INTERNATIONAL TRADE LAW
THROUGH THE CASES

J.H.H. Weiler
NYU School of Law

Julian Arato
University of Michigan Law School

Sungjoon Cho
Chicago-Kent College of Law

Kathleen Claussen
Georgetown University Law Center

Unit XII: Trade Remedies

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Supplementary Reading

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John H. Jackson, William J. Davey, Alan O. Sykes, International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 6th ed. 2013, 697-791.

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1. Anti-Dumping

1-1. OVERVIEW
https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

TECHNICAL INFORMATION ON ANTI-DUMPING

Dumping in the GATT/WTO

What is dumping?

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the "normal value") and the appropriate price in the market of the importing country (known as the "export price") so as to be able to undertake an appropriate comparison.

Article VI of GATT and the Anti-Dumping Agreement

… Article VI of GATT 1994, on the other hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

(…)

The UR [Uruguay Round] Agreement

Basic principles

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination of dumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.

(…)

Dispute settlement

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding ("DSU") (Article 17). … In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. …

(…)

Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases.

(…)

Alternative method of calculation

The Agreement provides that in circumstances where there is no export price, or where the export price is unreliable due to an association or compensatory arrangement between the exporter and the importer or a third party, an alternative method may be used to determine the export price. this results in a "constructed export price", and is calculated on the basis of the price at which the imported products are first resold in an independent buyer. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

Fair comparison of normal value and export price

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made at as nearly as possible the same time.

As part of the Agreement's requirements regarding transparency and participation, the investigating authorities are required to inform parties of the information needed to ensure a fair comparison, for instance, information regarding adjustments, allowances, and currency conversion, and may not impose an "unreasonable burden of proof" on parties.

Allowance

To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability.

Adjustments in case of constructed export price

The Agreement also provides specific rules on the adjustment to be made if the comparison of normal value is to a constructed export price. In those circumstances, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchaser, as well as for profits accruing. If price comparability has been affected, the Agreement requires either that the normal value be established at a level of trade equivalent to that of the constructed export price, which is likely to require an adjustment, or allowance must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability.

Conversion of currency

Where the comparison of normal value and export price requires conversion of currency, the Agreement provides specific rules governing that conversion (Article 2.4.1). Thus, the exchange rate used should be that in effect on the date of sale (date of contract, invoice, purchase order or order confirmation, whichever establishes material terms of sale). If a forward currency sale is directly linked to export sale, the exchange rate of forward currency sale must be used. Moreover, the Agreement requires that exchange rate fluctuations be ignored, and that exporters be allowed at least 60 days to adjust export prices for sustained exchange rate movements.

Calculation of dumping margins and duty assessment

Calculation of dumping margins

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is "targeted dumping": that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

Refund or reimbursement

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. …

Individual exporter dumping margins

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

(…)

Determination of injury and causal link

Like product (Article 2.6)

An important decision must be made early in each investigation to determine the domestic "like product". Like product is defined in the Agreement as "a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate "like product". The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

Domestic industry (Article 4)

The Agreement defines the term "domestic industry" to mean "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

(…)

Injury

Types of injury

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term "injury" to mean either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry, but is silent on the evaluation of material retardation of the establishment of a domestic industry.

Basic requirements for determination of material injury

The Agreement does not define the notion of "material". However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the dumped imports on domestic producers of the like product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made.

Basic requirements for determination of threat of material injury

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

(…)

Procedural requirements—Investigation

Initiation

… Article 5 of the Agreement establishes the requirements for the initiation of investigations. The Agreement specifies that investigations should generally be initiated on the basis of written request submitted "by or on behalf of" a domestic industry. This "standing" requirement includes numerical limits for determining whether there is sufficient support by domestic producers to conclude that the request is made by or on behalf of the domestic industry, and thereby warrants

initiation. The Agreement establishes requirements for evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that investigations without merit are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is de minimis, and establishes numeric thresholds for these determinations. In order to minimize the trade-disruptive effect of investigations, Article 5.10 specifies that investigations should be completed within one year, and in no case more than 18 months, after initiation.

Conduct

Article 6 of the Agreement sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment. The Agreement establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing. Further guidance on the conduct of investigations is contained in two Annexes to the Agreement, which set forth rules for the on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available in the event a party refuses access to, or does not provide, requested information, or significantly impedes the investigation.

Provisional measures and price undertakings

Imposition of provisional measures

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures— generally four months, with a possible extension to six months at the request of exporters. …

Price undertakings

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that

undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Collection of duties

Imposition and collection of duties

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a "lesser duty" rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

(…)

Review and public notice

Duration, termination, and review of anti-dumping measures

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The "sunset" requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year "sunset" provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public Notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.

* * *

1-2. TREATY TEXT

GATT 1994

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit

Due 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.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

(…)

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping … duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

(…)

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Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement)

Members hereby *agree* as follows:

PART 1

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

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

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are

[1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

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[4] The extended period of time should normally be one year but shall in no case be less than six months.

[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

[6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

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

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 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

[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3

Determination of Injury[9]

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

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

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the

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

imported products and the conditions of competition between the imported products and the like domestic product.

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

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

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' 'sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

[10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

Article 4

Definition of Domestic Industry

4.1 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, except that:

(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[12] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the

[11] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

[12] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export

prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 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[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de*

[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

[15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[16] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member

[17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.
[18] Members agree that requests for confidentiality should not be arbitrarily rejected.

in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 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.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the

margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 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. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

[19] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

[20] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 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) where 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. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

10.1 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.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 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.

10.7 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.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

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.[21] 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.[22] The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

[21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

[22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[23], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

[23] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall

afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

Article 15

Developing Country Members

It is recognized 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 under this Agreement. Possibilities 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.

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 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.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18

Final Provisions

18.1 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]

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

[24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

(…)

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. 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. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. 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.

1-3. US—HOT ROLLED STEEL

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Appellate Body Report, 24 July 2001, WT/DS184/AB/R

Note that the footnote numbering does not correspond to that in the original report.

Taniguchi, Presiding Member; Feliciano, Member; Lacarte-Muró, Member

I. Introduction

1. The United States and Japan appeal certain issues of law and legal interpretations in the Panel Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (the "Panel Report"). The Panel was established to consider a complaint by Japan with respect to anti-dumping measures imposed by the United States on imports of certain hot-rolled flatrolled carbon-quality steel products ("hot-rolled steel") from Japan.

2. On 15 October 1998, the United States Department of Commerce ("USDOC") initiated an anti-dumping investigation into imports of hot-rolled steel from, among others, Japan. USDOC determined that it was not practicable to examine all known Japanese producers and exporters and, therefore, conducted its investigation on the basis of a sample of Japanese producers. USDOC selected Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") for individual investigation. USDOC calculated an individual dumping margin for each of these companies. USDOC also established a single rate of anti-dumping duty applicable to all those Japanese producers and exporters not individually investigated (the "all others" rate). The "all others" rate was calculated as the weighted average of the individual dumping margins calculated for KSC, NSC and NKK. On 6 May 1999, USDOC published its final affirmative dumping determination. On 23 June 1999, the United States International Trade Commission (the "USITC") published its final affirmative determination of injury to the United States' hot-rolled steel industry. On 29 June 1999, USDOC published an anti-dumping duty order imposing anti-dumping duties on imports of hot-rolled steel from Japan. The factual aspects of this dispute are set out in greater detail in paragraphs 2.1 to 2.9 of the Panel Report.

(…)

III. Issues Raised in this Appeal

49. The following issues are raised in this appeal:

(a) whether the Panel erred in finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Nippon Steel Corporation, NKK Corporation and Kawasaki Steel Corporation;

(b) whether the Panel erred in finding, in paragraph 8.1(b) of the Panel Report, that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement*; that,

consequently, the United States acted inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* by failing to bring section 735(c)(5)(A) into conformity with its obligations under the *Anti-Dumping Agreement*; and that the United States' *application* of section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, to determine the "all others" rate in this case was also inconsistent with United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*;

(c) whether the Panel erred in finding, in paragraph 8.1(c) of the Panel Report, that:

(i) the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by excluding from the calculation of normal value, as outside "the ordinary course of trade", certain home market sales to parties affiliated with an investigated exporter, on the basis of the "99.5 percent" or "arm's length" test; …

(…)

IV. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU: Standard of Review

50. Before turning to the issues raised on appeal, it appears to us useful to address certain general aspects of the standard of review established by Article 17.6 of the *Anti-Dumping Agreement*, as this standard bears upon each issue arising in this appeal. [36] Article 17.6 of the *Anti-Dumping Agreement* reads:

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.

51. Two threshold aspects of Article 17.6 need to be noted. The first is that Article 17.6 is identified in Article 1.2 and Appendix 2 of the DSU as one of the "special or 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. …

52. Thus, we must consider the extent to which Article 17.6 of the *Anti-Dumping Agreement* can properly be read as "complementing" the rules and procedures of the DSU or, conversely, the extent to which Article 17.6 "conflicts" with the DSU.

53. The second threshold aspect follows from the first and concerns the relationship between Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. Article 17.6 lays down rules relating to a panel's examination of "matters" arising under one, and only one, covered agreement, the *Anti-Dumping Agreement*. In contrast, Article 11 of the DSU provides rules which apply to a panel's examination of "matters" arising under any of the covered agreements. Article 11 reads, in part:

> … 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 … (emphasis added)

54. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal. Thus, panels make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measure at stake with those covered agreements. Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter. The first sub-paragraph covers the *panel's* "*assessment* of the *facts* of the matter", whereas the second covers its "*interpret[ation* of] the *relevant provisions*". (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*.

