate Body emphasized that whereas the issue in *Pipe Fittings* was whether the competent authority had "considered" all of the relevant data, the issue here was whether the ITC used the data to "explain" how "unforeseen developments" resulted in increased imports. Here, the text of the ITC's report corresponding to the data at issue was totally unrelated to unforeseen developments. The Appellate Body then reiterated its earlier finding that it was for the ITC and not the Panel to provide "reasoned conclusions." (Paras. 326-329)

On this basis, the Appellate Body rejected the U.S. argument that the Panel was "required to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that 'unforeseen developments' had resulted in increased imports." (Para. 329)

Safeguards Agreement Articles 2.1 and 3.1 - Increased Imports

The Panel found that the ITC had failed to provide a "reasoned and adequate" explanation of how the facts supported its determination that imports of five specific products "increased," in violation of Safeguards Agreement Article 2.1. With regard to three of these products -- CCFRS, hot-rolled bar and stainless steel rod -- the United States challenged the Panel's "general interpretation" of the "increased imports" standard, as well as its "analysis of the import data" for these three products. As to the other two products -- tin mill products and stainless steel wire -- the United States challenged the Panel's conclusion that the ITC's determination was in error because it was based on "two sets of explanations" that, according to the Panel, "could not be reconciled." (Paras. 332-334) These issues are addressed separately below.

CCFRS, Hot-Rolled Bar and Stainless Steel Rod - Legal Standard for "Increased Imports"

Safeguards Agreement Article 2.1 provides that a safeguard measure may be applied "only" if the Member has determined that the product at issue "is being imported ... in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry ... ." GATT Article XIX:1(a) contains similar language. At issue

here was the legal standard relied on by the Panel to determine whether there were "increased imports." In this regard, the Panel had stated: "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." (Paras. 337-341)

The United States claimed that this finding was in error. In particular, the United States argued that the Appellate Body's statement in paragraph 131 of *Argentina - Footwear Safeguards* that the "increase in imports must have been recent enough, sudden enough, sharp enough and significant enough ... to cause or threaten to cause serious injury" was a statement about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement," and that "whether an increase in imports has been recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities ... proceed with the remainder of their analysis (i.e., with their consideration of serious injury/threat and causation)." Thus, according to the United States, the analysis of the "recent, sudden, sharp and significant" nature of the increase need not form part of the evaluation of whether imports have "increased," but rather will only be relevant for determining whether serious injury/threat and causation exist. In terms of the issue of whether imports have "increased," the United States contended that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time." (Para. 341)

In addressing this issue, the Appellate Body said it would examine "whether there is any *threshold*—qualitative or quantitative—to allow a finding by a competent authority on the existence of 'such increased quantities' within the meaning of Article XIX:1(a) and Article 2.1, or whether, as the United States argues, the requirement is 'that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time.'" (Para. 344)

The Appellate Body then stated that it had examined "essentially the same issue" in paragraph 131 of *Argentina - Footwear Safeguards*, where it had stated, in part: "[GATT Article XIX:1(a) and Safeguards Agreement Article 2.1 require] that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury.'" The Appellate Body said that it "reaffirm[ed]" this finding here. Elaborating on this point, the Appellate Body said that in *Footwear Safeguards*, it had "underlined the importance of reading the requirement of 'such increased quantities' in the context in which it appears, which includes the words 'to cause or threaten to cause serious injury.'" Read in that context, the Appellate Body said, it is apparent that "there must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure." Accordingly, the Appellate Body stated, "we agree with the United States that our statement in *Argentina – Footwear (EC)* that the 'increase in imports must have been recent enough, sudden enough, sharp enough and significant enough ... to cause or threaten to cause serious injury' was a statement about 'the entire investigative responsibility of the competent authorities under the Safeguards Agreement' and that '[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation).'" (Paras. 345-346)

The Appellate Body then examined the U.S. argument that because "the words recent, sudden, sharp or significant" do not appear in Article 2.1, "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time." (Para. 352)

In response, the Appellate Body recalled that it had concluded in paragraph 129 of *Argentina - Footwear Safeguards* that "the competent authorities are required to consider the *trends* in imports over

the period of investigation (rather than just comparing the end points) under Article 4.2(a)." It noted that a determination as to whether there is an increase in imports cannot be made merely by comparing the end points of the period of investigation, as "a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points." **Therefore, the Appellate Body rejected the U.S. argument that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."** (Paras. 353-356)

Finally, the Appellate Body noted that the United States argued that the Panel erred in requiring that "a finding that imports have increased ... can be made *only* when an increase evidences a certain degree of recentness, suddenness, sharpness and significance.'" The Appellate Body then said: "We understand that the United States is submitting in essence that, in so finding, the Panel established an absolute standard in the abstract, applicable irrespective of the facts of the case." (Para. 357)

Reviewing the Panel's reasoning, the Appellate Body concluded, "we do not understand the Panel to have articulated any absolute standard, in the abstract, for determining whether imports have increased within the meaning of Article XIX:1(a) and Article 2.1." Rather, the Panel had agreed with the United States "that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1." Thus, the Appellate Body concluded, "the Panel did not find that the degree of 'recentness, suddenness, sharpness and significance' had to be assessed by means of an absolute standard that, only if met, could warrant a finding of 'increased imports.'" Moreover, it agreed with the implication in the Panel's statement that this assessment is to be made on a "case-by-case basis," and is therefore not a "determination that is made in the abstract." (Paras. 358-360)

On this basis, the Appellate Body concluded, "the Panel did not require, in the abstract, that 'a finding that imports have increased ... can be made [only] when an increase evidences a certain degree of recentness, suddenness, sharpness and significance.'" Rather, "the Panel correctly relied on [the Appellate Body's] findings in *Argentina – Footwear (EC)*." (Para. 361)

CCFRS, Hot-Rolled Bar and Stainless Steel Rod - Panel's Findings for Specific Products

With this interpretation in mind, the Appellate Body then examined the U.S. appeal "as it relates specifically to 'increased imports' of CCFRS, hot-rolled bar, and stainless steel rod." The Appellate Body's conclusions for each product were very similar. (For hot-rolled bar, the Appellate Body examined the issues of increases in both "absolute imports" and "relative imports" -- the former is addressed together with the findings on CCFRS and stainless steel rod, the latter we address separately below.) The Appellate Body first quoted the Panel's findings on the issue for these three products. For each product, the Panel observed that the ITC had not explained the significance of a decrease in imports in the latest period. (Paras. 365, 378, 384) In its appeal, the United States argued that the Panel placed too much reliance on the decreases in imports in the most recent period, ignoring the increases in the earlier periods. (Para. 366, 379, 386)

The Appellate Body rejected the U.S. appeal. Examining the Panel's findings for each product, the Appellate Body found that the Panel properly concluded that the ITC had not provided a "reasoned and adequate" explanation with regard to the existence of "increased imports." (Paras. 368-375, 380-382, 387-388) In its reasoning, the Appellate Body set out a number of considerations, as follows: (1) that the Panel did not rely solely on the recent decreases, but rather found that the ITC failed to explain how the three products were imported in "increased quantities" in light of the decreases later in the period; (2) that data from the end of the period is of particular importance; (3) in every case, an explanation of how the

"trend" in imports supports the authority's finding on "increased imports" is required; (4) market share data are relevant for causation, but not for increased imports. (Paras. 369-375, 380-382, 387-388)

In addition, the Appellate Body considered the Panel's findings for hot-rolled bar in terms of a "relative" increase in imports. In this regard, the Appellate Body reviewed the Panel's findings, and noted the Panel's conclusion that: "the facts do not support a conclusion that hot-rolled bar 'is being imported in such increased quantities, ... relative to domestic production.'" (Paras. 390-394) The Appellate Body then reviewed the facts, and said that these facts "may well support" the ITC's conclusion. However, the Appellate Body noted, the issue is whether the ITC "provided an explanation in its report on whether imports increased relative to domestic production." On this point, the Appellate Body agreed with the Panel that the ITC "did not explain why, despite the decline that occurred at the end of the period of investigation, the facts nevertheless supported a determination of 'increased imports' within the meaning of Article 2.1." Thus, the Appellate Body agreed with the Panel, "albeit for different reasons, that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its determination." (Paras. 395-398)

On this basis, the Appellate Body upheld the Panel's conclusions that the application of the safeguard measures on CCFRS, hot-rolled bar and stainless steel rod is inconsistent with Safeguards Agreement Articles 2.1 and 3.1 because the United States failed to provide a reasoned and adequate explanation of how the facts support the determination with respect to "increased imports." (Para. 376, 383, 399)

Tin Mill Products and Stainless Steel Wire - "Alternative Explanations"

With regard to the measures imposed on tin mill products and stainless steel wire, the Panel found that the ITC's determination violates Safeguards Agreement Articles 2.1 and 3.1 because the ITC had failed to provide a "reasoned and adequate" explanation for the determination. In particular, the ITC's determination for each of these products was based on the affirmative findings of three (of six total) Commissioners, even though the three Commissioners did not "perform their analysis on the basis of the same like product definitions." (Different Commissioners made affirmative findings for tin mill products as compared to stainless steel wire, but the situations were otherwise the same.) Given the different like product definitions on which the Commissioners reached their decisions for each measure, the Panel considered that the Commissioners' findings "[could not] be reconciled as a matter of their substance." The Panel concluded that a WTO Member is not permitted to "base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other." (Paras. 401-402) On appeal, the United States argued that the Panel's findings were in error. The United States asserted that, for each measure, the three Commissioners' findings were combined into a "single institutional determination" that was consistent with the Safeguards Agreement. (Para. 404)

The Appellate Body first examined the issue at it relates to tin mill products, and it then applied its findings to stainless steel wire as well. In addressing this issue in relation to tin mill products, the Appellate Body first stated, "we are not persuaded that the findings of the three Commissioners '*cannot* be reconciled.'" In this regard, it said, "[w]e do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive." Here, it noted, the Panel did not "inquire into the details of the findings as they related to increased imports" and therefore the Panel "was not adequately informed as to whether the three findings were reconcilable or not." (Para. 413)

In any event, the Appellate Body stated, the Safeguards Agreement does not necessarily "preclude the possibility of providing multiple findings instead of a single finding in order to support a determination under" Articles 2.1 and 4. It continued, the Agreement "does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority." (Para. 414) The Appellate Body then stated, "these findings should *not* be read together, nor should a panel seek to 'reconcile' them." Rather, "a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, *even if only in one of the Commissioner's individual findings*." (emphasis added) Thus, in the case at hand, the Appellate Body said, "the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's 'single institutional determination' on tin mill products." (Paras. 415-416) In fact, the Appellate Body noted, the Panel "reviewed the multiple findings separately in the context of parallelism." (Para. 417)

With regard to stainless steel wire, the Appellate Body said that the facts and the findings of the Panel, "are, for all relevant purposes, identical to those before us in the context of tin mill products." Therefore, the Appellate Body found, its reasoning with respect to tin mill products "is applicable, *mutatis mutandis*, also to stainless steel wire." (Para. 429)

On this basis, the Appellate Body reversed the Panel's findings that the ITC report does not contain a "reasoned and adequate" explanation of how the facts support the determinations of "increased imports" for tin mill products and stainless steel wire because, according to the Panel, the explanations consist of "alternative explanations" partly departing from each other which cannot be reconciled as a matter of substance. (Paras. 419, 429) As noted above in the section on Procedural and Systemic issues, the Appellate Body decided it was unnecessary to complete the analysis on this issue.

Safeguards Agreement Articles 2 and 4 - Parallelism

As noted by the Appellate Body, in the safeguards investigation at issue, the United States excluded imports from Canada and Mexico, as well as those from Israel and Jordan, from the scope of application of the safeguard measures imposed on all of the ten steel products. The Panel found that these safeguard measures were therefore inconsistent with Safeguards Agreement Articles 2.1 and 4.2 "because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the application of these measures [*i.e.*, countries other than Canada, Israel, Jordan and Mexico], *alone*, satisfied the conditions for the application of a safeguard measure." As a result, the United States had acted inconsistently with the "parallelism" requirement. (Para. 433)

On appeal, the United States challenged these findings. In particular, the United States argued that the Panel "asserted two general conclusions in its introductory analytical section that served as the basis for its product-specific analyses." According to the United States, the first of these two "general conclusions" is a requirement to "account for the fact that excluded imports may have some injurious impact on the domestic industry," which the United States referred to as the "excluded sources accounting requirement." The second of these two "general conclusions" is a requirement to establish "explicitly" that imports from included sources satisfy the conditions for the imposition of a safeguard measure, a standard which the United States argued had been misconstrued by the Panel to require the competent authority to make "redundant findings." (Para. 437)

In considering these issues, the Appellate Body first reviewed its prior jurisprudence on Safeguards Agreement Article 2 and the "parallelism" requirement. It noted that it was undisputed that

the ITC considered *all imports* as part of its injury investigation, but excluded imports from Canada, Israel, Jordan and Mexico from the application of the safeguard measures. Thus, the Appellate Body said, based on the prior case law on this issue, it was incumbent on the ITC to justify this "gap" by "establishing explicitly" in its report that imports from countries covered by the safeguard measures -- *i.e.*, countries other than Canada, Israel, Jordan and Mexico -- "satisfy, alone, and in and of themselves," the conditions for application of the safeguard measures. (Paras. 440-444)

The Appellate Body then considered the specific points of the U.S. appeal, as follows.