55. In considering Article 17.6(i) of the *Anti-Dumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Anti-Dumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6(i) requires panels to make an "*assessment* of the *facts* ". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter". In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.

56. Article 17.6(i) of the *Anti-Dumping Agreement* also states that the panel is to determine, first, whether the investigating authorities' "*establishment* of the facts was *proper*" and, second, whether the authorities' "*evaluation* of those facts was *unbiased and objective*" (emphasis added) Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other

words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. 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*.

57. We turn now to Article 17.6(ii) of the *Anti-Dumping Agreement*. The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law." Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*").[38] Clearly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*.

58. The *second* sentence of Article 17.6(ii) bears repeating in full:

> 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.

59. This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."

60. It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*. We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.

61. We cannot, of course, examine here which provisions of the *Anti-Dumping Agreement* do admit of more than one "permissible interpretation". Those interpretive questions can only be addressed within the context of particular disputes, involving particular provisions of the *Anti-dumping Agreement* invoked in particular claims, and after application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*.

62. Finally, although the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an "objective assessment of the matter" as a whole. Thus, under the DSU, in examining claims, panels must make an "objective assessment" of the legal provisions at issue, their "applicability" to the dispute, and the "conformity" of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement 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. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement.

V. Article 6.8 of the *Anti-Dumping Agreement*: the use of "Facts Available"

A. Application of "Facts Available" to NSC and NKK

(…)

64. USDOC individually investigated three Japanese exporters of hot-rolled steel: NSC, NKK and Kawasaki Steel Corporation ("KSC"). USDOC requested, in its original questionnaire, that the investigated Japanese exporters provide a weight conversion factor for sales made on a so-called theoretical weight basis, so that USDOC could arrive at a single unit of measurement for all transactions. This would allow USDOC to calculate an overall dumping margin for each company.

65. Although both NSC and NKK made a small number of sales on a theoretical weight basis during the period of investigation, neither company provided a weight conversion factor in its questionnaire responses. NSC explained that it had no way of calculating a weight conversion factor, because it did not know the actual weight of the steel products sold on a theoretical weight basis. NKK stated that it was "impracticable or impossible" to calculate the requested weight conversion factor. However, before the Panel, the United States argued that, before stating that it was "impossible" to provide a weight conversion factor, NSC and NKK both attempted, in their responses to the initial questionnaires, to avoid providing the factor by stating that it was "unnecessary" to provide this information.

66. NSC and NKK both submitted their questionnaire responses, without the weight conversion factors, by the applicable deadlines of 21 December 1998 (original questionnaire) and 25 January 1999 (supplemental questionnaire). In all, the two companies were given 87 days to respond to the questionnaires.

67. In its preliminary dumping determination, issued on 19 February 1999, USDOC applied "facts available" to the small number of NSC and NKK transactions made on a theoretical weight basis because the actual weight conversion factor had not been submitted. As USDOC chose "adverse" facts available, this led to larger dumping margins for NSC and NKK than would have been the case if the weight conversion factors subsequently submitted by those companies had been used.

68. NSC submitted a weight conversion factor on 23 February 1999, 14 days before verification. While preparing for verification, NSC had discovered that information regarding the actual weight of products sold on a theoretical weight basis did, in fact, exist and was kept in a database at a production facility in the south-west of Japan, which is separate from the main sales database, maintained at its Tokyo headquarters. On the same day, and nine days before verification, NKK also submitted a weight conversion factor. According to the Panel, in reviewing USDOC's preliminary determination, NKK discovered that USDOC had accepted KSC's "best estimate" as a surrogate for an actual weight conversion factor. NKK, thereupon, submitted its own "best estimate" weight conversion factor, based on the same method used by KSC.

69. Shortly after the weight conversion factors had been provided, the petitioners submitted letters requesting USDOC to reject the weight conversion factors submitted by NSC and NKK. [48] USDOC conducted verifications during the week of 8 March 1999 at NSC's and NKK's respective Tokyo headquarters. USDOC did not verify the weight conversion factor submitted by NSC. According to the Panel, USDOC verified NKK's weight conversion factor. On 12 April and 15 April 1999, respectively, USDOC wrote to NSC and NKK informing them that the weight conversion factors submitted had been rejected as untimely. USDOC returned one copy of their respective weight conversion factor submissions to each of NSC and NKK, informed NSC and NKK that all other copies of that information would be expunged from the record, and requested NSC and NKK to revise and resubmit all submissions that referred to the weight conversion factors that had been submitted.

(…)

72. We begin with Article 6.1.1, which provides:

> Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

(…)

75. In sum, Article 6.1.1 establishes that investigating authorities may impose time-limits for questionnaire responses, and that in appropriate circumstances these time-limits must be extended. However, Article 6.1.1 does not, on its own, resolve the issue of when investigating authorities are entitled to *reject* information submitted, and instead resort to facts available, as USDOC did in this case. We consider that this issue is to be resolved by reading Article 6.1.1 together with Article 6.8 of the *Anti-Dumping Agreement*, and Annex II of that Agreement, which is incorporated by reference into Article 6.8.

76. Article 6.8 of the *Anti-Dumping Agreement* 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.

77. Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using "facts" which are otherwise "available" to the investigating authorities. According to Article 6.8, where the interested parties do not "significantly impede" the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information "within a reasonable period". Thus, 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.

78. Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available. Paragraph 1 of Annex II provides, in relevant part, that:

> The authorities should also ensure that the party is aware that if information is *not* supplied *within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available … (emphasis added)

79. Although this paragraph is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only "if information is not supplied within a reasonable time". Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a "reasonable time" but should, instead, be based on the information submitted.

80. Neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to *reject* information submitted by interested parties, as USDOC did in this case. In our view, paragraph 3 of Annex II of the *Anti-Dumping Agreement* bears on this issue. Paragraph 3 of Annex II states, in relevant part:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation *without undue difficulties*, *which is supplied in a timely fashion*, 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. (emphasis added)

81. Thus, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted "in a *timely* fashion".

82. The text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of "timeliness" under that provision. In our view, "timeliness" under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and

6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, "upon cause shown", and if "practicable", these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.

83. That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, "in a timely fashion", in paragraph 3 of Annex II as a reference to a "reasonable period" or a "reasonable time". This reading of "timely" contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines "upon cause shown", if "practicable". In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information.

(…)

86. (…) Articles 6.1.1 and 6.8, and Annex II of the *Anti-dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.

87. In this case, the Panel found that USDOC had rejected the weight conversion factors submitted by NSC and NKK *for the sole reason* that they were submitted after the deadline for submission of the questionnaire responses. According to the Panel, USDOC made no effort to determine whether, notwithstanding the fact that the weight conversion factors were received after the applicable deadlines, they were nevertheless submitted "within a reasonable period". Instead, USDOC relied *exclusively* on the fact that the deadline had expired, even though NSC and NKK had requested that USDOC accept the information as a *correction* to the information submitted in the questionnaire. USDOC did not consider any other facts and circumstances – even though several were raised – which indicated that the information might have been submitted within a reasonable period of time. Moreover, in the case of NKK, USDOC in fact verified the information, before subsequently rejecting it as out of time.

88. The approach taken by the United States in this case excludes the very *possibility*, recognized by Articles 6.1.1 and 6.8 and Annex II of the *Anti-Dumping Agreement*, that USDOC might be required, by these provisions, to extend the time-limits and accept the information submitted, as requested by NSC and NKK.

89. We are, therefore, of the view that USDOC acted inconsistently with Article 6.8 of the *Anti-dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by NSC and NKK were submitted within a reasonable period of time. In reaching this conclusion, we are *not* finding that USDOC *could not*, consistently with the *Anti-Dumping Agreement*, have rejected the weight conversion factors submitted by NSC and NKK. Rather, we conclude simply that, under Article 6.8, USDOC was not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires. Accordingly, we find that USDOC's action does not rest upon a permissible interpretation of Article 6.8 of the *Anti-Dumping Agreement*.

(…)

B. Application of "Adverse" Facts Available to KSC

91. During the period of investigation, KSC made a significant proportion of its export sales to the United States to California Steel Industries Inc. ("CSI"), a joint venture company which is owned 50 percent by KSC and 50 percent by a Brazilian company, Companhia Vale de Rio Doce ("CVRD"). In the proceedings before USDOC, CSI participated as one of the group of petitioners for the United States' hot-rolled steel industry.

92. In order to construct an export price for KSC's United States export sales, USDOC requested KSC to provide information concerning the prices at which CSI resold products it had purchased from KSC, as well as information concerning CSI's further manufacturing costs. KSC, or its lawyers, met with a CSI representative, and sent five separate letters to CSI, over a period of thirteen weeks, requesting cooperation and information. Notwithstanding initial indications that it would assist KSC, CSI eventually refused to supply the relevant information or to allow KSC's lawyers to visit CSI for purposes of gathering that information. Prior to submitting its response to the questionnaire, KSC reported to USDOC its difficulties in obtaining information from CSI, met with USDOC to discuss the issue, and requested several times to be excused from responding to the relevant section of the questionnaire. USDOC did not take any steps to assist KSC in overcoming the difficulties it was experiencing in obtaining the information, nor did USDOC request CSI to supply the information to it directly. Rather, USDOC continued to require KSC to provide the requested information.

(…)

94. In its final determination, USDOC concluded that "KSC did not act to the best of its ability with respect to the requested CSI data", and that "it cannot be said that KSC was fully cooperative and made every effort to obtain and provide the information". USDOC, therefore, decided to apply "adverse" facts available in determining that portion of KSC's dumping margin attributable to its sales to CSI. The facts available applied by USDOC significantly increased KSC's overall dumping margin.

(…)

98. We begin our examination of this issue with the last sentence of paragraph 7 of Annex II of that Agreement, 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*. (emphasis added)

99. Paragraph 7 of Annex II indicates that a lack of "cooperation" by an interested party may, by virtue of the use made of facts available, lead to a result that is "less favourable" to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of "cooperate": to "work together for the same purpose or in the same task." This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well "cooperate" to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of "cooperating" is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a "less favourable" outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has "cooperated" with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*.

(…)

103. We also observe that Article 6.13 of the *Anti-Dumping Agreement* provides:

> The authorities shall take *due account of any difficulties experienced by interested parties*, in particular small companies, in supplying information requested, *and shall provide any assistance practicable*. (emphasis added)

104. Article 6.13 thus underscores that "cooperation" is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to "take due account" of genuine "difficulties" experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation.

105. Bearing in mind our interpretation of the requirements of "cooperation", we recall the approach taken by USDOC and made of record in this case. It is uncontested that the information requested by USDOC: was not known to, nor in the possession of, KSC; related to the prices and costs of CSI; resulted from CSI's own operations and not KSC's; and was known only to, and in the possession only of, CSI. We observe, also, that, as set forth above, KSC made several attempts to obtain the requested information from CSI. Indeed, USDOC itself acknowledged that KSC "has provided a great deal of information and has substantially cooperated with respect to other issues" and that, with respect to the missing information, KSC "[has made] some effort to obtain the data and […] CSI's management rebuffed these efforts".

106. KSC also repeatedly reported to USDOC its difficulties in obtaining information from CSI. However, USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied. USDOC declined to allow KSC to attend a meeting with petitioners' counsel to discuss the issue. Although USDOC met

with KSC to discuss the issue, it appears that USDOC did not provide any specific guidance or assistance to KSC – USDOC simply repeated that KSC should obtain the requested information from CSI. USDOC did not take any steps to secure the necessary information by requesting it directly from CSI. We find nothing in the *Anti-Dumping Agreement* which would have prevented USDOC from asking CSI directly for the information. To the contrary, Articles 6.1 and 6.11 of the Agreement contemplate precisely such an approach.

107. We also note that, in its initial responses to KSC, CSI indicated that it *would* provide KSC with certain assistance, and that it was only as the deadline for questionnaire responses approached that CSI unequivocally refused to provide the requested information. Furthermore, following KSC's letter to USDOC explaining the difficulties it was experiencing, the petitioners, *of which CSI was one*, submitted comments to USDOC urging USDOC *not* to excuse KSC from providing any information relating to CSI.

108. According to USDOC's final determination, "it cannot be said that KSC was *fully* cooperative and made *every effort* to obtain and provide the information requested". (emphasis added) USDOC criticized KSC, in particular, because "KSC did not instruct its members of the CSI board to address the issue, did not invoke the Shareholder's Agreement, and did not discuss this issue with its joint venture partner." The United States highlights these alleged deficiencies and points, in particular, to KSC's failure to exercise certain rights under its Shareholder's Agreement with CVRD that might have influenced CSI. The United States, and USDOC, seem, therefore, to have expected KSC to have gone to very considerable lengths in pursuit of the necessary information. In particular, in contrast to USDOC's reluctance to take any available step, pursuant to Article 6.13 of the *Anti-Dumping Agreement*, to assist KSC in obtaining the information from CSI, USDOC seems to have expected KSC to have exhausted *all legal means* at its disposal to compel CSI to divulge the requested information, within the short time-limits of the investigation.

109. Against this background, the Panel found that the interpretation of "cooperate" applied by USDOC "went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II." The Panel stated that, in "the absence of a justified conclusion that there was a lack of cooperation", there was no basis, pursuant to that provision, for a result "less favourable" than would have been the case had KSC cooperated. In effect, the Panel held that USDOC's conclusion that KSC failed to "cooperate" in the investigation did not rest on a permissible interpretation of that word. In the light of our own interpretation of the word "cooperate", and taking account of the circumstances of this case, we agree with the Panel's finding on this issue.

(…)

VI. Article 9.4 of the *Anti-Dumping Agreement*: Calculation of the "All Others" Rate

(…)

114. Article 9.4 of the *Anti-Dumping Agreement* provides, in pertinent part:

> 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*:
>
> (ii) 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*. (emphasis added)

115. We observe, first, that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have, in accordance with Article 6.10 of the *Anti-Dumping Agreement*, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping duty rate to be applied to those exporters and producers who were *not* included in the investigated sample. The rate so established is referred to as the "all others" rate.

116. Article 9.4 does not prescribe any method that WTO Members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "*shall not exceed*" in establishing an "all others" rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a "weighted average margin of dumping established" with respect to those exporters or producers who *were* investigated. However, the clause beginning with "provided that", which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, "for the purpose of this paragraph", investigating authorities "*shall disregard* ", first, zero and *de minimis* margins and, second, "margins established under the circumstances referred to in paragraph 8 of Article 6." Thus, in determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the "all others" ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using "margins established under the circumstances referred to" in Article 6.8.

117. The United States' appeal on this point concerns only the second type of "margins" that are to be disregarded in the calculation of the maximum "all others" rate, namely "margins established under the circumstances referred to in paragraph 8 of Article 6." The United States' appeal is founded on the contention 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. By contrast, the Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the "all others" rate, any margins which are calculated, *even in part*, using facts available.

(…)

119. We proceed to examine the phrase "margins established under the circumstances referred to in paragragh 8 of Article 6." This provision permits investigating authorities, in certain situations, to reach "preliminary or final determinations … on the basis of the facts available". There is, however, no requirement in Article 6.8 that resort to facts available be limited to situations where there is *no* information whatsoever which can be used to calculate a margin. Thus, the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available. Rather, under Article 6.8, investigating authorities are entitled to have recourse to facts available *whenever* an interested party does not provide some necessary information within a reasonable period, or significantly impedes the investigation. Whenever such a situation exists, investigating authorities may remedy the lack of *any* necessary information by drawing appropriately from the "facts available". As the United States acknowledges, Article 6.8 may apply in situations where recourse to facts available is needed to cure the lack of even a very small amount of information.

120. In consequence, we are of the view that the "*circumstances* referred to" in Article 6.8 are the circumstances in which the investigating authorities properly have recourse to "facts available" to overcome a lack of necessary information in the record, and that these "circumstances" may, in fact, involve only a small amount of information to be used in the calculation of the individual margin of dumping for an exporter or producer.

(…)

127. The method used by the United States to calculate an "all others" rate is set forth in section 735(c)(5) of the United States Tariff Act of 1930, as amended, which 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. (emphasis added)
>
> (B) Exceptions
>
> 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. (emphasis added)

128. Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, sets forth a mandatory method for calculating the *actual* "all others" rate. This provision requires that the "all others" rate be equal to a weighted average of margins, unless those margins are zero, *de minimis*, or are determined "*entirely*" on the basis of the facts available. Thus, this provision requires the *inclusion* of *all* margins calculated using facts available, unless the margin is calculated *entirely* on the basis of the facts available. Accordingly, in calculating the "all others" rate, section 735(c)(5)(A) requires the *inclusion* of margins calculated *in part* using facts available. However, as we have said, Article 9.4 of the *Anti-Dumping Agreement* requires the *exclusion* of all such margins from the calculation of the maximum "all others" rate. In consequence, in cases where margins established *in part* on the basis of facts available are used to calculate the "all others" rate, the "all others" rate calculated pursuant to section 735(c)(5)(A) may well exceed the maximum allowable "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*.

129. As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. We also uphold the Panel's consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the *WTO Agreement*. We further uphold the Panel's finding that the United States' *application* of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the *Anti-Dumping Agreement* because it was based on a method that included, in the calculation of the "all others" rate, margins established, in part, using facts available.

130. Finally, the United States also argues that, in interpreting Article 9.4, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*. We note, however, that the Panel correctly identified its task as determining "whether Article 9.4 'admits of ' the interpretation put forward by the United States". Having interpreted Article 9.4 of the *Anti-dumping Agreement* in accordance with the customary rules of treaty interpretation of public international law, the Panel found that this provision "*can not*" be interpreted in the manner suggested by the United States. (emphasis added) For the reasons we have given, we agree with the Panel's interpretation of Article 9.4. We do not believe that Article 9.4 is susceptible, under the customary law rules of treaty interpretation, of the interpretation on which the United States' measure rests. We, therefore, believe that the Panel did not err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*.

VII. Article 2.1 of the *Anti-Dumping Agreement*: the "Ordinary Course of Trade"

A. 99.5 Percent Test

131. Before addressing the Panel's findings on Japan's claims regarding the so-called "99.5 percent" or "arm's length" test, it is useful to describe how this test has been applied by the United States. Article 2.1 of the *Anti-Dumping Agreement* provides that a determination of "dumping" must be based on transactions made "in the *ordinary course of trade*" (emphasis added). According to the United States:

> [USDOC] policy is to treat home market sales by an exporter to an affiliated customer as having been made at arm's length *if prices to that affiliated customer are, on average, at least 99.5 per cent of the prices charged to unaffiliated customers*. The purpose of the arm's length test (also referred to as the 99.5 per cent test) is to determine *whether the affiliation between the seller and the customer has, in general, affected the pricing of the goods sold to the affiliated customer*. (emphasis added)

132. USDOC applies the 99.5 percent test by determining, for sales by an exporter to *each affiliated* party, the weighted average selling price for the product. For the *group of non-affiliated* parties, USDOC also calculates the weighted average selling price for the product but, in this case, the average is for the group as a whole. 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". If the weighted average sales price for sales to an *individual affiliated party* falls below the 99.5 percent threshold, all of the sales to that affiliated party are treated as being made *outside* "the ordinary course of trade" and are disregarded in calculating normal value.