The Effect of Imports from "Excluded Sources"

The United States claimed that the Panel erred in concluding that the competent authorities are required to account for the fact that excluded imports may have some injurious impact on the domestic industry. In particular, while acknowledging that under its understanding of the *U.S. - Line Pipe Safeguards* decision authorities are required to "focus" on only non-excluded sources, the United States argued that the Panel went "further" and established a requirement for a separate analysis of imports from sources not subject to the safeguards measure, according to which the competent authority must "affirmatively account for the effect of such imports." (Para. 446)

In addressing the U.S. appeal, the Appellate Body first noted that the United States agreed that the "Appellate Body has read th[e] language ['such product ... being imported' in Article 2.1] to refer to only *imports from sources which are subject to a safeguards measure.*" Furthermore, it stated that the United States also agreed that Article 2.1 requires the competent authority to "establish explicitly that increased imports from [sources included in the safeguard measure] alone" satisfy the conditions for a safeguard measure. (Paras. 447-448)

Next, the Appellate Body referred to the "non-attribution" requirement of Article 4.2(b), and stated that the phrase "increased imports" in Articles 4.2(a) and 4.2(b) "must ... be read as referring to the same set of imports envisaged in Article 2.1, that is, *to imports included in the safeguard measure.*" Consequently, it said, "imports *excluded* from the application of the safeguard measure must be considered a factor 'other than increased imports' within the meaning of Article 4.2(b)," and the possible injurious effects that these excluded imports may have on the domestic industry must not, pursuant to Article 4.2(b), be attributed to imports included in the safeguard measure. (Para. 450)

In order to fulfill the "non-attribution" requirement, the Appellate Body said, an investigating authority must "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports." To provide this explanation, the authority "must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports* -- which subsume 'excluded imports' -- to the imports included in the measure." (Paras. 451-452) As a result, the Appellate Body said, the Panel "did not err by requiring the competent authority to 'account for the fact that excluded imports may have some injurious impact on the domestic industry,' to ensure that the effects of these excluded imports are not attributed to the imports included in the safeguard measure." Thus, the Appellate Body concluded, "the Panel correctly interpreted the causation and non-attribution requirements under Articles 2 and 4 of the *Agreement on Safeguards*." (Para. 453)

Noting that the United States acknowledged that the ITC did not comply with this requirement, the Appellate Body saw "no reason to disturb the Panel's findings for those nine product categories for which the Panel found that the United States did not account for the effect of imports excluded from the safeguard measures." **Therefore, the Appellate Body upheld the Panel's findings that the parallelism requirement had not been satisfied with respect to these nine products (CCFRS, tin mill products,**

hot-rolled bar, cold-finished bar, rebar, FFTJ, welded pipe, stainless steel bar and stainless steel wire). (Paras. 455-456)

Conclusions with Respect to Stainless Steel Rod

With respect to the safeguard measure on stainless steel rod, the Panel's findings on the issue of "parallelism" were slightly different than for the other nine products. The Panel found a violation because it was "unable to identify ... the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards." The Panel also held that even where imports are very low, the authorities must "actually express the findings required under parallelism" with respect to each of the excluded countries. (Paras. 458-459) On appeal, the United States claimed that the Panel "misconstrued" the requirement that findings be "explicit," noting that the ITC's reasoning with respect to Israel and Jordan was "complete, clear, and unambiguous," in that "imports from Israel and Jordan were too small to affect the data on which the ITC relied for its conclusions." (Para. 460)

Reviewing the ITC's findings on stainless steel rod, the Appellate Body concluded that the ITC did not reach a determination on whether imports from sources included in the safeguard measure "satisfied, alone, in and of themselves" the conditions for application of a safeguard measure. Rather, the ITC made "two separate determinations" -- "one determination that the exclusion of imports from *Canada and Mexico* would not change the 'injury analysis' of the USITC, and another *separate* determination that the exclusion of imports from *Israel and Jordan* would not change the conclusions of the USITC." (Paras. 462-465) In response, the Appellate Body stated: "The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations." If this were permitted, the Appellate Body said, "a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation." Therefore, the Appellate Body concluded that "the Panel raised a valid methodological concern when it stated that 'it would ... be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan.'" (Paras. 466-467) In this regard, the Appellate Body said, "rather than making *two separate determinations*—excluding either Canada and Mexico, or, alternatively, Israel and Jordan—from the underlying data on which it based its overall determination, the USITC should have, as the Panel found, provided *one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada, Israel, Jordan, and Mexico*, by themselves, satisfied the conditions for the application of a safeguard measure." (Para. 468)

The Appellate Body further stated: "We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as extensive as in circumstances where the excluded sources account for a large proportion of total imports." Nevertheless, it said, "even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*," and that finding "must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and—as we stated above—must address imports from all covered sources, excluding *all* of the non-covered sources." The Appellate Body, therefore, disagreed with the U.S. argument that the Panel effectively required the ITC to make "redundant findings." (Paras. 472-473)

On this basis, the Appellate Body upheld the Panel's finding with respect to stainless steel rod that the United States acted inconsistently with Safeguards Agreement Articles 2.1 and 4.2 because it failed to establish explicitly, with a reasoned and adequate explanation, that imports

included in the safeguard measure satisfy, *alone*, the requirements for the imposition of a safeguard measure. (Para. 474)

Safeguards Agreement Articles 2.1, 3.1 and 4.2(b) - Causation and Non-Attribution

The Panel found that for nine of the product categories subject to safeguard measures, the ITC had failed to provide a "reasoned and adequate" explanation demonstrating a "causal link" between increased imports and serious injury. (Para. 475) For seven of these product categories -- CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ and stainless steel bar -- the Panel found that the ITC's "causal link" determination was inconsistent with Safeguards Agreements Articles 2.1, 3.1 and 4.2(b). For the other two product categories -- tin mill products and stainless steel wire -- the Panel found that the ITC report did not contain a "reasoned and adequate" explanation under Articles 2.1, 3.1 and 4.2(h) because the determination was based on "alternative explanations" that "could not be reconciled." (Paras. 476-477) The United States appealed both findings.

On appeal, the Appellate Body first addressed the findings related to the seven product categories. In this regard, the Appellate Body concluded that because it had already found the measures to be inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Articles 2.1, 3.1 and 4.2, "it is unnecessary, for the purposes of resolving this dispute, to rule on whether the Panel was correct in finding that the United States also acted inconsistently with Articles 2.1 and 4.2" in relation to the causation requirement. **Therefore, the Appellate Body "declined to rule on the issue of causation" for these seven product categories, and it stated: "we neither reverse nor uphold [the Panel's] findings [on this issue]."** (Para. 483)

Turning to the findings on tin mill products and stainless steel wire, the Appellate Body recalled that the Panel based its causation findings on the conclusion that "the United States was not entitled to apply safeguard measures to imports of those two products because the relevant determinations made by the USITC were supported by findings of different Commissioners that could not be reconciled." The Appellate Body noted, in this regard, "[w]e have already reversed those findings [in the context of the findings on 'increased imports'"]. **Accordingly, the Appellate Body reversed the Panel's findings on causation in relation to tin mill products and stainless steel wire.** (Paras. 492-493)

The Appellate Body emphasized that it was not finding that a causal link has been established with respect to tin mill products and stainless steel wire, but rather "that the reasoning used by the Panel to find that the USITC failed to establish a causal link for these products is flawed, and does not support the Panel's conclusion that no such link was established." Thus, it made no finding on whether or not a causal link was established by the ITC for these products. In light of the findings that all ten safeguard measures are inconsistent with GATT Article XIX:1(a) and Safeguards Agreement Articles 2.1, 3.1 and 4.2, the Appellate Body concluded that "it is not necessary, for purposes of resolving this dispute, to make further rulings on causation related to tin mill products and stainless steel wire." (Para. 493)

DSU Article 11 - "Objective Assessment" of "Unforeseen Developments" and Causation

The United States alleged that the Panel "acted inconsistently with Article 11 of the DSU in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with GATT 1994 and the Safeguards Agreement." As stated by the Appellate Body, these U.S. arguments were "intermingled" with its arguments on the Panel's findings on "unforeseen developments" and with its arguments on the Panel's causation analysis. (Para. 494)

In addressing this issue, the Appellate Body noted: "A challenge under Article 11 of the DSU must not be vague or ambiguous," but, rather, "must be clearly articulated and substantiated with specific arguments." Such a claim "is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement." Furthermore, this claim "must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation." (Para. 498)

Applying this standard here, the Appellate Body stated, "[t]he United States' arguments on Article 11 of the DSU are mentioned only in passing in its appellant's submission," and "[n]owhere do we find a clearly articulated claim or specific arguments that would support such a claim." **The Appellate Body concluded: "In sum, the United States has not substantiated its claim that the Panel acted inconsistently with Article 11 of the DSU, and this claim must therefore fail."** (Para. 499)

DSU Article 12.7 - "Basic Rationale" in the Context of "Unforeseen Developments"

The United States argued that the Panel acted inconsistently with DSU Article 12.7 by failing to provide "the basic rationale" for its findings and conclusions in the context of its analysis of "unforeseen developments" under GATT Article XIX:1(a). In particular, the United States argued that the Panel did not articulate, "except in conclusory fashion," the reasons for finding that the ITC did not provide "reasoned conclusions" as required by Article 3.1. (Paras. 500-501)

After reviewing the Panel's reasoning, the Appellate Body stated, "it appears to us that the Panel considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged 'unforeseen developments' *resulted* in increased imports of *each* product subject to a safeguard measure." Thus, it concluded, "the Panel has sufficiently set out in its Reports the 'basic rationale' for its finding that the USITC failed to explain how, though 'plausible', the 'unforeseen developments' identified in the report in fact *resulted* in increased imports of the specific products subject to the safeguard measures at issue." (Paras. 503-504)

The United States also argued that the Panel did not explain how the ITC failed to demonstrate that the alleged "unforeseen developments" resulted in increased imports of each of the products to which the safeguard measures apply, but rather "simply assumed that the ITC's demonstration, which focused on macroeconomic events and relied on broad economic indicators, could not suffice as a demonstration for any specific measure." However, according to the Appellate Body, "the Panel did not simply *assume*, but rather clearly pointed to, a deficiency in the USITC's reasoning." It continued, "[t]he Panel reviewed the USITC's findings and found that the USITC failed to demonstrate that the 'plausible' unforeseen developments did, in fact, result in increased imports of the specific products subject to the safeguard measures at issue." As a result, the Appellate Body said, "[w]e agree with the Panel that the USITC's demonstration was insufficient, and we find no error in the Panel's explanation of that finding." (Paras. 505-506)

The Appellate Body then concluded, "we find that the Panel set out, in its Reports, a 'basic rationale' consistent with the requirements of Article 12.7 of the DSU." Accordingly, the Appellate Body rejected the U.S. claim relating to the Panel's alleged failure to provide a "basic rationale" for its finding concerning GATT Article XIX:1(a). (Para. 507)

COMMENTARY

For further reading on this dispute, see:

Alan O. Sykes, "The Persistent Puzzle of Safeguards: Lessons from the Steel Dispute," 7 JIEL 3, pp. 523-564 (2004).

Standard for "Increased Imports" under Safeguards Agreement Article 2.1

Safeguards Agreement Article 2.1 provides that a safeguard measure may be applied "only" if the imposing Member has determined that the product at issue "is being imported ... in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry ... ." GATT Article XIX:1(a) contains similar language. At issue in this case was the legal standard relied on by the Panel to determine whether the product at issue "is being imported ... in such increased quantities," or as referred to in the common shorthand, whether there are "increased imports."

The Panel had stated, in paragraph 10.167, that a determination that "imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." On appeal, the United States argued that this finding was in error, because the phrase "in such increased quantities" "simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of the period of investigation must be higher than at some unspecified earlier point in time." (Para. 23) In other words, according to the United States, the standard for determining the existence of "increased imports" is based solely on whether there is any "increase" in imports, and does not involve a consideration of the "degree of recentness, suddenness, sharpness and significance" of the increase. The reference to the "recentness, suddenness, sharpness and significance" of the increase, the United States contended, was based on the Appellate Body's findings in paragraph 131 of *Argentina - Footwear Safeguards*. However, the Appellate Body's findings, the United States argued, stand for the proposition that the "attributes of recentness, suddenness, sharpness and significance are inexorably linked to the ability of imports to cause or threaten to cause serious injury." Thus, according to the United States, the issue of whether the increase was "recent, sudden, sharp and significant" enough should be considered not as part of the "increased imports" analysis, but rather with the remainder of the investigation, that is, with the consideration of causation/injury. (Para. 25)

As we read the U.S. arguments on appeal, the United States was trying to establish the "increased imports" requirement as a narrow one, entirely separate from the causation/injury requirements. Specifically, the United States viewed the "increased imports" requirement as a narrow standard that should simply examine the trends in imports to determine whether any increase has occurred, while any relationship between "increased imports" and causation/injury should be addressed as a separate element. Thus, the United States considered that the "recent enough, sudden enough, sharp enough, and significant enough" standard should be relevant only in relation to the causation/injury analysis.

The Appellate Body discussed a number of points in response to this U.S. appeal:

- First, the Appellate Body said, "we agree with the United States that our statement in *Argentina – Footwear (EC)* that the 'increase in imports must have been recent enough, sudden enough, sharp enough and significant enough ... to cause or threaten to cause serious injury' was a statement about 'the entire investigative responsibility of the competent authorities under the Safeguards Agreement' and that '[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent

authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation).'" (Paras. 345-346)

- Second, the Appellate Body rejected the U.S. argument that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time." Rather, it said, "competent authorities are required to examine the trends in imports over the entire period of investigation." (Paras. 353-356)

- Third, the Appellate Body examined whether the Panel had set forth its standard "in the abstract," and it concluded that the Panel did not require, "in the abstract, that 'a finding that imports have increased ... can be made [only] when an increase evidences a certain degree of recentness, suddenness, sharpness and significance.'" (Paras. 357-360)

It is not clear whether these responses resolve the issue raised by the United States. The U.S. argument distinguished between the narrow view of "increased imports" stated above, and a broader view that "increased imports" is tied to the causation/injury elements, such that an "increased imports" examination will consider not just whether an increase exists, but also whether the increase was "such" as to cause or threaten to cause serious injury. However, the Appellate Body did not seem to reach any clear findings on this point, as its various statements on the issue seem to offer support for both sides of the argument. On the one hand, the first statement quoted above seems to express support for the U.S. view of a narrow "increased imports" standard, with the "recent enough, sudden enough, sharp enough, and significant enough" standard being considered under the causation/injury elements. On the other hand, the Appellate Body also rejected two other aspects of the U.S. arguments, and, ultimately, it did not reverse the specific Panel finding that was the basis for the U.S. appeal. As a result, the Appellate Body's view of the standard to be applied under the "increased imports" element is somewhat unclear.

Reasoned and Adequate Explanation - "Divergent Findings" by the ITC Commissioners

For two of the safeguard measures at issue -- related to tin mill products and stainless steel wire -- the Panel was faced with what it referred to as "divergent findings" by the ITC. Specifically, different ITC Commissioners relied on different product definitions in their analyses. With regard to tin mill products, four Commissioners considered tin mill products as a separate category, while two Commissioners considered tin mill products as part of the broader category of CCFRS. (Panel report, para. 10.191) Similarly, for stainless steel wire, four Commissioners considered stainless steel wire as a separate category, while two Commissioners considered stainless steel wire as part of a broader category of stainless steel wire and rope. (Panel report, para. 10.261) In the context of both increased imports and causation, the Panel noted that the tin mill products safeguard measure had been based on the affirmative conclusion reached by one of the four Commissioners who considered tin mill products as a separate product class (the other three reached a negative conclusion), together with the affirmative conclusion of the two Commissioners who considered tin mill products as part of the broader CCFRS category. Similarly, with stainless steel wire, the measure was based on the affirmative conclusion reached by one of the four Commissioners who considered stainless steel wire as a separate product class (the other three reached a negative conclusion), together with the affirmative conclusion of the two who considered it as part of the broader stainless steel wire and rope category.