(…)

139. Article 2.1 of the *Anti-Dumping Agreement* provides that normal value – the price of the like product in the home market of the exporter or producer – must be established on the basis of sales made "in the ordinary course of trade". Thus, sales which are *not* made "in the ordinary course of trade" must be excluded, by the investigating authorities, from the calculation of normal value. The *Anti-Dumping Agreement* does not define the term "in the ordinary course of trade". Before the Panel, Japan referred with approval to the definition of this term given by USDOC in its questionnaire and, for the purposes of this appeal, we are content to work with this definition. That USDOC definition states:

> Generally, sales are in the ordinary course of trade if made *under conditions and practices* that, for a *reasonable period of time prior to the date of sale* of the subject merchandise, have been *normal* for sales of the foreign like product. (emphasis added)

140. In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.

(…)

144. We observe that the *inclusion* of *lower*-priced transactions, between affiliates, in the calculation of *normal value* would result in a *lower* normal value, which would make a finding

of dumping *less* likely, and would also *lower* the amount of any margin of dumping, all to the *advantage* of the exporter. Conversely, the *inclusion* of *higher*-priced transactions in the calculation of normal value would result in a *higher* normal value, which would make a finding of dumping *more* likely and would also *raise* the amount of any margin of dumping, all to the *disadvantage* of the exporter.

145. In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "*normal* value".

146. In view of the many different types of transaction not "in the ordinary course of trade" – some including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not "in the ordinary course of trade".

147. We note that Article 2.2.1 of the *Anti-Dumping Agreement* itself provides for a method for determining whether *sales below cost* are "in the ordinary course of trade". However, that provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible methods for determining whether low-priced sales are "in the ordinary course of trade". Article 2.2.1 sets forth a method for determining whether sales between *any* two parties are "in the ordinary course of trade"; it does *not* address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that *sales above cost*, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities.

148. Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade", that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation. If 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".

149. In this case, the United States applied a general "bright line" test to identify *low*-priced sales between affiliates, which excluded such sales from the calculation of normal value, unless the weighted average sales price of sales to an affiliate lay within or above a very narrow, downward range of the weighted average sales price to all non-affiliates, namely a 0.5 percent range. Moreover, the 99.5 percent test operated *automatically*, that is, USDOC itself systematically tested all sales to affiliates. Further, in response to questioning at the oral hearing, the United States stated that the current practice of USDOC, applied in this case, does not involve any right for an exporter to demonstrate that sales to affiliates were, in the light of all of the circumstances, actually in the ordinary course of trade, even though they fell below the 0.5 percent downward range. The United States indicated that if an exporter requested an

opportunity to rebut the presumption raised by the 99.5 percent test, USDOC would "entertain" such a request. However, the United States indicated that to accede to such a request it would have to change its current practice.

150. In sum, we observe that, under the 99.5 percent test, a great range of low-priced sales to affiliates can be *excluded* from the calculation of normal value because they are deemed not to be "in the ordinary course of trade". The effect of this test is to minimize, to an extreme degree, possible downward distortion of normal value that might result from sales to affiliates.

151. As regards *high*-priced sales between affiliates, the United States argues that it did apply a rule to such sales, but a rule different from the one applied to low-priced sales. The rule applied by the United States to high-priced sales between affiliates was that such sales were excluded from the calculation of normal value only if they were "*aberrationally*" or "*artificially*" high (the "aberrationally high" test). However, USDOC does not have any standard, nor even guidelines, for determining the threshold of aberrationally high prices or for informing exporters when USDOC might consider prices to be aberrationally high. Nor does USDOC *systematically* test for aberrationally high-priced sales. Instead, exporters must request the exclusion of individual, high-priced sales and the exporters bear the "burden" of demonstrating that, in the circumstances, the price is aberrationally high.

152. Under the aberrationally high test, a far smaller range of high-priced sales between affiliates can be *excluded* as not "in the ordinary course of trade", than the 99.5 percent test excludes for low-priced sales. With low-priced transactions, sales which are below the *very narrow* 0.5 percent downward range are excluded, whereas only "*aberrationally*" high prices are excluded. Moreover, USDOC *systematically* tests for low-priced sales and it *assumes* that sales below the 0.5 percent downward range are not "in the ordinary course of trade". Under the current practice, applied by USDOC in this case, exporters have *no right* to demonstrate that such sales are, in fact, made "in the ordinary course of trade". By contrast, high-priced sales are automatically *included* unless the exporter demonstrates that the sales price is aberrationally high.

153. Given that exporters will rarely be apprised of the threshold figure, applied by USDOC, for determining whether prices are high, it will be extremely difficult for exporters to know which of their sales are aberrationally high. The burden placed on exporters to demonstrate that prices are aberrationally high is, therefore, very difficult to satisfy. In addition, under Article 2.1, it is for the *investigating authorities*, and not exporters, to ensure that the calculation of normal value is based on sales made "in the ordinary course of trade", as they are responsible for making a determination of dumping. It, therefore, seems open to serious doubt whether USDOC, under the aberrationally high test, can place on exporters the burden of demonstrating that prices were aberrationally high.

154. In our view, there is 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". The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters.

(…)

156. Finally, we observe that USDOC was requested, during a review of its policies, to apply a "100.5 percent" test to mirror the effects of the 99.5 percent test. USDOC refused to amend its policies in this way, stating:

> The purpose of an arm's length test is to eliminate prices that are *distorted*. We test sales between two affiliated parties to determine *if prices may have been manipulated to lower normal value*. We do not consider home market sales to affiliates at prices above the threshold to have been *depressed* due to the affiliation. … (emphasis added)

157. In this passage, USDOC states that it seeks to "eliminate prices that are distorted". As we have noted, sales between affiliates may result in prices that are either higher or lower than the "ordinary course" price, and *both* may distort normal value. Yet USDOC does not take equal account of the possibility that the inclusion of "prices above the threshold" can also "distort" normal value and, instead, focuses predominantly on the "distortion" that results from "lower" or "depressed" prices. However, the language in Article 2.1 of the *Anti-Dumping Agreement* applies to *any* sales not "in the ordinary course of trade" and not simply those that *lower* normal value.

158. In conclusion, albeit for reasons which differ in part, we uphold the Panel's finding, in paragraph 7.112 of the Panel Report, 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 the Panel's related finding in paragraph 8.1(c) of that Report.

(…)

XI. Findings and Conclusions

240. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Nippon Steel Corporation and NKK Corporation;

(b) upholds the Panel's finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its application of "facts available" to Kawasaki Steel Corporation;

(c) upholds the Panel's findings, in paragraph 8.1(b) of the Panel Report, that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement*; that, therefore, the United States acted inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* by failing to bring section 735(c)(5)(A) into conformity with the United States' obligations under the *Anti-Dumping Agreement*; and that the United States' *application* of section 735(c)(5)(A) of the United States Tariff Act of 1930, as

amended, to determine the "all others" rate in this case, was also inconsistent with the United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*;

(d) upholds the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the United States acted inconsistently with Article 2.1 of the *Anti-Dumping Agreement* by excluding from the calculation of normal value, as outside "the ordinary course of trade", certain home market sales to parties affiliated with an investigated exporter, on the basis of the "99.5 percent" or "arm's length" test;

(…)

241. The Appellate Body *recommends* that the DSB request that the United States bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements.

1-4. INTRODUCTION TO "ZEROING"

Sungjoon *Cho, No More Zeroing? The United States Changes its Anti-Dumping Policy to Comply with the WTO*, 16 ASIL INSIGHTS 8 (2012)

Footnotes omitted.

What Is "Zeroing"?
General Agreement on Tariffs and Trade ("GATT") Article VI and the WTO Antidumping Agreement ("ADA") authorize importing countries to impose extra tariffs on imports found to be "dumped" and to cause material injury or threat to the domestic industry producing a like product. Article VI defines "dumping" as sales for export below "normal value" (the comparable price for sales within the exporting country or to a third country, or the cost of production plus overhead and profit). The DOC and other antidumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregated the results. "Zeroing" meant that the DOC would omit ("zero") the calculations where export price was *higher* than normal value, thus inflating dumping margins. The DOC, the EU, and some other importing countries originally used zeroing both in antidumping investigations and in administrative reviews of antidumping orders.

Zeroing in the GATT/WTO
In the pre-WTO period, Japan unsuccessfully challenged zeroing in the *EC—Audio Cassettes* case, though the panel report's adoption was blocked. The Uruguay Round negotiations also failed to clarify whether zeroing would be legal. India then challenged zeroing under the WTO in *EC—Bed Linen*. The EC argued that without any explicit instruction by the ADA, an antidumping authority could establish a dumping margin for each product model and therefore need not aggregate any negative results to obtain a final dumping margin for the product as a whole. The panel and the Appellate Body rejected the EC's position. The Appellate Body ruled that the "fair comparison" requirement in ADA Article 2.4.2 meant that the EC should have established the dumping margin "for the *product*—cotton-type bed linen—and not for the various types or models of that product." The Appellate Body also concluded that the EC should have taken into account "*all* comparable export transactions," including those with negative individual dumping margins.

The Appellate Body then reiterated this position in cases against U.S. antidumping investigations. The battle eventually shifted to whether ADA Article 9.3, which governs administrative reviews, also would exclude zeroing and whether the zeroing jurisprudence would apply to other types of zeroing (weighted-average-to-transaction and transaction-to-transaction, as well as weighted-average-to-weighted-average). Initially, panels resisted the Appellate Body's sweeping stance against zeroing, and one panel even questioned the binding nature of the Appellate Body's anti-zeroing decisions. However, the Appellate Body reaffirmed the vitality of jurisprudence within the WTO system, emphasizing that "adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes."

The battle concerning zeroing in administrative reviews has focused on the United States because of the U.S. retrospective method of assessing antidumping duties. In the U.S. system, the

antidumping duty rate established by the DOC in an antidumping investigation does not determine an importer's final antidumping duty liability for imports of the subject goods into the United States. In the U.S. system, the importer deposits a security (in the form of a cash deposit) at the time of importation. The importer, or any interested party (a domestic producer or a foreign exporter or producer) may annually ask the DOC to perform an administrative review. In its review, the DOC gathers data on actual export prices and normal values for the period under review, and it calculates margins of dumping. If the calculated dumping margin is higher than the cash deposit, the importer must pay the difference with interest, and if it is lower, the difference is refunded with interest. The final margin of dumping for each importer becomes the new cash deposit rate for future entries of merchandise.

If no periodic review is requested, entries for that period are liquidated (duty assessment becomes legally final) at the initial cash deposit rate. The U.S. industry (petitioners) and importers and foreign exporters (respondents) both viewed zeroing as possibly making the difference between keeping or losing long-standing U.S. antidumping orders. Respondents argued that zeroing was creating margins where dumping had ceased; petitioners argued that respondents should not be able to hide targeted dumping by averaging dumped prices in competitive markets with non-dumped prices in non-competitive markets.

The U.S. Resists

U.S. negotiators tried to negotiate a solution, proposing in the Doha Round Rules negotiations that ADA Articles 2.4 and 9.3 be amended to permit zeroing. This position found little or no support and was met by strong opposition by the "Friends of Anti-Dumping" anti-zeroing alliance. No resolution is likely on this issue in the now-deadlocked Doha Round Rules negotiations.

The U.S. antidumping authorities did only the minimum to comply with the Appellate Body decisions on zeroing. After the Appellate Body found that zeroing in investigations violated ADA Article 2.4, the DOC eliminated zeroing in original investigations but continued to use zeroing in administrative reviews. The EU and Japan then pursued and won WTO challenges to U.S. use of zeroing in administrative reviews, and then pursued compliance proceedings. They both threatened trade retaliation against U.S. exports unless the DOC stopped using zeroing in administrative reviews.

On December 28, 2010, the DOC published a Federal Register Notice under Section 123(g) of the Uruguay Round Agreements Act ("URAA"), seeking comments on a proposal to change its methodology for calculating dumping margins and antidumping duty assessment rates in reviews, to parallel its methodology for investigations. Section 123 applies when the WTO has determined that a U.S. federal regulation or practice is WTO-inconsistent; it provides that the regulation or practice may be modified to implement the WTO decision only through a final rule or other modification published in the Federal Register, after the agency concerned has consulted with Congress and has published a proposed modification for comment.

Meanwhile, the Court of Appeals for the Federal Circuit ruled that the inconsistency in the DOC's interpretation of U.S. law as permitting both non-use of zeroing in original investigations and use of zeroing in administrative reviews was arbitrary and unreasonable. Trading partners have continued to bring, and the United States has consistently lost, challenges to use of zeroing in U.S. antidumping cases. The U.S. has not won a single case on zeroing in the WTO.

1-5. US—MEXICO STAINLESS STEEL

United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, Appellate Body Report, 30 April 2008, WT/DS344/AB/R

Ganesan, Presiding Member; Bautista, Member; Sacerdoti, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (the "Panel Report"). The Panel was established to consider a complaint by Mexico concerning the calculation of margins of dumping by the United States Department of Commerce (the "USDOC") based on a methodology that does not fully reflect export prices that are above normal value [known as "zeroing"].

(…)

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 20 December 2007, the Panel found that [a method of zeroing at the time of the initial investigation, known as] "model zeroing in investigations" is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, and that the USDOC acted inconsistently with this provision by using model zeroing in the original investigation at issue. However, the Panel found that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*, and that, accordingly, the USDOC did not act inconsistently with these provisions by using simple zeroing in the five periodic reviews at issue.

(…)

III. Issues Raised in This Appeal

65. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*;

(b) whether the Panel erred in finding that the United States Department of Commerce (the "USDOC") did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* by using simple zeroing in the five periodic reviews at issue in this dispute;

(c) whether the Panel erred in finding that "simple zeroing in periodic reviews" is not, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement* and,

consequently, in finding that the USDOC did not act inconsistently with that provision in the five periodic reviews at issue in this dispute; and

(d) whether the Panel failed to fulfil its obligations under Article 11 of the DSU by making findings that contradict those in previous Appellate Body reports adopted by the DSB.

IV. Introduction

66. The issue of "zeroing" has been raised on appeal on numerous occasions in different contexts. The Appellate Body has examined the WTO-consistency of the zeroing methodology in original investigations, periodic reviews, new shipper reviews, and sunset reviews. In each context, the Appellate Body has held that zeroing is inconsistent with the relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement*. More specifically, the Appellate Body has found zeroing to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in the *original investigations* in five disputes. The Appellate Body has also found zeroing in *periodic reviews* to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* in two disputes. In one of those disputes, the Appellate Body further found zeroing in new shipper reviews to be inconsistent with Article 9.5 of the *Anti-Dumping Agreement*. Moreover, in that same dispute, the Appellate Body found that the United States had acted inconsistently with Article 11 of the *Anti-dumping Agreement* because it relied on margins of dumping calculated in previous proceedings in using zeroing in two sunset review determinations.

67. Before the Panel, Mexico distinguished between two types of zeroing: "model zeroing in investigations" and "simple zeroing in periodic reviews". By "model zeroing in investigations", Mexico meant the method under which the USDOC, in original investigations, makes a weighted average-to-weighted average ("W-W") comparison of export price and normal value for each "model" of the product under investigation, and disregards the amount by which the weighted average export price exceeds the weighted average normal value for any model, when aggregating the results of model-specific comparisons to calculate a weighted average margin of dumping for the exporter or foreign producer investigated. By "simple zeroing in periodic reviews", Mexico meant the method under which the USDOC, in periodic reviews for assessment of final liability for payment of anti-dumping duties, compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amount by which the export price exceeds the monthly weighted average normal value for each model, when aggregating the results of the comparisons to calculate the margin of dumping for the exporter and the duty assessment rate for the importer concerned.

(…)

A. The United States' System for the Imposition and Assessment of Anti-Dumping Duties

71. Before addressing the issues raised by the participants in this appeal, we consider it useful to provide a brief overview of the United States' system for the imposition and assessment of anti-dumping duties. This overview is based on the explanations provided by the participants in their written submissions and at the oral hearing in the course of these appellate proceedings.

72. The first stage of the system is the original investigation for the imposition of anti-dumping duties. The USDOC conducts an investigation to determine whether dumping by an exporter occurred during the period of investigation. This is done by calculating an "overall weighted average dumping margin for each foreign producer/exporter investigated". This determination is published in a Notice of Final Determination of Sales at Less Than Fair Value. The USDOC communicates its determination of the existence and level of dumping to the United States International Trade Commission (the "USITC"). The USITC conducts an investigation to determine whether the relevant United States industry is materially injured or threatened with material injury by reason of the dumped imports. If the USDOC finds that dumping existed during the period of investigation, and the USITC finds that the domestic industry was materially injured, or threatened with material injury, by reason of dumped imports, the USDOC issues a Notice of Antidumping Duty Order and imposes an "estimated anti-dumping duty deposit rate" (also referred to as a "cash deposit rate"), equivalent to the "overall weighted average dumping margin", for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an "all-others" rate applicable to exporters that were not individually examined.

73. In order to determine the existence of dumping and the "overall weighted average dumping margin" for each exporter investigated, the USDOC normally uses the W-W comparison methodology under which the weighted average normal value is compared with the weighted average export price. In doing so, the USDOC takes into consideration all of the export transactions of each exporter investigated. The Panel found, as a factual matter, that "the United States [had] abandoned the practice of model zeroing in investigations as from 22 February 2007". In other words, the USDOC currently takes into account the results of all model-specific comparisons, regardless of whether the weighted average export price is above or below the weighted average normal value for each model. If the "overall weighted average dumping margin" for a particular exporter thus calculated is zero, or below *de minimis* levels, that exporter is not found to be dumping and the investigation is terminated in relation to it. On the other hand, if the "overall weighted average dumping margin" is above *de minimis* levels, the exporter is found to be dumping, and the *entire volume of sales* made by that exporter is considered to be "dumped imports" for purposes of the injury determination.