These "divergent findings" were discussed by the Panel in relation to the claims on increased imports, causation and parallelism. The Panel's most detailed discussion was set out as part of its "increased imports" finding for tin mill products. There, the Panel concluded that these "divergent findings" could not be "reconciled." In particular, the Panel focused on the fact that the determinations were based on different product definitions. In this regard, it stated, "with regard to ... the question of

whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products," noting that "[t]he difference is that the import numbers for different product definitions will not be the same." As a result, the Panel concluded that the ITC's findings on this issue were not "reasoned and adequate." Specifically, it stated: "A reasoned and adequate explanation is not contained in a set of findings which cannot be reconciled one with another." (Panel report, paras. 10.191-200) The Panel made similar findings for increased imports in relation to stainless steel wire and also for causation with respect to both products, with brief discussions that referred back to the increased imports findings for tin mill products. (Panel report, paras. 10.261-263, 10.420-422, 10.570-572)

Similar findings were also reached in the parallelism section, although the Panel's findings were not as strongly worded. There, the Panel stated that findings on a product category *other than* tin mill products or stainless steel wire cannot support a measure relating to tin mill products or stainless steel wire as a separate product category, unless there is a reasoned and adequate explanation "relating the two product categories." Finding no such explanation, the Panel concluded that the findings of the Commissioners who examined a broader category do not meet the requirements of parallelism in relation to tin mill products and stainless steel wire. (Panel report, paras. 10.612-615, 10.684-685)

We note that the Panel's reasoning on this issue was fairly brief in each of the three sections (*i.e.*, increased imports, causation and parallelism) and was somewhat different as between the parallelism findings and its findings on increased imports/causation. As a result, it is not clear what the Panel had in mind when it said that the different Commissioners' determinations could not be "reconciled." Presumably, there are many ways that the reasoning of different judicial decision-makers may differ. How different must two findings be in order to say that they cannot be "reconciled"? Here, it is certainly true that the reasoning of the different Commissioners was not *identical*, as some of the determinations were based on a broader category of products. On the other hand, determinations on increased imports and causation could, in theory, be quite similar for both the narrower and broader product categories in terms of import quantities and effects.

Moreover, the Panel's findings do not make clear *why* the reasoning of individual Commissioners must be "reconcilable." The Panel's conclusion assumes that irreconcilable findings are not "reasoned and adequate," in part because parties will have difficulty understanding decisions where different reasoning is used. In this regard, the Panel stated: "There is no indication of how interested parties (and the Panel for that matter) can identify which of the various and inconsistent findings by various Commissioners is the basis for the imposition of the safeguard measure on tin mill." However, we note that divergent reasoning is a fairly common occurrence in any judicial proceeding involving multiple decision-makers. In many instances in domestic and international courts, the reasoning of individual judges diverges considerably, often in the form of concurring opinions. However, in these situations, the court's opinion is based on the result reached by the majority of decision-makers, even if the reasoning differs. It is not clear why the Panel took the view that the same practice should not be followed here.

On appeal, the Appellate Body reversed the Panel's findings. In doing so, it did not explore in any detail the nature of separate opinions in judicial proceedings. Instead, it simply stated that the Safeguards Agreement does not necessarily "preclude the possibility of providing multiple findings instead of a single finding" in order to support a determination under Articles 2.1 and 4. It concluded, the Agreement "does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority." (AB report, para. 414) (Furthermore, the Appellate Body also noted, "we are not persuaded that [the Commissioners'] findings ... '*cannot* be reconciled.'") (AB report, para. 413)

One aspect of the Appellate Body's conclusion is worth highlighting. The Appellate Body stated, "[the separate] findings should *not* be read together, nor should a panel seek to 'reconcile' them." Rather, "a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, *even if only in one of the Commissioner's individual findings*." (emphasis added) Thus, in the case at hand, the Appellate Body said, "the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's 'single institutional determination' on tin mill products." (AB report, paras. 415-416)

The Appellate Body's conclusion that only one individual finding need be "reasoned and adequate" seems quite broad and deferential to investigating authorities. In effect, the Appellate Body appears to have ruled that as long as there is a finding by one judicial decision-maker that is "reasoned and adequate," the findings by all of the other decision-makers may be "un-reasoned" and "inadequate." While the Appellate Body's skepticism towards the Panel's approach is understandable, it is not clear that it was necessary to go as far as the Appellate Body did in the other direction. As an alternative approach, for example, the Appellate Body could have found that while individual findings need not be reconciled, there must be -- using the situation of the ITC as an example -- affirmative findings that are "reasoned and adequate" from at least three of the six Commissioners (that is, there must be "reasoned and adequate" findings by the minimum number of decision-makers required for an affirmative determination under the relevant domestic law).

Standard of Review

In the context of examining the Panel's conclusions regarding the ITC's determination on "unforeseen developments" under GATT Article XIX:1(a), the Appellate Body elaborated on the standard of review that panels are to apply to these types of determinations. Previously, the Appellate Body had said, in paragraph 103 of its report in *U.S. - Lamb Safeguards*, that when examining a competent authority's safeguard determination under Safeguards Agreement Article 4.2, "a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination." *See DSC for U.S. - Lamb Safeguards (AB)*. In *Steel Safeguards*, the Appellate Body extended this "reasoned and adequate explanation" standard to the "unforeseen developments" determination. In doing so, the Appellate Body emphasized that its discussions of the standard of review in earlier cases, such as *Lamb*, were not limited to Safeguards Agreement Article 4.2, but apply to findings reached under the Safeguards Agreement more generally, as well as the related findings under GATT Article XIX:1(a).

The Appellate Body's extension of the "reasoned and adequate explanation" standard of review to GATT Article XIX (and to the Safeguards Agreement generally) may have implications for the standard of review to be applied in the context of trade remedies more broadly. In extending the "reasoned and adequate explanation" standard to Article XIX, the Appellate Body focused not only on the close relationship between the Safeguards Agreement and Article XIX, but also on the "objective assessment" requirement contained in DSU Article 11. Specifically, in paragraph 279 the Appellate Body said, "[w]e do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on 'unforeseen developments.'" This reference to DSU Article 11 suggests that the Appellate Body considers that the "reasoned and adequate explanation" standard exists outside the context of the specific provisions of the Safeguards Agreement. Thus, such a standard would apply to trade remedy measures outside of the safeguards context, with the caveat that AD Agreement Article 17.6 provides a special standard of review in the context of anti-dumping measures. (We note that in *U.S. - Hot Rolled Steel*, the Appellate Body found no "conflict" between DSU Article 11 and AD Agreement Article 17.6(i), and it viewed Article

17.6(ii) as "supplementing, rather than replacing, the DSU, and Article 11 in particular." *See* paras. 55, 62).

Last Update: January 6, 2006

Exhibit 29

Panel Report
United States - Measures Relating to Zeroing and Sunset Reviews
(WT/DS322/R)

Parties
Complainant: Japan
Respondent: U.S.
Third Parties: Argentina, China, EC, Hong Kong, India, Korea, Mexico, New Zealand, Norway, Thailand

Timeline of Dispute
Panel Request: February 4, 2005
Panel Established: February 28, 2005
Panel Composed: April 15, 2005
Interim Report Issued: March 8, 2006
Final Report Circulated: September 20, 2006
Notice of Appeal: October 11, 2006
Notice of Other Appeal: October 23, 2006
AB Report Circulated: January 9, 2007
Adoption: January 23, 2007

Panelists
Mr. David Unterhalter (Chairperson), Mr. Simon Farbenbloom, Mr. José Antonio Buencamino

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Key Findings

- Concluded that the "zeroing procedures" are a measure that can be challenged "as such." **[Upheld by Appellate Body.]**
- Concluded that by maintaining *model zeroing* procedures, and by using model zeroing, in *original investigations*, the Department of Commerce ("DOC") violated AD Agreement Article 2.4.2.
- Found that in maintaining *simple zeroing* procedures in the context of *original investigations*, DOC does not violate AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2, or AD Agreement Articles 3.1-3.5, 5.8, 1, 18.4 and WTO Agreement Article XVI:4. **[Reversed by Appellate Body.]**
- Found that in maintaining *simple zeroing* procedures in the context of *periodic* and *new shipper reviews*, DOC does not act inconsistently with AD Agreement Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3, 9.5 and 18.4, GATT Articles VI:1 and VI:2 and WTO Agreement Article XVI:4; also found that DOC did not act inconsistently with AD Agreement Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3 and GATT Articles VI:1 and VI:2 by applying *simple zeroing* in 11 *periodic reviews*. **[Reversed by Appellate Body.]**
- Rejected claim that by maintaining zeroing procedures in *changed circumstances* and *sunset reviews* DOC acts inconsistently with AD Agreement Articles 2 and 11. Also found that the ITC and DOC did not violate AD Agreement Articles 2 and 11 in relying, in two *sunset reviews*, on margins calculated in previous proceedings. **[Finding related to DOC's sunset reviews reversed by Appellate Body.]**

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BACKGROUND

This dispute concerns the calculation of dumping margins by the U.S. Department of Commerce ("DOC") based on a methodology that "disregards the amounts by which export prices for certain transactions are above the normal value in the process of establishing an overall margin of dumping," *i.e.*, it treats these amounts as zero. Japan, the complainant in this case, referred to this aspect of the DOC methodology as the "zeroing procedures" and as the "standard zeroing line" of the computer code in the DOC's dumping margin calculation program.

In its submissions, Japan identified two types of zeroing: "model zeroing" and "simple zeroing." By "model zeroing," Japan meant the method through which the DOC "makes *average-to-average* comparisons of export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models') and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping." Specifically, "model zeroing" means that when the DOC "aggregates the results of model-specific, average-to-average comparisons of normal value and export price into a weighted average margin of dumping, the numerator of that margin of dumping only includes the results of models for which the average export price is less than the normal value," with amounts where average export price is greater than normal value disregarded (that is, treated as "zero").

By "simple zeroing," Japan meant the method through which the DOC "determines a weighted average margin of dumping based on *average-to-transaction* or *transaction-to-transaction* comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons." Specifically, "simple zeroing" means that when the DOC "aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value," with amounts where individual export prices are greater than normal value disregarded (that is, treated as "zero").

Japan asserted that the DOC "routinely uses model zeroing in original investigations," although it recently applied simple zeroing when it calculated a dumping margin in an original investigation using the transaction-to-transaction method. In periodic reviews and new shipper reviews, Japan said, the DOC "routinely uses average-to-transaction comparisons, including simple zeroing." Japan also submitted that in changed circumstances reviews and sunset reviews, the DOC "generally does not calculate a new margin of dumping but relies on margins of dumping calculated in original investigations on the basis of model zeroing or on margins of dumping calculated in periodic reviews on the basis of simple zeroing."

Japan argued that "these zeroing procedures" can be challenged "as such" as a "measure," pursuant to the AD Agreement and the DSU. Japan also challenged the application of these procedures in a number of anti-dumping proceedings with respect to products from Japan, specifically, in one original investigation, various periodic reviews, and two sunset reviews.

(Paras. 2.1-3, 7.1-5)

Japan alleged that these measures result in violations of AD Agreement Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8, 9.1, 9.2, 9.3, 9.5, 11.1, 11.2, 11.3, 18.4; GATT Articles VI:1 and VI:2; and WTO Agreement Article XVI:4.

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Precedential Value of Adopted Panel and Appellate Body Reports

The Panel said that while it recognized "the important systemic considerations in favour of following adopted panel and Appellate Body reports," it decided not to adopt the approach to the "zeroing" issue taken by the Appellate Body in a previous case. In doing so, it noted that "[i]t is well established that panel and Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties to the dispute, but that such reports create 'legitimate expectations' among WTO Members and should therefore be taken into account where they are relevant to any dispute." While stating that the notion of an "expectation" that panels will follow Appellate Body reports (as well as panel reports) "is supported by important systemic considerations, including the objective, referred to in Article 3.2 of the DSU, of providing security and predictability to the multilateral trading system," the Panel said that "[a]t the same time, a panel is under an obligation under Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... .'" Moreover, it noted, DSU Article 3.2 requires a panel "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" and provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements." (Para. 7.99, fn. 733)

DSU Article 15 - Interim Review: Relevance of New Decision after Issuance of Interim Report

Subsequent to its review of the parties' comments on the interim report, the Panel indicated to the parties that "it was aware of the findings of the Appellate Body in its report issued on 18 April 2006 in *US – Zeroing (EC)* and that it recognized that these findings had a direct bearing on the contents of the interim report." Therefore, the Panel requested the parties "to convey their views on whether the Panel should proceed to reconsider the findings in the interim report in light of the Appellate Body Report in *US – Zeroing (EC)* and, if so, how the Panel should adjust its timetable and working procedures in order to provide the parties with an opportunity to express views on any relevant issues of law addressed in that Appellate Body Report." In response, both parties submitted comments, and, following a request by the United States, the Panel held a meeting with the parties. (Para. 6.2)

SUBSTANTIVE ISSUES

Claims Against the Zeroing Procedures in Original Investigations - General

Japan claimed that model and simple zeroing procedures, in the context of original investigations, are "as such" inconsistent with: (1) AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2; (2) AD Agreement Article 2.4; (3) AD Agreement Articles 3.1-3.5; (4) AD Agreement Article 5.8 and (5) AD Agreement Articles 1 and 18.4 and WTO Agreement Article XVI:4. Japan also claimed that the use of model zeroing as applied in an original investigation concerning imports of certain cut-to-length carbon quality steel products from Japan is inconsistent with: (1) AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2; (2) AD Agreement Article 2.4; (3) AD Agreement Articles 3.1-3.5; and (4) AD Agreement Article 1. (Paras. 7.15-16)

In examining these claims, the Panel first considered whether the zeroing procedures, as such, can be the subject of dispute settlement proceedings. It then examined separately whether the "model

zeroing" and "simple zeroing" methodologies are proscribed in original investigations under the various provisions at issue. Finally, it examined the "as applied" claim regarding the use of "model zeroing" in a specific original investigation.

Whether the Zeroing Procedures, As Such, Can Be the Subject of Dispute Settlement Proceedings

Independently of their application in specific anti-dumping proceedings, Japan challenged as "measures" both the line of computer code related to zeroing in the DOC's Anti-Dumping Margin Calculation Program (the "standard zeroing line") and the DOC's "model" and "simple" "zeroing procedures." (Japan also used the term "zeroing measures" as encompassing both the zeroing procedures and the standard zeroing line.) (Paras. 7.18-20) In response, the United States argued, *inter alia*, that this computer code is not an "instrument" but merely a "tool" to calculate margins, and that there is no "measure" that corresponds to the alleged "procedures." (Paras. 7.29-30)

In addressing the issue of whether an "as such" challenge can be brought against the zeroing procedures, the Panel first reviewed recent Appellate Body jurisprudence. In this regard, it cited the Appellate Body report in *U.S. - Corrosion-Resistant Steel from Japan*, which had referred to "the notion of rules or norms of general and prospective application" as "an essential condition in order for an act to be challengeable as such." (Paras. 7.37-41) The Panel then discussed the Appellate Body report in *U.S. - "Zeroing" of Dumping Margins (EC)*, which also dealt with an "as such" claim against the U.S. zeroing methodology. There, the Appellate Body found that "in the specific circumstances of this case, the evidence before the panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application." The Appellate Body therefore had concluded that "the zeroing methodology, as it relates to original investigations in which the average-to-average comparison method is used, can be challenged as such in WTO dispute settlement." However, it also had found that what had been referred to as the "Standard Zeroing Procedures" did not constitute a measure that could be challenged as such. (Paras. 7.42-44)

Applying this jurisprudence here, the Panel noted Japan's challenge to the zeroing procedures and standard zeroing line, and said "[t]he question we must address is whether it is possible to identify the precise content of the zeroing procedures and the standard zeroing line and whether the zeroing procedures and the standard zeroing line are attributable to the United States and can be considered to be rules or norms intended to have general and prospective application." (Para. 7.45)

Turning first to the "standard zeroing line," the Panel rejected Japan's argument that this line of computer code "constitutes an act setting forth a rule, norm or standard of general application." In this regard, it said, "[i]n order for this line to be applicable to a particular investigation or review, a decision must be made to include the line in the computer programme used in that investigation or review," and "[t]he line by itself cannot be a measure; rather there must be something else that causes the zeroing line to be applied." **Therefore, it concluded that the standard zeroing line is not a measure that can be challenged "as such."** (Para. 7.46)

As to the "zeroing procedures," the Panel understood this to refer to the "zeroing methodology *per se*, as distinguished from the standard zeroing line." In addressing whether this methodology could be challenged as a measure, the Panel first noted that the fact that a "norm to act in a given way in a given situation" is not contained in legislation or a regulation is irrelevant. Rather, the "content must be clear and it must be understood ... that it will be applied generally and prospectively." Furthermore, it said, the absence of a written instrument that explicitly lays down a rule or norm is not "of decisive importance." (Paras. 7.47-49)

The Panel then stated that "the evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessment rates." In this regard, the Panel emphasized two main points. First, it explained that "the evidence before the Panel shows that zeroing ... has been a constant feature of USDOCs practice for a considerable period of time," and that the line of computer code described as the "standard zeroing line" by Japan "has been included in the vast majority of computer programmes used by USDOC to calculate margins of dumping and assessment rates in specific cases." Where it has not been included, other methods of zeroing were used. Thus, the Panel said, "it is clear as a factual matter that USDOC always applies zeroing." Second, the Panel said, the evidence shows that what is at issue "goes beyond the simple repetition of the application of a certain methodology to specific cases," as the manner in which the DOC's use of zeroing "has been characterized in statements by DOC, other United States' agencies and courts" confirms that the DOC's consistent application of zeroing "reflects a deliberate policy." These statements, it noted, "are significant as evidence showing that the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application." The Panel further explained that "the terms 'model zeroing' and 'simple zeroing' used by Japan do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm – not allowing non-dumped export sales to offset margins on export prices below the normal value." (Paras. 7.50-53)

The Panel later added that "the character of the zeroing methodology as a rule or norm of general and prospective application is not diminished by the fact that the USDOC Assistant Secretary may change this methodology or decide not to apply it in a particular case." (Para. 7.57)

On this basis, the Panel considered that the evidence "is sufficient to identify the precise content of what Japan terms 'zeroing procedures,' that these procedures are attributable to the United States and that they are a rule or norm of general and prospective application." Thus, it said, "this norm can be characterized as an 'administrative procedure' within the meaning of Article 18.4 of the *AD Agreement*." **As a result, the Panel concluded, "what Japan terms 'zeroing procedures' is a measure which can be challenged as such."** (Paras. 7.55, 7.58) (On appeal, the Appellate Body upheld the Panel's finding. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement Article 2.4.2 - Model Zeroing As Such in Original Investigations

In challenging the "model zeroing" procedures "as such," Japan submitted that it follows from the definition of "dumping" and "margin of dumping" in AD Agreement Article 2.1 and GATT Article VI in relation to "a product" and "products" that dumping and margins of dumping can be determined only for a "product as a whole" and not in relation to a product type, model or category. Thus, it contended, maintaining model zeroing procedures, which do not consider the product as a whole, in the context of original investigations is inconsistent with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2. (Paras. 7.60, 7.75) In response, the United States argued that there is no obligation to calculate the margin of dumping for the product as a whole. (Para. 7.67)

In addressing this issue, the Panel first noted that the term "model zeroing," as used by Japan, "involves average-to-average comparisons of export price and normal value within individual averaging groups established on the basis of physical characteristics." The Panel then cited a number of past cases in which panels and the Appellate Body found that model zeroing is impermissible under AD Agreement Article 2.4.2 because it does not take into account "all" of the comparisons so as to calculate an "overall" margin of dumping. (Para. 7.80)

In response to a U.S. argument that the Appellate Body's past reasoning on this issue was "flawed," the Panel stated that "the language used in the first sentence of Article 2.4.2 of the *AD Agreement* warrants the conclusion that model zeroing is proscribed." In this regard, the Panel noted that

"[t]his follows in particular from the requirement in the first sentence of Article 2.4.2 that the weighted average normal value be compared with a weighted average export price that reflects the prices of *all comparable export transactions* and from the fact that this sentence does not contain language that indicates that margins of dumping can be determined in respect of individual models of a product." Thus, it considered that "model zeroing in the context of an average-to-average comparison when the existence of margins of dumping is established during the investigation phase is inconsistent with Article 2.4.2 of the *AD Agreement*." Then, recalling its conclusion that "a measure exists that requires the use of zeroing and that model zeroing is one aspect of this measure," it found that model zeroing in the establishment of the existence of margins of dumping during the investigation phase is inconsistent with Article 2.4.2 and thus "produces WTO-inconsistent conduct." **The Panel therefore concluded that model zeroing procedures in the context of original investigations are, as such, inconsistent with Article 2.4.2, and thus found that "by maintaining model zeroing procedures in the context of original investigations" the DOC acts inconsistently with Article 2.4.2.** (Paras. 7.82-86) (The Panel exercised judicial economy on Japan's related claims under AD Agreement Article 2.1 and GATT Articles VI:1 and VI:2, and later under AD Agreement Article 2.4. Paras. 7.87-89, 7.152)

AD Agreement and GATT - Simple Zeroing As Such in Original Investigations

The Panel considered Japan's "as such" challenge to the use of "simple zeroing" procedures in original investigations separately under the various provisions referred to by Japan.

AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2

Japan argued that the same reasoning it set out above in the context of "model zeroing," relating to the definitions of "dumping and "margin of dumping" on the basis of the product "as a whole," dictates that "simple zeroing" in the context of original investigations is inconsistent "as such" with AD Agreement Articles 2.1 and 2.4.2 of GATT Articles VI:1 and VI:2. (Paras. 7.60-61, 7.75, 7.90) In particular, Japan argued that the reasoning of the Appellate Body in *U.S. - Final Lumber AD Determination* regarding model zeroing "necessarily implies that simple zeroing in original investigations is also inconsistent with these provisions because, like model zeroing, simple zeroing amounts to a failure to determine dumping, and to calculate a margin of dumping, for the product as a whole." Japan further contended that although the Appellate Body report in *U.S. - "Zeroing" of Dumping Margins (EC)* did not address the issue of whether zeroing is prohibited if a transaction-to-transaction comparison is used in an original investigation, nevertheless "the reasoning of the Appellate Body in that report dictates that conclusion in that it confirms that the requirement to determine dumping and margins of dumping for the product under investigation as a whole applies throughout the *AD Agreement*." (Para. 7.91) In response, the United States argued that there is no obligation to calculate the margin of dumping for the product as a whole. (Para. 7.67)

The Panel rejected Japan's arguments. With regard to the *Lumber* case, the Panel noted that it dealt with "multiple averaging," and said that there is nothing to suggest that the Appellate Body's reasoning extended beyond that context. (Paras. 7.92-94)

As to the *"Zeroing"* case, the Panel noted that the Appellate Body used the concept of "the product as a whole" in a manner that "suggests that the relevance of that concept is not limited to the establishment of the existence of margins of dumping under the average-to-average method provided for in the first sentence of Article 2.4.2" when it found that the United States had acted inconsistently with AD Agreement Article 9.3 and GATT Article VI:2 by applying zeroing in the administrative reviews at issue. (Paras. 7.95-98) In reaction, the Panel said that it had considered Japan's arguments in favor of a broader application of the "product as a whole" concept in a manner consistent with the reasoning of the Appellate Body in *"Zeroing."* However, while it recognized "the important systemic considerations in

favour of following adopted panel and Appellate Body reports," it decided "not to adopt that approach" for the reasons outlined below. (Para. 7.99)

First, it said, there are difficulties "in discerning the precise meaning and scope of application of the phrase 'multiple comparisons ... at an intermediate stage'" as used in the Appellate Body report in *"Zeroing."* Second, the Appellate Body report in *Lumber* used the phrase "product as a whole" in the context of "multiple averaging" and did not address the issue more generally, and the Appellate Body report in *"Zeroing"* does not provide a rationale for extending the concept. Third, the Panel considered it "permissible" to interpret AD Agreement Articles 2.1 and 2.4.2, as well as GATT Article VI, to mean "there is no general requirement to determine dumping and margins of dumping for the product as a whole." This view, it said, was based on an analysis of the words "product" and "products" as used in AD Agreement Article 2.1 and GATT Article VI, as well as the text of AD Agreement Article 2.4.2. (Paras. 7.100-102) The Panel then elaborated on this last point, first considering the relevance of the words "product" and "products" and then turning to Article 2.4.2.

As to the words "product" and "products" in AD Agreement Article 2.1 and GATT Article VI, the Panel noted that the expression "product as a whole" does not appear in Article 2.1 or GATT Articles VI:1 and VI:2. The Panel then stated that these provisions do not require an examination of export transactions at an "aggregate level," and said that it agreed with the panel in *U.S. - Final Lumber AD Determination, Article 21.5* that there is nothing inherent in the word "product" as used in these provisions to preclude the possibility of establishing a dumping margin on a transaction-specific basis. In addition, the Panel considered that the context in which these terms are used does not support Japan's argument. (Paras. 7.103-106)

The Panel concluded that the ordinary meaning of the words "product" and "products," read in the context of the definition of "dumping" and "margin of dumping," "provides no support for the view that these words give rise to a general prohibition of zeroing by requiring an examination of export transactions at an aggregate level." It further noted that "the record of past discussions in the framework of the GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions." (Para. 7.107) Finally, the Panel considered other relevant context contained in the AD Agreement and the GATT, and it concluded that this additional context did not lead to a different conclusion. (Paras. 7.108-111)

On this basis, the Panel concluded that the fact that the terms "dumping" and "margin of dumping" in Article 2.1 and Articles VI:1 and VI:2 are defined in relation to "product" and "products" "does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value." (Para. 7.112)

Next, turning to the text of AD Agreement Article 2.4.2, the Panel rejected Japan's argument that the concept of "product as a whole" means that Article 2.4.2 provides for a "general prohibition" of zeroing. In doing so, the Panel structured its analysis as follows. First, it explained that a "key consideration" guiding its analysis was "the need for an internally coherent interpretation" of Article 2.4.2. Noting that zeroing "has already been found to be inconsistent with Article 2.4.2 if applied in the context of the average-to-average transaction method when establishing the existence of margins of dumping during the investigation phase," it said that "[i]n determining whether zeroing is also inconsistent with Article 2.4.2 if used in connection with other comparison methods, we must adopt an interpretation that gives full effect, on the one hand, to the nature of the transaction-to-transaction method as one of the two normal comparison methods which is used for the same purpose and which is subject to the same conditions as the average-to-average method." At the same time, though, it said that it "must

give full effect to the average-to-transaction method as an exception to the normal methods provided for in the first sentence." (Paras. 7.113-117)

Second, the Panel noted the "lack of support" in the text of Article 2.4.2 for a "general prohibition" of zeroing. In this regard, it noted that a transaction-to-transaction comparison methodology focuses on "individual transactions." Because Article 2.4.2 permits the use of such a comparison, it said, this means that a Member "may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value." These arguments, it said, "also apply to the average-to-transaction method." (Paras. 7.118-120)

On the other hand, the Panel recognized some "possible considerations" that it said would indicate the existence of a "general prohibition" of zeroing under Article 2.4.2. In particular, it observed that there is no "logical basis" to distinguish the rules for average-to-average comparisons with those for transaction-to-transaction or average-to-transaction comparisons, and thus it would not make sense, for example, to prohibit zeroing under the average-to-average method but not under the transaction-to-transaction method. Furthermore, it pointed out that prohibiting zeroing only in the context of average-to-average comparisons could undermine the effectiveness of the average-to-transaction method. (Paras. 7.121-126)

Fourth, the Panel "analyze[d] the logical impossibility of reconciling a general prohibition of zeroing with the express provision for the use of an average-to-transaction method in the second sentence of Article 2.4.2." On this point, it noted that if zeroing were generally prohibited under Article 2.4.2, the results of the average-to-average method would not differ from those of the average-to-transaction method, which would undermine the rationale of that latter method. Japan's arguments on this issue, the Panel said, were insufficient to rebut the U.S. argument regarding these identical results. (Paras. 7.127-137)

In summing up its views on the issues under Article 2.4.2, the Panel said that it "realize[d] that it could be argued that Article 2.4.2 must be interpreted to mean that zeroing is prohibited under the average-to-average and transaction-to-transaction methods but not in the average-to-transaction method." However, it explained, "we see no textual support for such an interpretation," as there is "no textual difference between the average-to-transaction method and the transaction-to-transaction method that can sustain the view that zeroing, while not prohibited under the average-to-transaction method is prohibited under the transaction-to-transaction method." (Para. 7.139)

On the basis of its above consideration of AD Agreement Article 2.1 and GATT Articles VI:1 and VI:2, as well as AD Agreement Article 2.4.2, the Panel concluded that "it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing." **Thus, the Panel found, "by maintaining simple zeroing procedures in the context of original investigations," the DOC does not act inconsistently with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2.** (Paras. 7.142-143) (On appeal, the Appellate Body reversed the Panel's findings. *See* DSC for U.S. - Zeroing (Japan) (AB).)