74. The second stage of the United States' system is the assessment of the final liability for anti-dumping duties. For assessing anti-dumping duties, the United States follows a "retrospective" assessment system under which final liability for anti-dumping duties is determined after the merchandise is imported. Under this system, the United States initially collects cash deposits at the time of each entry of the subject merchandise at the estimated anti-dumping duty deposit rate of the relevant exporter. Subsequently, once a year, during the anniversary month of the anti-dumping duty order, interested parties—including importers, domestic interested parties, foreign producers, and exporters—may request the USDOC to conduct a periodic review to determine the final amount of anti-dumping duties owed on entries that occurred during the previous year. If a request for a periodic review is made by any party, the USDOC will review *all* sales made by the relevant exporter in order to calculate a going-forward cash deposit rate that will apply to all future entries of the subject merchandise from that exporter. Simultaneously, the USDOC will calculate a duty assessment rate applicable to each importer that imports from that exporter and determine the final liability for payment of anti-dumping duties by that importer on the basis of its duty assessment rate. If no periodic review is requested, the cash deposits made on entries during the previous year are automatically assessed as the final duties

75. In a periodic review, the USDOC determines the final liability for anti-dumping duties of an individual importer—that is, the duty assessment rate applicable to that importer—on the basis of a methodology that compares monthly weighted average normal value with prices of individual export transactions. Under this methodology, the product under consideration is broken down into models, and a monthly weighted average normal value is determined for each model. When comparing the monthly weighted average normal value with the price of each individual export transaction, the USDOC considers the amount by which the normal value exceeds the export price to be the "dumping margin" for that export transaction. If, however, the export price exceeds the normal value, the USDOC considers the "dumping margin" for that export transaction to be zero. For each importer, the USDOC expresses the total of the "dumping margins" as a percentage of the total entered value of its imports of the subject merchandise from the relevant exporter, including the value of those transactions for which the dumping margin was considered to be zero. This percentage becomes the "duty assessment rate" for that importer, and it is applied to the total entered value of its imports from the relevant exporter during the period reviewed in order to determine the final anti-dumping liability of that importer. The same zeroing methodology is also applied to determine the going-forward cash deposit rate for all future entries of the subject merchandise from the exporter concerned.

B. Standard of Review: Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement

76. Before turning to the issues raised on appeal, we recall that the standard of review applicable to disputes under the *Anti-Dumping Agreement* is set out in both Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*. As regards issues of legal interpretation, Article 17.6(ii) provides that:

> [a] 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 Appellate Body has noted that the customary rules of interpretation of public international law as codified in Articles 31 and 32 of the *Vienna Convention* apply to the interpretation of the *Anti-dumping Agreement*. The Appellate Body has recognized that the second sentence of Article 17.6(ii):

> … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations." (original emphasis)

In our analysis, we therefore bear in mind that there could be more than one permissible interpretation of a provision of the *Anti-Dumping Agreement*.

V. Simple Zeroing, As Such, in Periodic Reviews

(…)

82. In our view, the reasoning of the Panel and the arguments advanced in this appeal raise, in essence, three questions for our consideration. First, are the terms "dumping" and "margin of dumping" exporter- or importer-related concepts for the purpose of Article 9.3 of the *Anti-Dumping Agreement*? Secondly, can "dumping" and "margin of dumping" be found to exist at the transaction-and importer-specific level for the purpose of Article 9.3 of the *Anti-Dumping Agreement*? Thirdly, in duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*, is it permissible to disregard the amount by which the export price exceeds the normal value in any export transaction? We examine these questions in turn below, recognizing that they are interconnected.

A. Are "Dumping" and "Margin of Dumping" Exporter- or Importer-related Concepts?

83. We begin with an examination of the concepts of "dumping" and "margin of dumping" under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. "Dumping" is defined in Article VI:1 of the GATT 1994 as occurring when a product of one country is introduced into the commerce of another country at less than its normal value. Article VI:1 further states that dumping is to be "condemned" if it causes or threatens to cause material injury to the domestic industry producing a like product. In turn, Article VI:2 lays down that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Article VI:6(a) also stipulates that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

(…)

94. To sum up (…), it is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*. It must be stressed that, under the *Anti-Dumping Agreement*, the concepts of "dumping", "injury", and "margin of dumping" are interlinked and that, therefore, these terms should be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*.

95. Based on the above analysis, we disagree with the proposition that importers "dump" and can have "margins of dumping". Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets. The fact that "dumping" and "margin of dumping" are exporter-specific concepts under the *Anti-Dumping Agreement* is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties.

(…)

B. Can "Dumping" and "Margin of Dumping" Be Found to Exist at the Level of a Transaction?

(…)

98. First, as we noted earlier, dumping arises from the pricing behaviour of an exporter. A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time. Contrary to what the Panel indicates, the notion that "a product is introduced into the commerce of another country at less than its normal value" in Article VI:1 of the GATT 1994 suggests to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation. Furthermore, as we emphasized earlier, the *Anti-Dumping Agreement* deals with "injurious dumping", and the very purpose of an anti-dumping duty is to counteract the injury caused or threatened to be caused by "dumped imports" to the domestic industry. The notion that dumping and margin of dumping can exist at the level of an individual transaction runs counter to these basic principles of the *Anti-Dumping Agreement*.

99. Secondly, if it were permissible to determine a separate margin of dumping for each individual transaction, several margins of dumping would exist for each exporter and for the product under consideration. However, the existence of "dumping" and several "margins of dumping" at the transaction-specific level cannot be reconciled with a proper interpretation and application of several provisions of the *Anti-Dumping Agreement*. We do not see how, for example: the determination of injury under Article 3; the establishment of an individual margin of dumping for each exporter under Articles 5.8, 6.10, 6.10.2, 9.4, and 9.5; the acceptance of voluntary undertakings from an exporter under Article 8; and a review under Article 11.2 or 11.3 for continuation or revocation of an anti-dumping duty order, can be done at the transaction-or importer-specific level. The Panel's interpretation appears to us to be premised on the notion that the concept of transaction- and importer-specific dumping and margin of dumping could be confined to the stage of duty assessment and collection under Article 9.3. However, we find no textual or contextual basis for such an interpretation.

C. Is It Permissible to Disregard the Amount By Which the Export Price Exceeds the Normal Value?

100. We now turn to the question whether it is permissible, in duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*, to disregard the amount by which the export

price exceeds the normal value in any transaction; in other words, whether it is permissible to use "simple zeroing" in duty assessment proceedings.

101. As we understand it, the United States' position that simple zeroing is permitted in periodic reviews is premised on the argument that "dumping" and "dumping margins" can be found to exist at the level of individual transactions and for individual importers when assessing the anti-dumping duty liability for each importer. Under this argument, individual transactions where the export price exceeds the normal value are "non-dumped" transactions and can be disregarded for the purpose of determining importer-specific duty assessment rates. Furthermore, the United States argues that Article 9.3 deals with only transaction-specific comparisons, and that it does not require the aggregation of the results of such comparisons in order to determine a margin of dumping for the relevant exporter. The United States points out that, in the calculation of a duty assessment rate for a particular importer, the value of *all* sales made to that importer is included in the denominator merely for the sake of convenience to enable the customs authorities to apply a single duty assessment rate to all such sales.

102. Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. We recall that our examination of the context of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* confirmed that the term "margin of dumping", as used in those provisions, relates to the "exporter" of the "product" under consideration and not to individual "importers" or "import transactions", and, furthermore, that the concepts of "dumping" and "dumping margin" apply in the same manner throughout the *Anti-dumping Agreement* and do not vary under the various provisions of the Agreement. Thus, under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter

103. We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter. The Appellate Body has previously noted that other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to disregard "any zero and *de minimis* margins" under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters that have not been individually investigated. Similarly, Article 2.2.1, which deals with the calculation of normal value, sets forth the only circumstances under which sales of the like product in the exporting country can be disregarded. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.

(…)

107. We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped" for purposes of determining the existence and magnitude of dumping in the original investigation and as "non-dumped" for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. Such treatment brings about the following inconsistencies. First, as noted above, the transactions that are disregarded may well pertain to a model, type, or class that fell within the definition of the product under investigation and were treated as "dumped" in the

original investigation. By excluding these transactions at the duty assessment stage, a mismatch is created between the product considered "dumped" and the product as defined by the investigating authority.

108. Secondly, and more importantly, this treatment is inconsistent with the manner in which injury was determined in the original investigation, where transactions that occurred at above the normal value were taken into account in order to calculate the volume of dumped imports for purposes of injury determination. Obviously, we do not suggest that there need be a fresh injury determination at the duty assessment stage; rather, we wish to point to the contradiction that arises when the same type of transactions are treated as "dumped" for purposes of injury determination in the original investigation and as "non-dumped" in periodic reviews for duty assessment.

109. In addition, as we see it, a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. We further note that, if no periodic review is requested, the final anti-dumping duty liability for all importers will be assessed at the cash deposit rate applicable to the relevant exporter. When the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order.

(…)

H. Historical Background

128. We do not consider it strictly necessary in this case to have recourse to the supplementary means of interpretation identified in Article 32 of the *Vienna Convention* because our analysis under Article 31 has not left the meaning of the relevant provisions of the *Anti-Dumping Agreement* "ambiguous or obscure", nor has it led to a "manifestly absurd or unreasonable" result. Nevertheless, we turn to examine the United States' arguments relating to the historical background of the *Anti-dumping Agreement*.