AD Agreement Article 2.4

Japan claimed that both *model* and *simple* zeroing are "as such" inconsistent with AD Agreement Article 2.4 because they violate the obligation to make a "fair comparison" between the export price and the normal value, as required by the first sentence of that provision. (Paras. 7.144, 7.150, 7.153) (In light

of its earlier finding of a violation of Article 2.4.2, the Panel did not make findings on Japan's *model* zeroing claim, for reasons of judicial economy.)

In addressing the *simple* zeroing claim, the Panel first noted that the "fair comparison" requirement is an "independent legal obligation" that "is not defined exhaustively by the specific requirements set out in the remainder of Article 2.4 and is not limited in scope to the issue of adjustments to ensure price comparability." However, it said, while the "fair comparison" requirement "constitutes an independent legal obligation, its precise meaning must be understood in light of the nature of the activity at issue." It further explained: "The concept of 'fairness' is potentially a rich concept with different meanings in different contexts. One meaning of 'fairness' is that 'like' must be compared with 'like.' This is the requirement that comparisons should not be arbitrary. Fairness can also be understood to mean that once an authority has determined the universe of transactions that it will compare it must take account of the results of all the comparisons made in respect of those transactions and may not limit its analysis to those results that tend to support an affirmative finding of dumping." (Paras. 7.154-155)

After noting that the Appellate Body has not previously made a "legal finding" that the use of zeroing is inconsistent with Article 2.4 on its own, the Panel then stated that "the somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders more specific provisions of the *AD Agreement* completely inoperative." In this regard, it said, it agreed with the view expressed by the panel in *U.S. - "Zeroing" of Dumping Margins (EC)* that the "fair comparison" requirement "cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgement of what fairness means in the abstract and in complete isolation from the substantive context." Here, it noted, the relevant "substantive context," as addressed in the previous sections, "indicates that the 'fair comparison' requirement cannot be interpreted to create a general prohibition of zeroing." (Paras. 7.157-160)

On this basis, the Panel found that in "maintaining simple zeroing procedures in the context of original investigations," the DOC does not act inconsistently with Article 2.4. (Para. 7.161) (On appeal, the Appellate Body reversed the Panel's finding. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement Articles 3.1 through 3.5

Japan claimed that maintaining zeroing procedures in original investigations is inconsistent with AD Agreement Articles 3.1 to 3.5 because, "as a consequence of the systematic distortion of the margin of dumping resulting from the zeroing procedures, injury determinations are not objective in that they are not based on positive evidence as required by Article 3.1 on the volume of dumped and non-dumped imports, the rate of increase of dumped imports, the prices of dumped and non-dumped imports and the magnitude of the margin of dumping." (Para. 7.162)

For model zeroing, the Panel noted that Japan's claims were dependent on the inconsistency of the measure with Article 2, and thus the Panel did not consider it necessary to make findings. (Para. 7.165) As to simple zeroing, the Panel noted its earlier finding that "hy maintaining simple zeroing procedures in the context of original investigations," the DOC does not act inconsistently with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2, or with AD Agreement Article 2.4. **Thus, since Japan's claims were "entirely dependent" upon the inconsistency of the measure with Article 2, the Panel found that the DOC does not act inconsistently with Articles 3.1-3.5 either.** (Para. 7.166)

AD Agreement Article 5.8

Japan claimed that maintaining zeroing procedures in original investigations is inconsistent with AD Agreement Article 5.8 because "the zeroing procedures deprive USDOC of an adequate and credible basis for determining whether there is sufficient evidence of dumping to justify proceeding with an investigation." (Para. 7.167)

For model zeroing, the Panel noted that Japan's claims were dependent on the inconsistency of the measure with Article 2, and thus did not consider it necessary to make findings. (Para. 7.169) As to simple zeroing, the Panel noted its earlier finding that "by maintaining simple zeroing procedures in the context of original investigations," the DOC does not act inconsistently with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2, or with AD Agreement Article 2.4. **Thus, the Panel found that the DOC does not act inconsistently with Article 5.8 either.** (Para. 7.170)

AD Agreement Articles 1 and 18.4, WTO Agreement Article XVI:4

For model zeroing, the Panel noted that Japan's claims under AD Agreement Articles 1 and 18.4 and WTO Agreement Article XVI:4 were consequential claims, and it therefore did not consider it necessary to make findings. (Paras. 7.171-174) As to simple zeroing, the Panel said it had found that simple zeroing procedures in the context of original investigations are not inconsistent with AD Agreement Articles 2.1, 2.4.2 and 2.4 and GATT Articles VI:1 and VI:2. **It thus found that "by maintaining simple zeroing procedures in the context of original investigations" the DOC does not act inconsistently with AD Agreement Articles 1 and 18.4 and WTO Agreement Article XVI:4.** (Para. 7.175)

AD Agreement Article 2.4.2 - Model Zeroing As Applied in the Original Investigation at Issue

Japan claimed that "by using model zeroing in the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan," the DOC acted inconsistently with AD Agreement Articles 2.1 and 2.4.2 and with GATT Articles VI:1 and VI:2 "in that it failed to determine the existence of dumping, and to calculate a margin of dumping, for the product as a whole by not taking into account the results of all the comparisons for the product." (Para. 7.176)

Recalling its earlier finding that model zeroing is inconsistent with AD Agreement Article 2.4.2 when applied in the context of average-to-average comparisons, **the Panel found that "by using model zeroing in the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan," the DOC acted inconsistently with AD Agreement Article 2.4.2.** (Paras. 7.178-179)

Zeroing in Periodic and New Shipper Reviews - General

Japan claimed that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews, the United States acts inconsistently with the following provisions: (1) AD Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2; (2) AD Agreement Article 2.4; (3) AD Agreement Articles, 9.1, 9.2 and 9.3; and (4) AD Agreement Articles 1 and 18.4 and WTO Agreement Article XVI:4. In addition, Japan claimed that, as a consequence of simple zeroing, antidumping measures resulting from 11 periodic reviews are inconsistent with the following provisions: AD Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2; (2) AD Agreement Article 2.4; (3) AD Agreement Articles, 9.1, 9.2 and 9.3; and (4) AD Agreement Article 1. (Paras. 7.187-188)

AD Agreement and GATT - Simple Zeroing As Such in Periodic / New Shipper Reviews

Japan claimed that the "simple zeroing procedures maintained by USDOC in relation to periodic reviews and new shipper reviews" are inconsistent with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2 "because they fail to provide for a determination of dumping, and calculation of a margin of dumping, for the product as a whole." (Paras. 7.189-7.193)

At the outset, the Panel recalled its earlier analysis of related issues in the context of original investigations. In particular, it referred to its earlier conclusions as follows: (1) it is permissible within the meaning of AD Agreement Article 17.6(ii) to interpret GATT Article VI and the relevant AD Agreement provisions "to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing"; (2) the ordinary meaning and context of the use of the words "product" and "products," and the fact that the terms "dumping" and "margins of dumping" are defined in relation to those terms, "does not warrant the conclusion that under [AD Agreement Article 2.1 and GATT Article VI] the existence of dumping and margins of dumping can only be established on the basis of an aggregate examination of export transactions in which the export prices that are higher than the normal value are accorded the same significance as export prices that are less than the normal value"; and (3) the text of AD Agreement Article 2.4.2 "does not support" the view that the AD Agreement and GATT Article VI "must be interpreted to mean that there exists a general prohibition of zeroing," in particular, because an interpretation resulting in such a prohibition "would deprive the average-to-transaction method provided for in the second sentence of Article 2.4.2 of its effectiveness and would thus be inconsistent with the principle of effective treaty interpretation." In addition, noting that Japan found support for its claims in respect of periodic and new shipper reviews in the Appellate Body report in *U.S. - Zeroing (EC)*, the Panel recalled that it had already "pointed to the difficulties of interpretation of the meaning and scope of application of the phrase 'multiple comparisons ... at an intermediate stage'" as used in that Appellate Body report, along with the "limited explanation" in that report "as to why the 'product as a whole' concept is applicable more broadly than in the specific context of 'multiple averaging' in which it is used in the Appellate Body Report in *U.S. - Softwood Lumber V*." (Paras. 7.194-195)

The Panel found support for its view in "important considerations specific to Article 9." In particular, examining Articles 9.3.1 and 9.3.2, the Panel emphasized that "the obligation to pay an anti-dumping duty is incurred on an *importer*- and *import*-specific basis." In this regard, it explained that under Japan's interpretation "according to which a margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value," the "implication" would be that "if a Member applies a retrospective duty assessment system, a Member may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point in time because of prices of export transactions to other importers at a different point in time that exceed normal value." Moreover, the Panel pointed to Article 9.4(ii), which, it explained, "expressly" refers to calculation of the amount of liability for payment of anti-dumping duties on the basis of "prospective normal value," and for which "an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payment of anti-dumping duties." The Panel saw no reason why liability could be determined in a prospective normal value system "without regard to whether or not prices of other export transactions exceed normal value," whereas liability in a retrospective duty assessment system like that applied by the United States "may not be similarly assessed on the basis of export prices less than normal value." In this regard, the Panel found statements made by the Appellate Body in paragraph 131 and footnote 234 of *U.S. - "Zeroing" of Dumping Margins* referring to Article 9 and systems based on prospective normal value to be unclear. As a result, the Panel concluded that AD

Agreement Article 9.3, "especially when interpreted in light of the express reference to a prospective normal value system in Article 9.4(ii), lends further support to the view that it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and the relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing." (Paras. 7.196-209 and footnote 822)

Next, the Panel considered AD Agreement Article 2.4.2, another provision invoked by Japan in support of its claim regarding simple zeroing procedures in relation to periodic reviews and new shipper reviews. At the outset, the panel recalled its finding that "Article 2.4.2 does not support the view that zeroing is prohibited outside the context of the average-to-average comparison method when establishing the existence of margins of dumping during the investigation phase." Moreover, it added that even if it assumed *arguendo* that Article 2.4.2 could be construed as prohibiting zeroing under any comparison method, it still would not uphold Japan's claim because, in the Panel's opinion, Article 2.4.2 cannot be interpreted to be applicable to reviews under Articles 9.3 and 9.5. That is, it said, "[b]earing in mind Article 17.6(ii) of the *AD Agreement*, we find that it is permissible to interpret Article 2.4.2 as being applicable only to investigations within the meaning of Article 5 of the *AD Agreement*." In this regard, the Panel said that it agreed with the reasoning and conclusion of the majority of the panel in *U.S. - "Zeroing" of Dumping Margins (EC)*, emphasizing the following points: (1) the phrase "during the investigation phase" defines when Article 2.4.2 is applicable; (2) while there is textual similarity between Articles 2.4.2 and 5.1, by contrast, "the AD Agreement does not describe the purpose of proceedings under Articles 9 and 11 in terms of establishing 'the existence of margins of dumping during the investigation phase' but uses rather different terminology in these provisions'"; (3) other provisions support the view that "investigation" has a specific meaning in the context of the AD Agreement; (4) panel and Appellate Body reports support the view that "investigations are phases or stages that are distinct from other phases or stages of anti-dumping and countervailing duty proceedings"; and (5) arguments made by the European Communities in the *"Zeroing"* case based on subsequent practice, negotiating history and object and purpose of Article 9.3 do not support the position that Article 2.4.2 is not limited in its application. (Paras. 7.210-7.215)

On this basis, the Panel concluded that "by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the AD Agreement and Articles VI:1 and VI:2 of GATT 1994." (Para. 7.216) (On appeal, the Appellate Body reversed the Panel's findings. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement Article 2.4 - Simple Zeroing As Such in Periodic / New Shipper Reviews

The Panel explained that the parties' arguments on whether Article 2.4 proscribes the use of simple zeroing in periodic reviews and new shipper reviews "are identical to their arguments on whether Article 2.4 proscribes zeroing in the context of investigations within the meaning of Article 5 of the AD Agreement." (Para. 7.217)

At the outset, the Panel recalled its finding that "simple zeroing is not inconsistent with Article 2.4 of the AD Agreement," a conclusion based on its view that "to interpret the 'fair comparison' requirement of Article 2.4 as creating a general prohibition of zeroing would undermine the effectiveness of other provisions of the AD Agreement." Moreover, it recalled its earlier consideration that "an interpretation that zeroing is prohibited under any comparison method and in any type of proceeding is not supported by the provisions in Article 9 on the assessment of the amount of anti-dumping duties." **On this basis, the Panel concluded that "by maintaining simple zeroing procedures in the context of**

periodic reviews and new shipper reviews, USDOC does not act inconsistently with Article 2.4 of the AD Agreement." (Paras. 7.218-219) (On appeal, the Appellate Body reversed the Panel's finding. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement and WTO Agreement - Simple Zeroing As Such in Periodic / New Shipper Reviews

Japan argued that the inconsistency of simple zeroing procedures, as such, with AD Agreement Articles 2.4 and 2.4.2 would necessarily give rise to violations of AD Agreement Articles 1, 9.1-9.3, 9.5 and 18.4 and WTO Agreement Article XVI:4. **In light of its earlier findings that the United States is not acting inconsistently with AD Agreement Articles 2.1, 2.4.2 and 2.4 and GATT Articles VI:1 and VI:2, the Panel rejected Japan's consequential claims.** (Paras. 7.220-224) (On appeal, the Appellate Body reversed the Panel's findings. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement and GATT - Simple Zeroing in Periodic Reviews As Applied

Japan argued that the DOC acted inconsistently with various AD Agreement and GATT provisions in 11 specific periodic reviews. The Panel noted that Japan's arguments in support of its claims "are the same as in the case of Japan's 'as such' claims relating to periodic reviews and new shipper reviews." (Para. 7.225)

The Panel said that it rejected Japan's claims "[f]or the reasons explained in the previous section [i.e., that dealing with Japan's as such claims]." **As a result, the Panel concluded, "by applying simple zeroing in 11 periodic reviews USDOC did not act inconsistently with Articles 1, 2.1, 2.4.2, 2.4 and 9.1-9.3 of the AD Agreement and with Articles VI:1 and VI:2 of the GATT 1994."** (Paras. 7.226-227) (On appeal, the Appellate Body reversed the Panel's findings. *See DSC for U.S. - Zeroing (Japan) (AB).*)

AD Agreement Articles 2 / 11 - Zeroing Procedures As Such in Changed Circumstances / Sunset Reviews

Japan argued that, in changed circumstances reviews and sunset reviews, "[b]y relying on margins of dumping calculated in prior proceedings on the basis of model zeroing or simple zeroing," the United States violates AD Agreement Articles 2.1, 2.4.2 and 2.4 and, as a consequence, fails to comply with AD Agreement Articles 11.2 and 11.3 and the obligation in Article 11.1 to ensure that anti-dumping duties remain in force only as long as, and to the extent necessary, to counteract dumping. (Para. 7.230)

The Panel began with an examination of Articles 11.2 and 11.3, which govern changed circumstances reviews and sunset reviews, respectively. They provide as follows:

> 11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review. *(footnotes omitted)*

The Panel noted that both provisions "are silent on this issue of whether in reviews contemplated by these provisions authorities are required to calculate margins of dumping." In this regard, it noted previous statements by the Appellate Body, particularly in paragraph 127 of *U.S. - Corrosion-Resistant Steel Sunset Review*, explaining that if investigating authorities choose to rely upon dumping margins in making a likelihood determination in a sunset review, then the calculation of those margins must conform to the disciplines of Article 2.4. (Paras. 7.233-235)

Noting that Japan's challenge centered on the DOC's alleged reliance in these reviews on margins of dumping calculated in prior proceedings in a WTO-inconsistent manner, the Panel explained that "a key factual question before the Panel is whether a rule or norm of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings to support its determinations in changed circumstances reviews and sunset reviews." Examining the documents and cases on which Japan relied in support of its assertion, the Panel concluded: "Japan has failed to adduce evidence necessary to establish that a rule, norm or standard of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings *to support* its determinations in changed circumstances reviews and sunset reviews." (Paras. 7.236-243)

On this basis, the Panel concluded that "Japan has failed to make a *prima facie* case that by maintaining zeroing procedures in the context of changed circumstances reviews and sunset reviews USDOC acts inconsistently with Articles 2 and 11 of the AD Agreement." (Para. 7.244)

AD Agreement Articles 2 / 11 - Simple Zeroing As Applied in Two Sunset Reviews

Japan claimed that "anti-dumping measures adopted pursuant to two sunset reviews are inconsistent with the AD Agreement and GATT 1994 because in these reviews the investigating authorities [*i.e.*, the ITC and the DOC] relied on dumping margins calculated using the standard zeroing procedures." (7.245)

The Panel first considered "the factual evidence adduced by Japan as support for its assertion that in the two sunset reviews at issue the USITC and USDOC relied upon historical margins of dumping." Examining the relevant ITC determinations, the Panel found that while the ITC noted these dumping margins, there was no indication that the ITC actually relied upon previously calculated margins as support for its conclusion. As a result, the Panel concluded that Japan failed to substantiate its assertion that the ITC "actually relied upon dumping margins calculated by USDOC in prior proceedings." (Paras. 7.249-254)

Next, the Panel turned to the DOC determinations, and found, by contrast, that "there is sufficient evidence ... to conclude that in making its determinations ..., USDOC did rely on margins of dumping established in prior proceedings." Nonetheless, the Panel noted that the margins of dumping relied upon

by DOC were margins calculated during periodic reviews (not those calculated in original investigations). Given the Panel's earlier finding that the AD Agreement "does not proscribe simple zeroing in periodic reviews within the meaning of Article 9.3," the Panel said, "we cannot find that by relying on margins of dumping calculated in periodic reviews on the basis of simple zeroing USDOC acted inconsistently with the AD Agreement." (Paras. 7.255-256)

On this basis, the Panel concluded that the ITC and the DOC "did not act inconsistently with Articles 2 and 11 of the AD Agreement by relying on dumping margins calculated in previous proceedings in the sunset reviews of corrosion-resistant carbon steel from Japan and of anti-friction bearings from Japan." (Para. 7.257) (On appeal, the Appellate Body reversed the Panel's findings related to the DOC's actions. *See DSC for U.S. - Zeroing (Japan) (AB).*)

COMMENTARY

"Zeroing"

This Panel report is one of a growing number to address the issue of "zeroing" (the fifth such decision in the past year, in fact). We have discussed various issues related to "zeroing" in the Commentary sections of our other DSCs. Here, we address two additional issues.

First, just prior to circulation of this Panel report to the public on September 20, the Appellate Body report in the *U.S. - Final Lumber AD Determination, Article 21.5 (Softwood Lumber V)* case was circulated on August 15. Although the *Zeroing (Japan)* Panel report does not indicate when it was issued to the parties, given the date of its circulation to the public, which can only take place after translation into all three official WTO languages has been completed, issuance to the parties likely occurred prior to August 15 and thus the Panel was not able to take the *Lumber* Appellate Body report into account in making its findings. This Appellate Body decision held that "zeroing" in the context of transaction-to-transaction comparisons in original investigations was inconsistent with AD Agreement Articles 2.4.2 and 2.4. The Appellate Body's finding in this regard appears to contradict the Panel's conclusion that "simple zeroing," which includes zeroing in the transaction-to-transaction context, in original investigations is permissible. Given the Appellate Body's finding on this issue in *Lumber*, it seems almost inevitable that if this Panel report is appealed, the Appellate Body will reverse the Panel's finding on this point and instead follow the reasoning of its *Lumber* decision so as to find that the U.S. methodology violates the rules.

Similarly, the Panel's finding that "simple zeroing" in periodic reviews is permissible appears to contradict the reasoning of the Appellate Body in *U.S. - "Zeroing" of Dumping Margins (EC)*, where the Appellate Body found the application of this methodology in particular periodic reviews to violate AD Agreement Article 9.3 and GATT Article VI:2. As with the previous issue, it seems very likely that the Panel's finding will be reversed on appeal, although the different argumentation made by the complainants in the two cases could affect the reasoning that the Appellate Body relies upon. In addition, a reversal by the Appellate Body of the finding on this issue could have an impact on the Panel's findings related to sunset reviews, for which the determinations at issue relied on margins calculated in periodic reviews.

Second, as a general matter, it seems that panels have been more reluctant than the Appellate Body to find that various kinds of "zeroing" violate WTO rules. In the three cases on "zeroing" prior to this one, the panels hearing the case either upheld certain aspects of the "zeroing" at issue or at least had a dissenter who viewed a specific "zeroing" practice as permissible. By contrast, in these cases the Appellate Body found unanimously that the methodology at issue violated WTO rules. In this regard, in

the *Lumber, Article 21.5* case (noted above), the panel found that "zeroing" in the transaction-to-transaction context in original investigations was permissible, while the Appellate Body considered it to violate Articles 2.4.2 and 2.4; in the *U.S. - "Zeroing" of Dumping Margins (EC)* case, the panel found that "zeroing" in the average-to-transaction context in duty assessment proceedings does not violate Articles 2.4.2 or 2.4 (one panelist dissented on this issue), while the Appellate Body found that this kind of "zeroing" violates AD Agreement Article 9.3 and GATT Article VI:2; and in the original proceedings of the *Lumber* case, the panel majority concluded that the use of "model zeroing" by the DOC as part of the dumping margin calculation was inconsistent with AD Agreement Article 2.4.2, but one panelist dissented on this point and would have allowed the use of this kind of "zeroing," while the Appellate Body sided with the Panel majority.

To the extent that the Appellate Body has been more willing to strike down a methodology like "zeroing," which is not addressed very clearly in the agreements, the Appellate Body has been more "activist" than panels have been on the issue. This difference could be the result of: different views held by panels on the substantive issues involved, with specific panelists believing the rules to be more flexible in this regard; a greater reluctance by panels to take such an approach to "zeroing" for fear of being accused of "activism"; or a recognition by panels that the Appellate Body is likely to take this approach, leading to a feeling among the panelists that there is no need for them to do so and take the blame. These suggested reasons are all just speculation, of course, but the record is clear that the Appellate Body is more likely to take a broader approach to prohibiting "zeroing" than panels seem to be.

Precedential Value of Adopted Panel and Appellate Body Reports

The Panel's decision to take an approach to certain aspects of "zeroing" that differs from that set out previously by the Appellate Body was surprising, as was the language the Panel used to explain its actions. In this regard, the Panel said that while it recognized "the important systemic considerations in favour of following adopted panel and Appellate Body reports," it decided not to adopt the approach to the "zeroing" issue taken by the Appellate Body in a previous case. In doing so, the Panel noted that "[i]t is well established that panel and Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties to the dispute, but that such reports create 'legitimate expectations' among WTO Members and should therefore be taken into account where they are relevant to any dispute." While stating that the notion of an "expectation" that panels will follow Appellate Body reports (as well as panel reports) "is supported by important systemic considerations, including the objective, referred to in Article 3.2 of the DSU, of providing security and predictability to the multilateral trading system," the Panel said that "[a]t the same time, a panel is under an obligation under Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... .'" Moreover, it noted, DSU Article 3.2 requires a panel "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" and provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements." (*See* para. 7.99, fn. 733)

The Panel's statements in this regard have important implications for the future behavior of panels (and the Appellate Body) in examining issues where precedent exists. The Panel implied that there may be tension between following precedent and making a proper interpretation pursuant to the DSU. In a sense, the Panel appeared to be saying that panels and the Appellate Body may get interpretations wrong, and that future panels and Appellate Body divisions addressing the same or similar issues in these circumstances should not feel completely bound by the past holdings.

It is certainly no great shock to hear a suggestion that courts sometimes get interpretations wrong, and, as a consequence, that not all precedent should be followed. In domestic legal systems, with the

large number of cases heard, there are many such instances. Thus, it is not surprising that it might also occur in the context of WTO dispute settlement. Furthermore, the role of WTO precedent may be somewhat less than that of precedent in domestic legal systems, as the Appellate Body has previously made clear that panel and Appellate Body reports are only "binding" with respect to the particular dispute. Nevertheless, despite these factors, it is still a bit surprising to see a panel make an explicit decision not to follow a recent Appellate Body ruling. Of particular interest with regard to these statements by the Panel is that one of the panelists in this case was David Unterhalter, who was recently appointed to the Appellate Body and will now be considering past Appellate Body statements on a regular basis as an Appellate Body Member.

Last Update: April 23, 2007

Appellate Body Report
United States - Measures Relating to Zeroing and Sunset Reviews
(WT/DS322/AB/R)

Participants
Appellant/Appellee: Japan
Appellant/Appellee: U.S.
Third Participants: Argentina, China, EC, Hong Kong, India, Korea, Mexico, New Zealand, Norway, Thailand

Timeline of Dispute
Panel Request: February 4, 2005
Panel Established: February 28, 2005
Panel Composed: April 15, 2005
Interim Report Issued: March 8, 2006
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Notice of Other Appeal: October 23, 2006
AB Report Circulated: January 9, 2007
Adoption: January 23, 2007

Appellate Body Division
Sacerdoti (Presiding Member), Abi-Saab, Ganesan

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Key Findings

- Upheld Panel's finding that the "zeroing procedures" "constitute a measure which can be challenged as such"; thus, dismissed U.S. claim that the Panel violated DSU Article 11 in reaching this conclusion.
- Reversed Panel's finding that the United States does not violate AD Agreement Articles 2.4.2 and 2.4 by maintaining the zeroing procedures when calculating dumping margins on the basis of transaction-to-transaction comparisons in original investigations; found instead that the United States does violate these provisions.
- Reversed Panel's finding that the United States does not violate AD Agreement Articles 9.3 and 9.5 and GATT Article VI:2 by maintaining the zeroing procedures in periodic reviews and new shipper reviews; found instead that the United States does violate these provisions.
- Reversed Panel's finding that zeroing in the context of periodic reviews and new shipper reviews is not, as such, inconsistent with Article 2.4; found instead that zeroing is inconsistent with that provision.
- Reversed Panel's finding that zeroing as applied by the United States in the 11 periodic reviews at issue in this appeal is not inconsistent with AD Agreement Articles 2.1, 2.4, 9.1, and 9.3 and GATT Articles VI:1 and VI:2; found instead that the United States violates Articles 2.4 and 9.3 and Article VI:2.
- Reversed Panel's finding that the United States acted consistently with AD Agreement Articles 2 and 11 when, in the sunset reviews at issue, it relied on margins of dumping that had been calculated using zeroing in previous anti-dumping proceedings; found instead that the United States violates Article 11.3.

BACKGROUND

This dispute concerns the calculation of dumping margins by the U.S. Department of Commerce ("DOC") based on a methodology that "disregards the amounts by which export prices for certain transactions are above the normal value in the process of establishing an overall margin of dumping," *i.e.*, it treats these amounts as zero. Japan, the complainant in this case, referred to this aspect of the DOC methodology as the "zeroing procedures" and as the "standard zeroing line" of the computer code in the DOC's dumping margin calculation program.

In its submissions, Japan identified two types of zeroing: "model zeroing" and "simple zeroing." By "model zeroing," Japan meant the method through which the DOC "makes *average-to-average* comparisons of export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models') and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping." Specifically, "model zeroing" means that when the DOC "aggregates the results of model-specific, average-to-average comparisons of normal value and export price into a weighted average margin of dumping, the numerator of that margin of dumping only includes the results of models for which the average export price is less than the normal value," with amounts where average export price is greater than normal value disregarded (that is, treated as "zero").

By "simple zeroing," Japan meant the method through which the DOC "determines a weighted average margin of dumping based on *average-to-transaction* or *transaction-to-transaction* comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons." Specifically, "simple zeroing" means that when the DOC "aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value," with amounts where individual export prices are greater than normal value disregarded (that is, treated as "zero").

Japan asserted that the DOC "routinely uses model zeroing in original investigations," although it also noted that the DOC recently applied simple zeroing when it calculated a dumping margin in an original investigation using the transaction-to-transaction method. In periodic reviews and new shipper reviews, Japan said, the DOC "routinely uses average-to-transaction comparisons, including simple zeroing." Japan also submitted that in changed circumstances reviews and sunset reviews, the DOC "generally does not calculate a new margin of dumping but relies on margins of dumping calculated in original investigations on the basis of model zeroing or on margins of dumping calculated in periodic reviews on the basis of simple zeroing."