129. The United States argues that recourse to the circumstances of the conclusion of the *Anti-dumping Agreement* is appropriate in this case as a supplementary means of interpretation under Article 32 of the *Vienna Convention*. The United States refers to various historical materials, including the 1960 Group of Experts Report, two pre-WTO panel reports that dealt with the issue of zeroing in the context of the *Tokyo Round Anti-Dumping Code*, and several proposals submitted during the Uruguay Round. According to the United States, the historical materials demonstrate that the negotiators were not able to agree on a general prohibition of zeroing or on a requirement to aggregate individual transactions under Article 9.3 of the *Anti-Dumping Agreement*. The United States submits that, throughout the history of the GATT, it was recognized that zeroing was allowed under Article VI of the GATT 1947, and adds that this Article was not modified during the Uruguay Round. According to the United States, "[n]o consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore,

and the Nordic Countries, their proposals [for prohibiting zeroing] were firmly opposed by the [European Communities], the United States and Canada."

130. We are not persuaded that the aforementioned historical materials provide guidance as to whether simple zeroing is permissible under Article 9.3 of the *Anti-Dumping Agreement*. First, as we see it, the negotiating proposals referred to by the United States reflect the positions of only some of the negotiating parties. Japan argued at the oral hearing that, contrary to what the United States suggests, if certain proposals on zeroing were not expressly included in the text, it is because the negotiators considered that the new Uruguay Round *Anti-Dumping Agreement* prohibited zeroing. The European Communities, in turn, suggests that there is a "strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2".

131. Secondly, we note that the same historical materials referenced by the United States were examined by the Appellate Body in *US – Softwood Lumber V*, where the Appellate Body concluded that these materials did not resolve the issue of whether the negotiators of the *Anti-dumping Agreement* intended to prohibit zeroing. Although the 1960 Group of Experts Report concluded that making an injurious dumping determination based on individual transactions was the "ideal method", it also regarded such method as "clearly impracticable". This report is of little relevance to our analysis and does not shed light on the determination of a margin of dumping under Article 9.3 of the *Anti-Dumping Agreement*. In addition, even if we were to assume that zeroing was permitted under Article VI of the GATT 1947, Article VI of the GATT 1994 has to be interpreted now in conjunction with the relevant provisions of the *Anti-Dumping Agreement*, such as Articles 2.1, 2.4, 2.4.2, and 9.3.

(…)

I. Conclusion

133. As noted above, when applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. Simple zeroing thus results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, as we have explained above, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter. Therefore, simple zeroing is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

134. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.143 and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, and *find*, instead, that simple zeroing in periodic reviews is, as such, inconsistent with the United States' obligations under those provisions. As a consequence, we also *reverse* the Panel's findings, in paragraphs 7.143 and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.

The Panel offers no additional reasoning that could independently support its findings under those provisions.

135. We note that Mexico requests the Appellate Body not only to reverse the Panel's findings of consistency, but also to find that simple zeroing in periodic reviews is, as such, inconsistent with the United States' obligations under Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.[275] As we have found that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, we do not consider it necessary to make an additional finding on Mexico's claim under Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.

136. In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the *Anti-Dumping Agreement*. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*, do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned.

(…)

VIII. Mexico's Claim under Article 11 of the DSU Concerning the Panel's Failure to Follow Previous Adopted Appellate Body Reports Addressing the Same Issues

145. We turn next to address Mexico's claim that the Panel acted inconsistently with Article 11 of the DSU because, by making findings and conclusions that are identical to those that have been reversed by the Appellate Body in previous disputes, it failed to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

A. The Panel's Findings and Mexico's Appeal

146. At the outset of its analysis, the Panel recalled previous Appellate Body jurisprudence regarding the relevance of adopted panel and Appellate Body reports for future panels addressing the same issues. The Panel referred to the Appellate Body Report in *Japan – Alcoholic Beverages II*, where the Appellate Body said that, although adopted panel reports are not binding, except with respect to resolving the particular dispute between the parties, they should be taken into account where they are relevant to any dispute. The Panel also referred to the Appellate Body's statement in *US – Oil Country Tubular Goods Sunset Reviews*, that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, [it] is what would be expected from panels, especially where the issues are the same." Nevertheless, the Panel decided not to follow the legal interpretation of the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, where the Appellate Body found that simple zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*. Instead, the Panel relied on findings in panel reports that the Appellate Body has reversed.

147. On appeal, Mexico argues that the Panel's approach was inconsistent with the first sentence of Article 11 of the DSU, which stipulates that the function of panels is to assist the DSB in discharging its responsibilities under the DSU. In support of its claim, Mexico refers to Articles 3.2 and 3.3 of the DSU, which state that the dispute settlement system is a "central element in providing security and predictability to the multilateral trading system" and that the

"prompt settlement of situations" is "essential to the effective functioning of the WTO". Mexico emphasizes that the Panel acted inconsistently with Article 11 of the DSU by failing "to follow a consistent line of adopted Appellate Body reports that address identical issues with respect to the same responding party" and, as a result, by making findings that are identical to those that have been expressly reversed by the Appellate Body in previous cases. Mexico maintains that it was compelled to appeal because of the Panel's departure from previous Appellate Body reports. In Mexico's view, this "interfere[d] with the prompt settlement of this dispute and, thereby, frustrate[d] the effective functioning of the WTO dispute settlement system".

148. The United States requests the Appellate Body to reject Mexico's claim. According to the United States, the Panel made an objective assessment of the matter by "conduct[ing] its own, objective review of the applicable facts and law to come up with findings to assist the DSB." The United States further submits that the Panel "carefully considered and took into account the Appellate Body's previous rulings on zeroing and explained in detail why it did not believe they should apply in this case." With respect to the "expectation" that panels follow adopted panel and Appellate Body reports, the United States disagrees with Mexico that a failure to meet this expectation could constitute a violation of Article 11 of the DSU. The United States also refers to the last sentence of Article 3.2 of the DSU, which states that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

(…)

B. Analysis

(…)

155. We begin our consideration with the text of Article 11 of the DSU, which sets forth the function of panels in the WTO dispute settlement system. The first sentence stipulates that "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. The second sentence states that "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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

(…)

157. We consider the meaning of "[t]he function of panels" in the first sentence of Article 11 is informed by the general provisions contained in Article 3 of the DSU, which sets out the basic principles of the WTO dispute settlement system. Article 3.2 provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system"; it serves "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

158. It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. …

(…)

161. In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.

162. We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above. Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU.

(…)

X. Findings and Conclusions

165. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding, in paragraphs 7.143, 7.145, and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-dumping Agreement*; and finds, instead, that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-dumping Agreement*;

(b) reverses the Panel's finding, in paragraphs 7.149 and 8.1(d) of the Panel Report, that the United States did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*; and finds, instead, that the United States acted inconsistently with

Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in the five periodic reviews at issue in this dispute;

(…)

(d) does not make an additional finding that the Panel failed to discharge its duties under Article 11 of the DSU by making findings that contradict those in previous Appellate Body reports adopted by the DSB.

166. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and with the *Anti-Dumping Agreement*, into conformity with its obligations under those Agreements.

1-6. AUSTRALIAN GOVERNMENT RESEARCH PAPER ON ANTI-DUMPING (2016)

"Developments in Anti-Dumping Arrangements," Productivity Commission Research Paper (Australian Government, February 2016), pp. 10-15

The system makes us worse, not better, off. The costs of imposing measures exceed the benefits for recipients.

As noted, anti-dumping protection — like other trade protection — reduces the competitiveness of the imports concerned and thereby helps to support activity, employment and investment in recipient local industries (and their suppliers). Especially when these industries have been under significant competitive pressure, such positive impacts may be highly visible.

But there are offsetting activity, employment and investment effects — including for locally based importers and for downstream industries using the goods concerned. Anti-dumping measures also result in higher prices for consumers, whether felt directly as a tax on imports purchased, or indirectly via higher input costs for some goods and services, or the higher price levels permitted by reduced competition.

Importantly, though often diffuse, the costs imposed on the community by anti-dumping protection will exceed the benefits for recipient industries. This net cost arises from, among other things, less efficient resource use and muted incentives for protected industries to innovate or otherwise improve their competitiveness. In fact, the economic costs of anti-dumping protection will generally be higher than the costs of 'comparable' tariff protection:

- The highly technical, applications-based nature of the system means that the administrative and compliance costs are proportionately greater than for tariff protection.
- As well as directly increasing the price of some goods, the system, as noted, will inevitably cause some other overseas suppliers to compete less aggressively on price.
- More generally, the channels of influence are more explicit under an administered protection law than under a conventional tariff regime. This suggests that the potential for gaming of the system — a matter explored extensively in the literature — will be commensurately higher.
- Where the government accepts an undertaking in lieu of imposing a duty, revenue that would otherwise have accrued to taxpayers is retained overseas.

By increasing access to, and the scope of, protection offered to eligible industries, the recent changes to the anti-dumping system almost certainly have increased, or will increase when they come into full effect, the net cost of the anti-dumping system for the Australian community.

Yet the harm arising from Australia's anti-dumping policy is largely ignored in deliberations as to whether measures should be imposed and in current policy development processes.

There is no cogent reason for anti-dumping protection.

Since the inception of anti–dumping protection more than a century ago, an array of explanations has been advanced in support of its retention.

Objective assessment of rationales has often been sidetracked by the emotive terminology and concepts employed in the system's architecture (box 2). Putting terminology aside, almost all of the arguments put forward to justify this type of protection lack credibility.