Japan argued that "these zeroing procedures" can be challenged "as such" as a "measure," pursuant to the AD Agreement and the DSU. Japan also challenged the application of these procedures in a number of anti-dumping proceedings with respect to products from Japan, specifically, in one original investigation, various periodic reviews, and two sunset reviews.

(Panel report, paras. 2.1-3, 7.1-5; AB report, paras. 1-3)

Before the Panel, Japan alleged that these measures result in violations of the following provisions: AD Agreement Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8, 9.1, 9.2, 9.3, 9.5, 11.1, 11.2, 11.3, 18.4; GATT Articles VI:1 and VI:2; and WTO Agreement Article XVI:4. The Panel

concluded that the "zeroing procedures" are a measure that can be challenged "as such" and found that, in maintaining *model zeroing* procedures in the context of *original investigations*, the DOC acts inconsistently with AD Agreement Article 2.4.2. However, it also found that in maintaining *simple zeroing* procedures in the context of *original investigations*, the DOC does not act inconsistently with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2, or with AD Agreement Articles 3.1-3.5, 5.8, 1, 18.4 and WTO Agreement Article XVI:4. Similarly, it found that in maintaining *simple zeroing* procedures in the context of *periodic reviews* and *new shipper reviews*, the DOC does not act inconsistently with AD Agreement Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3, 9.5 and 18.4, GATT Articles VI:1 and VI:2 and WTO Agreement Article XVI:4. It also found that the DOC did not act inconsistently with AD Agreement Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3 and GATT Articles VI:1 and VI:2 by applying *simple zeroing* in 11 *periodic reviews*. Finally, it found that Japan failed to prove that by maintaining zeroing procedures in the context of *changed circumstances* and *sunset reviews* the DOC acts inconsistently with AD Agreement Articles 2 and 11, and, in addition, it concluded that the International Trade Commission and the DOC did not act inconsistently with AD Agreement Articles 2 and 11 in relying, in two *sunset reviews*, on margins calculated in previous proceedings.

On appeal, Japan contended that the Panel erred in its findings related to the use of simple zeroing in original investigations and in periodic, new shipper and sunset reviews. In addition, the United States filed a Notice of Other Appeal in which it alleged that the Panel erred in finding that the "zeroing procedures" are a measure that can be challenged in WTO dispute settlement.

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Working Procedures for Appellate Review Rule 18(5) - Correction of "Clerical Errors"

Japan requested authorization from the Appellate Body to correct a "clerical error" in its appellant's submission, pursuant to Rule 18(5) of the Working Procedures for Appellate Review. None of the participants or third participants objected to Japan's request, and the Appellate Body Division hearing the case authorized Japan to correct the error. (Para. 5)

Request for Consultations in Relation to Terms of Reference

In support of its appeal under DSU Article 11 relating to whether the "zeroing procedures" constitute a measure, the United States asserted that Japan's consultations request did not include a reference to a "zeroing measure" in the context of weighted average-to-transaction or transaction-to-transaction comparisons in original investigations. Thus, the United States argued, "Japan's failure to consult on any such measures means that they are not within the terms of reference of this dispute, and the Appellate Body should reverse the Panel's finding as to the existence of such [United States] measures on that basis." (Para. 89)

In examining this issue, the Appellate Body noted that Japan's panel request "refers to zeroing in the context of all types and stages of anti-dumping proceedings, and in all comparison methodologies." Then, turning to Japan's consultations request, the Appellate Body said that it did not agree with the United States' reading of this document. In this regard, it stated that "[a] careful examination of this request indicates that the use of 'zeroing procedures' in the context of all types and stages of anti-dumping proceedings, and regardless of the comparison methodology used, was covered by that request." It elaborated, "[t]he language in Japan's request for consultations should, in our view, have sufficiently alerted the United States to the fact that Japan wished to consult on zeroing in the context of all

comparison methodologies, including T-T and W-T comparisons in original investigations." (Paras. 92-95)

On this basis, the Appellate Body said that it disagreed with the United States' contention that the "zeroing procedures," as they relate to weighted average-to-transaction or transaction-to-transaction comparisons in original investigations, are not within the Panel's terms of reference. (Para. 96)

AD Agreement Article 17.6(ii) - Permissible Interpretation

The Appellate Body noted that the Panel and the United States referred to AD Agreement Article 17.6(ii), which states in part: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." In reaction, the Appellate Body said that "there is no room for recourse to the second sentence of Article 17.6(ii) in this appeal" because AD Agreement Articles 2.4, 2.4.2, 9.3, 9.5, and 11.3 and GATT Articles VI:1 and VI:2, "when interpreted in accordance with customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii), do not admit of another interpretation of these provisions as far as the issue of zeroing before us is concerned." (Paras. 188-189)

SUBSTANTIVE ISSUES

Whether the Zeroing Procedures, As Such, Constitute a Measure / DSU Article 11

Based on the evidence before it, the Panel had concluded that "a rule or norm exists providing for the application of zeroing whenever [the] USDOC calculates margins of dumping or duty assessment rates," and thus the "zeroing procedures" constitute "a measure which can be challenged as such." (Para. 76) In its "other appeal," the United States argued that the Panel erred in finding that the "zeroing procedures," inasmuch as they relate to the calculation of margins of dumping on the basis of transaction-to-transaction ("T-T") and weighted average normal value-to-prices of individual export transactions ("W-T") comparisons in original investigations, constitute a measure that can be challenged, as such, in WTO dispute settlement. (Para. 72) In this regard, the United States contended that the Panel "failed to make an objective assessment of the matter before it—including an objective assessment of the facts of the case—as required by DSU Article 11." Specifically, the United States pointed out that in original investigations, "it has never applied the W-T comparison methodology and has only once applied the T-T comparison methodology." Moreover, the United States asserted that it has "never pronounced on how it would conduct such comparisons, including whether it would or would not 'zero' in connection with those comparisons." (Para. 78) In response, Japan argued that there was "no need for the Panel to have parsed the evidence as to each specific comparison [methodology] and procedural [context]" in its determination that "there exists a single rule or norm that can be challenged as such." (Para. 81)

In examining this claim, the Appellate Body first stated that "the United States' challenge under Article 11 of the DSU is directed at the Panel's appreciation and weighing of the evidence." After reviewing the evidence considered by the Panel, the Appellate Body explained that "[t]he thrust of the United States' argument is that context-specific evidence is required to demonstrate the existence of the zeroing procedures in T-T and W-T comparisons in original investigations," that is, "the existence of a rule or norm requiring the application of zeroing must be examined separately for each comparison methodology and for each type of anti-dumping proceeding." However, the Appellate Body said, "the United States did not adduce evidence of a single case in which zeroing was not applied," and "[n]or did it indicate how the use of alternative comparison methodologies would make a difference in the operation or application of the zeroing procedures." Moreover, the United States "did not explain why the rationale

underlying the zeroing procedures in W-W comparisons in original investigations, or W-T comparisons in periodic reviews, does not apply to the calculation of margins of dumping on the basis of T-T and W-T comparisons in original investigations." (Paras. 82-87)

On this basis, the Appellate Body said it "agreed with the Panel's understanding of the Appellate Body's previous jurisprudence and the manner in which the Panel framed the question before it." It also considered that "the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm" and that the Panel "examined ample evidence regarding the precise content of this rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States." Thus, the Appellate Body disagreed with the United States' contention that the Panel "did not assess objectively the issue of whether a single rule or norm exists by virtue of which the USDOC applies zeroing." (Para. 88)

After rejecting an argument by the United States related to Japan's request for consultations in relation to the terms of reference for the issue at hand (see Procedural and Systemic Issues above), **the Appellate Body said it upheld the Panel's finding that the "zeroing procedures" "constitute a measure which can be challenged as such." Therefore, it dismissed the United States' claim that the Panel acted inconsistently with DSU Article 11 when it concluded that "the zeroing procedures, as they relate to original investigations based on transaction-to-transaction and weighted average normal value-to-prices of individual export transactions comparisons, constitute a measure that can be challenged, as such, in WTO dispute settlement."** (Para. 96)

Zeroing "As Such" - Original Investigations, Periodic Reviews, New Shipper Reviews

Before the Panel, Japan claimed that the DOC's "simple zeroing" procedures, as they relate, *inter alia*, to original investigations, periodic reviews, and new shipper reviews, are inconsistent, as such, with certain provisions of the GATT and the AD Agreement. The Panel rejected Japan's claims relating to "simple zeroing" procedures in transaction-to-transaction ("T-T") comparisons in original investigations, taking the view that it is "permissible" to interpret AD Agreement Articles 2.1 and 2.4.2, as well as GATT Article VI, to mean that "there is no general requirement to determine dumping and margins of dumping for the product as a whole." (Paras. 98-100) The Panel concluded that, "by maintaining simple zeroing procedures in the context of original investigations," the DOC does not act inconsistently with AD Agreement Articles 2.1 and 2.4.2 and GATT Articles VI:1 and VI:2. The Panel also concluded that there was no violation of the "fair comparison" requirement of Article 2.4. Finally, the Panel applied the "same line of reasoning" to Japan's claims relating to periodic and new shipper reviews. (Paras. 102-104)

Japan challenged these findings on appeal, arguing that pursuant to AD Agreement Article 2.1 and GATT Articles VI:1 and VI:2, "'dumping' and 'margins of dumping' must be defined in relation to the 'product' under investigation as a whole." In this regard, Japan contended that "[b]ecause the zeroing procedures lead to addressing only a 'sub-part' of the product in a dumping determination, they violate Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994." Japan made similar arguments under AD Agreement Articles 9.3 and 9.5 in relation to periodic and new shipper reviews. (Para. 105)

In addressing this issue, the Appellate Body structured its analysis as follows. First, it discussed the "fundamental disciplines" that apply under the AD Agreement and GATT to all anti-dumping proceedings. Next, it examined Japan's claim that zeroing in T-T comparisons in original investigations is, as such, inconsistent with AD Agreement Articles 2.1, 2.4, and 2.4.2 and GATT Articles VI:1 and VI:2. Finally, it examined Japan's claim that zeroing in periodic reviews and new shipper reviews is, as

such, inconsistent with AD Agreement Articles 2.1, 2.4, 9.1-9.3, and 9.5 and GATT Articles VI:1 and VI:2. (Para. 107)

The Concepts of "Dumping" and "Margins of Dumping"

In discussing the concepts of "dumping" and "margins of dumping," the Appellate Body recalled at the outset the definition of "dumping" in GATT Article VI:1 and AD Agreement Article 2.1, and that of "margin of dumping" in GATT Article VI:2, both of which refer to a "product." It then noted that the AD Agreement "prescribes that dumping determinations be made in respect of each exporter or foreign producer examined." Finally, it observed that the AD Agreement and the GATT are concerned only with dumping that causes or threatens to cause material injury. After setting out these views, the Appellate Body then said "it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (a) the concepts of 'dumping' and 'margins of dumping' pertain to a 'product' and to an exporter or foreign producer; (b) 'dumping' and 'dumping margins' must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer." These concepts, it noted, are "interlinked." (Paras. 108-114)

Finally, the Appellate Body also stated that "dumping" and "margins of dumping" can be found to exist "only in relation to that product as defined by [the investigating] authority." By contrast, "[t]hey cannot be found to exist for only a type, model, or category of that product," nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist "at the *level* of an individual transaction." Thus, it said, "when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping," but rather are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer." (Para. 115)

Zeroing "As Such" - Dumping Margin Determination Based on Transaction-to-Transaction Comparisons in Original Investigations

In considering the Panel's findings relating to the "zeroing procedures" "as such" in T-T comparisons in original investigations, the Appellate Body addressed three sets of provisions separately: AD Agreement Article 2.4.2; AD Agreement Article 2.1 and GATT Articles VI:1 and VI:2; and AD Agreement Article 2.4.

AD Agreement Article 2.4.2

Turning first to Article 2.4.2, the Appellate Body analyzed separately the Panel's consideration of the first sentence of that provision and the contextual arguments relating to the second sentence of the provision. Article 2.4.2 states:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export

> prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

With regard to the first sentence of Article 2.4.2, the Appellate Body noted that "[u]nder the T-T comparison methodology at issue in this appeal, the margin of dumping is established by a comparison between the normal value and the export price in individual transactions." The issue, it said, is whether the zeroing procedures are, as such, inconsistent with the first sentence of Article 2.4.2 in the context of T-T comparisons in original investigations. (Para. 119) On this issue, the Appellate Body first recalled its earlier finding in *U.S - Final Lumber AD Determination ("Softwood Lumber V"), Article 21.5*, where it concluded that zeroing, as applied in the original investigation determination based on the T-T comparison methodology at issue there, was inconsistent with AD Agreement Article 2.4.2. The Appellate Body said it saw "no reason to depart from" its reasoning in that case, which, it said, "is in consonance with" the Appellate Body's approach in the earlier case of *U.S - Final Lumber AD Determination ("Softwood Lumber V")* and is "consistent with the fundamental disciplines that apply" under the AD Agreement and GATT Articles VI:1 and VI:2. (Paras. 120-121) As further support, it said: having prohibited "zeroing" in the context of W-W comparisons, there is no reason to allow "zeroing" in the context of T-T comparisons; the absence of the phrase "all comparable export transactions" from the T-T comparison language does not mean that "zeroing" is permissible in that context; and because the W-W and T-T comparison methodologies "fulfil the same function," it would be "illogical to interpret the [T-T] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the [W-W] methodology." (Paras. 123-125)

On the basis of this and other reasons, the Appellate Body said that it disagreed with the Panel that "dumping may be determined at the level of individual transactions, and that multiple comparison results are margins of dumping in themselves." It also disagreed that the terms "product" and "products" "can apply to individual transactions and do not require an examination of export transactions at an aggregate level," and that "a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value." Therefore, the Appellate Body disagreed with the Panel's finding that, "in the context of the [T-T] methodology in the first sentence of Article 2.4.2, the term 'margins of dumping' can be understood to mean the total amount by which transaction-specific export prices are less than transaction-specific normal values." (Para. 129)

Turning then to the contextual arguments related to the second sentence of Article 2.4.2, the Appellate Body noted that this provision provides for an "asymmetrical comparison methodology" that addresses a "pattern" of "targeted" dumping. This methodology, it said, is an "exception" to the normal methodologies. The Appellate Body explained that the Panel assumed that a general prohibition of "zeroing" could not be reconciled with Article 2.4.2, second sentence, on the basis that the results under the first sentence and second sentence would be "mathematically equivalent" if "zeroing" were not used. (Paras. 131-132) The Appellate Body rejected the Panel's view, referring to its reasoning in *U.S - Final Lumber AD Determination ("Softwood Lumber V"), Article 21.5* and also explaining that the "universe of export transactions" would be more limited under the second sentence. (Paras. 133-135) Thus, the Appellate Body disagreed with the Panel's finding that the second sentence provides contextual support for its conclusion. (Para. 136)

On this basis, the Appellate Body concluded that, "in establisbing 'margins of dumping' under the T-T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which

export prices are above normal value." Accordingly, the Appellate Body reversed the Panel's finding that the United States does not act inconsistently with Article 2.4.2 by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations. It found instead that the United States acts inconsistently with that provision. (Paras. 137-138)

AD Agreement Article 2.1 and GATT Article VI:1

The Appellate Body next considered AD Agreement Article 2.1 and GATT Articles VI:1 and VI:2. **In this regard, noting that "these findings are simply based on the Panel's findings and reasoning relating to Article 2.4.2 of the *Anti-Dumping Agreement*, which we have reversed," the Appellate Body reversed the Panel's findings that "simple zeroing" in original investigations is not inconsistent with Article 2.1 and Articles VI:1 and VI:2.** (Para. 139) In addition, the Appellate Body noted Japan's request that the Appellate Body not only reverse the Panel's findings of consistency, but also find that the United States acted inconsistently with these provisions in using zeroing in the context of T-T comparisons in original investigations. However, the Appellate Body said that Article 2.1 and Article VI:1 are "definitional provisions," as they set out a definition of "dumping" for the purposes of the AD Agreement and the GATT. While these provisions "are no doubt central to the interpretation of other provisions," the Appellate Body said that "read in isolation, [they] do not impose independent obligations." Given its finding of violation of Article 2.4.2, the Appellate Body did not consider it necessary to make additional findings under these provisions. (Para. 140)

AD Agreement Article 2.4

Finally, turning to AD Agreement Article 2.4, the Appellate Body considered whether the "zeroing procedures" are inconsistent with the "fair comparison" requirement in that provision. In this regard, the Panel had stated that the "somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders more specific provisions of the *[Anti-Dumping] Agreement* completely inoperative." Japan contended that the Panel erred in making Article 2.4 subject to the "more specific" provisions of Article 2.4.2. The Appellate Body agreed that the Panel's reasoning implies that the "fair comparison" requirement in Article 2.4 is dependent on Article 2.4.2, and it said that this is not a correct representation of the relationship between the provisions. (Paras. 141-143) With regard to the substance of the issue, the Appellate Body recalled that it had previously said, in paragraph 139 of *U.S - Final Lumber AD Determination ("Softwood Lumber V"), Article 21.5*, that the use of zeroing under the T-T comparison methodology "distorts the prices of certain export transactions because the 'prices of [certain] export transactions [made] are artificially reduced,'" which "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely." It noted its statement in paragraph 142 of that same case that "[t]his way of calculating cannot be described as impartial, even-handed, or unbiased." The Appellate Body therefore considered that zeroing in T-T comparisons in original investigations is inconsistent with the fair comparison requirement in Article 2.4. (Para. 146)

On this basis, the Appellate Body reversed the Panel's finding that the United States does not act inconsistently with AD Agreement Article 2.4 by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations. It found instead that the United States acts inconsistently with this provision. (Para. 147)

Zeroing "As Such" in Periodic Reviews and New Shipper Reviews

The Appellate Body next considered Japan's claims relating to zeroing, as such, in periodic and new shipper reviews, under the following provisions: AD Agreement Articles 9.3 and 9.5 and GATT

Article VI:2; the "fair comparison" requirement of AD Agreement Article 2.4; and AD Agreement Articles 2.1, 9.1 and 9.2, along with GATT Article VI:1. (Para. 148)

Turning first to AD Agreement Articles 9.3 and 9.5 and GATT Article VI:2, the Appellate Body noted that the Panel had relied on its reasoning relating to original investigations to find that the "zeroing procedures" do not violate AD Agreement Articles 2.1, 2.4, 9.1-9.3 and 9.5 and GATT Articles VI:1 and VI:2 in periodic and new shipper reviews. According to the Appellate Body, the Panel's reasoning assumed that the terms "dumping" and "margins of dumping" "refer to results of transaction-specific comparisons." The Appellate Body disagreed with this view, stating that "dumping" and "margins of dumping" can exist "only at the level of a 'product.'" (Paras. 149-151) In addition, the Appellate Body rejected the Panel's consideration of Article 9, recalling its previous holding in paragraph 130 of *U.S. - Zeroing (EC)* that the margin of dumping acts as a "ceiling" for the total amount of anti-dumping duties. (Paras. 152-156) Next, the Appellate Body considered issues related to the operation of "prospective" normal value systems. In this regard, the Panel had taken the view that such systems allow for the transaction-specific consideration of export transactions that are below normal value, and thus indicate that duties may be assessed in the same way in the U.S. retrospective system. The Appellate Body disagreed with this analysis, and found instead that "[u]nder any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter." Thus, as with the U.S. retrospective system, "[t]o the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded." (Para. 162) Finally, noting Japan's argument that the Panel "gave no separate interpretive consideration" to new shipper reviews, the Appellate Body also considered that "zeroing" applied to new shippers is inconsistent with AD Agreement Article 9.5. (Paras. 164-165)

On this basis, the Appellate Body reversed the Panel's finding that the United States does not act inconsistently with AD Agreement Articles 9.3 and 9.5 and GATT Article VI:2 by maintaining zeroing procedures in periodic reviews and new shipper reviews. It found instead that the United States acts inconsistently with these provisions. (Para. 166)

The Appellate Body then examined the issue of zeroing in periodic and new shipper reviews under the "fair comparison" requirement of Article 2.4. In this regard, the Appellate Body stated that the use of zeroing means that anti-dumping duties are collected in excess of the margin of dumping, a methodology which does not involve a "fair comparison." **Accordingly, the Appellate Body reversed the Panel's finding that zeroing in the context of periodic reviews and new shipper reviews is not, as such, inconsistent with Article 2.4. It found instead that zeroing is, as such, inconsistent with that provision.** (Paras. 167-169)

Finally, as a consequence, the Appellate Body reversed the Panel's findings that zeroing is not, as such, inconsistent with AD Agreement Articles 2.1, 9.1, and 9.2 and GATT Article VI:1, because these findings were based on the Panel's findings and reasoning relating to AD Agreement Articles 2.4, 2.4.2, and 9.3 and GATT Article VI:2, which the Appellate Body had reversed. The Appellate Body found it unnecessary to complete the analysis on these claims. (Paras. 170-171)

Zeroing As Applied in Periodic Reviews

The Panel had found that zeroing, as applied by the United States in the periodic reviews at issue, is not inconsistent with AD Agreement Articles 1, 2.1, 2.4, 2.4.2, and 9.1-9.3 and GATT Articles VI:1 and VI:2. On appeal, Japan challenged the Panel's findings under Articles 2.1, 2.4, 9.1-9.3 and Articles VI:1 and VI:2. (Paras. 172-173)

On this issue, the Appellate Body recalled, *inter alia*, its earlier finding in this case to the effect that zeroing in periodic reviews as such violates AD Agreement Articles 2.4 and 9.3 and GATT Article VI:2. In the periodic reviews at issue here, the Appellate Body noted, the DOC assessed the anti-dumping duties "according to a W-T comparison methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value." If, for a given individual transaction, "the export price exceeded the contemporaneous average normal value," the DOC, "at the aggregation stage, disregarded the result of this individual comparison." Since the results of such comparisons were "systematically disregarded," "the amount of anti-dumping duties collected in the periodic reviews at issue exceeded the exporters' proper margins of dumping." (Paras. 174-175)

On this basis, the Appellate Body reversed the Panel's finding that zeroing, as applied by the United States in the 11 periodic reviews at issue in this appeal, is not inconsistent with AD Agreement Articles 2.1, 2.4, 9.1, and 9.3 and GATT Articles VI:1 and VI:2. It found instead that the United States acted inconsistently with Articles 2.4 and 9.3 and Article VI:2. (Para. 176) The Appellate Body did not consider it necessary to complete the analysis and make findings under Articles 2.1 and 9.1. (Para. 177)

Zeroing As Applied in Sunset Reviews

With regard to the specific sunset review determinations at issue, the Panel had found that the margins relied on by the DOC in these sunset reviews were from previous periodic reviews, for which it had already found that the AD Agreement does not prohibit zeroing. Thus, the Panel had concluded that the DOC did not violate AD Agreement Articles 2 and 11 when it made its sunset determinations based on previous periodic review margins that used zeroing. Japan alleged that this finding was in error. (Paras. 178-180)

In addressing this issue, the Appellate Body recalled its previous statements that the terms "determine" and "review" in Article 11.3 require a "reasoned conclusion" based on "positive evidence" and a "sufficient factual basis." It also noted its finding in *U.S. - Corrosion-Resistant Steel Sunset Review* that when investigating authorities rely on past dumping margins in making their likelihood determination in a sunset review, these margins must be consistent with Article 2.4. (Paras. 182-183)

Here, the Appellate Body noted, the Panel had found that the DOC relied on past margins that were calculated during periodic reviews on the basis of "simple zeroing." Having previously concluded that zeroing in periodic reviews is inconsistent with Articles 2.4 and 9.3, the Appellate Body found that the determinations in the sunset reviews at issue are inconsistent with Article 11.3. (Paras. 184-185)

On this basis, the Appellate Body reversed the Panel's finding that the United States acted consistently with Articles 2 and 11 when, in the sunset reviews at issue in this case, it relied on margins of dumping calculated in previous periodic review proceedings. It found instead that the United States acted inconsistently with Article 11.3. The Appellate Body found it unnecessary to make further rulings under AD Agreement Articles 2.1 and 2.4 and GATT Article VI. (Paras. 186-187)

COMMENTARY

The Nature of AD Agreement Article 2.1 and GATT Article VI:1

As part of its findings, the Appellate Body made the following statements regarding the nature of AD Agreement Article 2.1 and GATT Article VI:1:

> Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the *Anti-Dumping Agreement* and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations.

(*See* para. 140) Thus, the Appellate Body made clear its view that these two provisions are "definitional" only and "do not impose independent obligations."

While both provisions do provide a definition of dumping, it could be argued that they do more than just this. For instance, both provisions state that a product "is to be considered" as being dumped where certain conditions are met. The language "is to be considered" seems like a substantive requirement imposed on investigating authorities, to the effect that the conditions therein establish the only situations in which a product can be properly treated as dumped. In addition, Article VI:1 says, "[d]ue allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." Again, this appears to impose a substantive requirement on investigating authorities in relation to how they carry out a dumping margin calculation. Thus, Article 2.1 and Article VI:1 appear to do more than just offer a definition.

Furthermore, the Appellate Body's statements here seem inconsistent with its findings in the *U.S. - Japan Hot-Rolled Steel* case. There, the Appellate Body stated: "The text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be 'in the ordinary course of trade'; second, it must be of the 'like product'; third, the product must be 'destined for consumption in the exporting country'; and, fourth, the price must be 'comparable.'" (*See* para. 165 of *Hot-Rolled Steel*) In terms of its findings in that case, the Appellate Body said that "Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade,' and it found that the determination at issue "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade,'" in violation of Article 2.1. (*See* paras. 140, 158 and 240(d) of *Hot-Rolled Steel*) Thus, these findings appear to treat Article 2.1 as an independent obligation.

Zeroing - Prospective Versus Retrospective Systems

In the many cases where it has addressed the issue of zeroing, the Appellate Body has made it very clear that it opposes zeroing in virtually every circumstance. However, one area that remains a bit uncertain is the extent to which zeroing can be used in prospective systems, as most of the WTO cases on zeroing have involved the U.S. retrospective system. In particular, as explained below, in the case at hand the Appellate Body's statements seem to permit the use of a practice that is akin to zeroing in prospective systems, at least at an early stage of the duty collection process.

The issue of the comparative treatment of prospective and retrospective systems arose in relation to the following U.S. argument regarding duty collection in prospective systems:

> Members who utilize a prospective normal value system assess anti-dumping duties on each transaction where normal value exceeds export price. In a transaction where export price is equal to, or exceeds, normal value there is no margin of dumping, and thus no anti-dumping duty

> assessed. Nonetheless, such Members are not required to provide a refund or a credit for any amount by which the export transaction exceeds normal value. (*See* para. 4.95 of panel report)

In essence, the United States' concern was that in prospective systems, Members engage in behavior that is akin to zeroing, as they do not assess duties "where export price is equal to, or exceeds, normal value there is no margin of dumping." Thus, it contended, the United States and others should be able to do the same in a retrospective system. The Panel agreed with this view, stating: "If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, we see no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective duty assessment system applied by the United States that is the subject of Japan's 'as such' and 'as applied' claims in this dispute." (*See* para. 7.206 of panel report)

On appeal, however, the Appellate Body rejected this reasoning, explaining:

> Under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping. (*See* para. 162)

Thus, the Appellate Body's view seems to be that engaging in a practice that is similar to zeroing during the *duty collection* phase in a prospective system does not violate WTO anti-dumping rules because *final liability* is not yet determined at this stage. Importers have a right to request a refund of any excess duties collected, and it is only at this later stage that anti-dumping rules prohibit zeroing.

We note one concern in relation to the Appellate Body's approach here. If in a prospective system investigating authorities may collect duties on dumped sales while ignoring non-dumped sales (*i.e.*, if they "zero" the non-dumped transactions), it may be possible to use the system in a manner that imposes a greater burden on importers than would a retrospective system. Specifically, a Member can use zeroing in the duty collection phase so as to inflate the amounts collected in relation to the actual margin. While it is true that importers can request a refund later, there will be a period of time before the refund request is resolved during which importers will have paid an amount that exceeds the actual dumping margin. Because Members can take this approach in a prospective system but not in a retrospective system, there may be an advantage to using a prospective system in terms of protecting domestic industries from imports. On the other hand, given that some prospective systems allow exporters/importers to avoid any liability by simply charging a price that is above normal value, and given other differences between the two systems, this concern may be more theoretical than practical. Whether the application of different rules on zeroing as between the two systems has an actual impact would need to be determined by a quantitative analysis.

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