- The arguments suggesting a potential economic efficiency benefit are highly theoretical and of little practical relevance.
  - In a globalised trading environment, it is hard to conceive of circumstances that would enable an overseas supplier to successfully deploy a predatory dumping strategy. For a supplier to exercise other than transitory market power, there would have to be no third supplier of those goods and no prospect of other suppliers entering the market. In globalised markets with few regulatory barriers to entry, this is unrealistic. Indeed, the focus on predation as a rationale in anti-dumping systems disappeared by the 1920s and is now widely acknowledged to be irrelevant.
  - As a small country, Australia's countervailing arrangements are likely to have minimal, if any, impact on the global incidence of trade-distorting subsidies. In these circumstances, countervailing measures simply act as a tax on imports.
- The system is poorly designed and targeted if its intent is to aid structural adjustment.
  - There is no requirement or expectation that recipients of anti–dumping protection implement strategies to improve their competitiveness. Indeed, because the hurdle for continuing measures beyond the initial five year period is low, measures can morph into long–term protective instruments that dull adjustment incentives. To suggest that measures in place for a decade or more were promoting adjustment is plainly stretching credulity.

Duties can be triggered by price shocks that are small in the context of the multitude of other pressures that import-competing firms may face. For example, in contrast to the sizable appreciation in Australia's exchange rate during the mining boom, a subsidy margin equivalent to just 1 per cent of the price charged by an overseas supplier can result in countervailing duties being imposed. The provision of assistance in such circumstances is in stark contrast to the general expectation of good public policy that governments will only step in when pressures are particularly acute and disruptive, and where there is a genuine prospect of sustainable employment and investment. Businesses are otherwise expected to respond to changing market circumstances without relying on public assistance.

  - The material injury test simply requires that injury is not immaterial and, as a result of recent changes to the test, can now be met even when an industry is profitable and its sales are growing (albeit below the market rate).
- 'Fairness' arguments ignore outcomes for anyone other than those who benefit from

anti–dumping protection. This includes, as noted earlier, users of the protected imports and the community as a whole. Notably, following the Christchurch earthquake in 2011, the New Zealand Government temporarily exempted various construction materials from the coverage of its anti–dumping system to avoid increasing rebuilding costs for people already experiencing significant hardship.

– Further, system criteria, together with significant application costs for those seeking measures, have meant that access to the system has effectively been limited to a relatively small group of Australian industries. The bulk of Australian industries have therefore been required to deal with much the same competitive pressures without a protective leg up.

– The bulk of Australia's anti–dumping measures are imposed on products from countries that are less well off than Australia. Hence, from an international perspective, the fairness of the system is also open to question.

– The argument that countries discouraged from trading 'unfairly' in other markets will target Australia if it does not have an anti-dumping system mistakenly presumes that unilateral market opening is harmful rather than beneficial. As both trade theory and empirical studies demonstrate, the gains for a country from reducing protection do not depend on reductions elsewhere. Commission modelling in 2010 suggested that the benefit to Australia from a unilateral removal of its remaining import tariffs would be 1.5 times greater than the benefit it would receive were every other country in the world to remove their tariffs.

Box 2 **Looking beyond terminology**

The anti–dumping policy area is characterised by emotive or suggestive terminology. This has hindered balanced consideration and debate on the impacts of anti-dumping measures on those directly affected and the broader community.

The use of the term 'dumped' to describe the sale of goods at a lower price than in the supplier's home market implies undesirability. Yet it is only one manifestation of the very common practice of varying prices across markets, or the customer base within a market, to take account of differences in the price sensitivity of demand. For example:

- Discounting in price sensitive markets will often help firms to reduce an excessive build–up in inventory.
- Similarly, discounting is a common strategy for firms with long-lived assets to better utilise their production capacity in periods of excess supply (such as that which has characterised the steel industry for a number of years).
- Retailers will often use loss leaders to entice more price-sensitive customers into their stores.
- Airlines and hotels frequently sell cheap seats/rooms in order to fill surplus capacity.

Attempting to deter such pricing behaviour through imposing taxes whenever it was observed would clearly be nonsensical. Indeed, Blonigen and Prusa (2015, p. 4) portray the pricing concept that underlies the anti–dumping system as '… convict[ing] a foreign firm for not making enough economic profit from a country's consumers.' Were anti–dumping pricing principles extended more broadly, large numbers of Australian businesses would face the risk of regulatory action to prevent them charging lower prices to those less able or willing to pay. The pricing concept also stands in contrast to the 'beachhead pricing' strategy (sacrificing early margins) that has been endorsed by Austrade (2015) for Australian exporters as a means to break into new export markets.

Another illustration of the terminology issue is the concept of 'injury' caused by a dumped or subsidised product. In practical terms, such injury may be little different from the loss of sales or profits that a local producer may experience for a range of other market-related reasons, or simply by virtue of the fact that there is a foreign competitor in the market. Through the link to the practice of dumping or subsidisation, however, such injury assumes a special policy significance.

More broadly, the concept of 'fairness' which features prominently in anti–dumping discussions is emotionally charged and subject to selective interpretation (see text).

In recent years, the case for the system has increasingly fallen on the so-called 'system preservation' argument. In this case, the contention is that anti–dumping protection satisfies a political need to act against adverse effects of foreign competition for some import-competing industries and, as such, may act as a safety valve that preserves the wider system for progressing trade liberalisation. In essence, this is saying that the costs of anti–dumping protection may be worth incurring to secure greater support for, and benefit from, broader trade liberalisation.

In the Australian context, this argument, too, is very weak. For a range of reasons, including significant trade liberalisation achieved by Australia in past decades, any system preservation benefits potentially on offer will almost certainly be small. And the costs of securing any such benefits have risen due to the recent changes to increase the stringency and reach of Australia's anti–dumping arrangements. At best, the system preservation argument could only ever justify a much less protectionist and therefore economically less costly mechanism than the one now in place.

The detriment from the system is set to increase

The absence of a robust rationale for anti–dumping protection is not just an issue for Australia's current system. It is evident that the problematic logic that underpins the system in itself has provided reason to increase the system's stringency and reach.

That is, the anti-dumping system focuses exclusively on whether injurious dumping or subsidisation to an import-competing firm has occurred and remedying the perceived injury. However, the weight of studies, including in Australia, suggests that this focus is to the detriment of countries as a whole. The recent changes to Australia's anti-dumping arrangements have given little, if any, recognition to the weak conceptual basis for anti-dumping protection.

The current environment is therefore one in which policy is being driven by the interests of a small group of local industries; and justified by what the WTO rules do not prohibit.

The system has been sustained by a lack of consolidated public reporting on system outcomes and significant gaps in the information that is available on those outcomes (box 3). It is apparent, however, that this lack of information is not just a failure to publish. The procedural apparatus in a system that currently has no regard to the overall benefits and costs for the community is simply not geared towards collecting information of this nature.

In countries where the system's 'logic of permission' has been extended furthest, such as the United States, anti–dumping systems are a significant economic burden (see above). It is concerning that these systems are now frequently being portrayed as the 'gold standard' to which Australia should aspire. For example, as part of the Senate Economics Legislation Committee which examined the Bill to give effect to the 2014 Levelling the Playing Field package, Senator Nick Xenophon said:

> … there ought to be a willingness on the part of the government to explore the toughest possible measures to ensure dumping does not occur that does not contravene WTO rules. It seems other countries, particularly the US and European Union, have taken a much more active approach against dumping than successive Australian Governments … (p. 37)

And the Government has recently signalled its intention to work with stakeholders to further strengthen the anti-dumping system. In this environment, it is naïve to look at the impacts of recent changes in isolation. Rather, they are part of a trend that could see the system become increasingly more protectionist and damaging.

This is not to suggest that the current policy path will necessarily lead to a US–style system. At some point, Australia's general embrace of freer trade and the benefits it brings is likely to exert some constraint on the attenuation of those benefits.

However, that point may be some way off. In the meantime, and absent a fundamental rethink on the basis for, and the operation of, Australia's anti–dumping system, the economic costs of the system could increase considerably.

Box 3 **The need for greater transparency**

While this research study clearly indicates that the costs of the anti–dumping system outweigh its benefits and that this net cost is growing, the Commission's analysis has been constrained by information gaps. The analysis that has been possible has also been dependent on the Commission assembling information that should already have been readily accessible. For example:

- Neither the Anti-Dumping Commission (ADC), nor the Department of Industry, Innovation and Science, routinely publish consolidated reports on system usage trends (number of measures in force, new cases initiated, new measures imposed). Likewise, there is no consolidated summary of the degree of support provided through extant measures, or on their industry or country coverage. Rather, as the Commission has done, this sort of information must be assembled from the status reports published by the ADC or from World Bank data. As such, both the overall significance of the system, and its focus in terms of beneficiaries and targets, is far from transparent.
- Published ad valorem duties and equivalents are sometimes more an indication than an accurate measure of the level of protection a recipient industry is actually receiving. Also, there is no consolidated information published on the proportion of measures that are continued beyond their initial five–year term. Yet this is central to understanding the degree of protection afforded by the system and, more particularly, the extent to which measures are providing long–term protective support to certain industries.
- There is only limited information available on the numbers of applications that do not proceed to investigation. As well as being relevant to understanding system usage and how this is changing over time, data on unsuccessful applications is one of the few empirical avenues for exploring whether the threat of anti–dumping and countervailing action is being used as a strategic deterrence tool.
- There is no public reporting of the impacts of anti-dumping and countervailing measures on users and the broader economy.

Given WTO rules and commercial-in-confidence considerations, there are limits on the degree to which certain types of detailed information relating to specific parties can be made publicly available. As the report explains, however, there is scope to do more than at present.

Improved reporting on system outcomes would add to administrative costs. If the anti–dumping system is to continue, however, such reporting — and especially the juxtaposition of the benefits and costs for the various stakeholders — is essential.

* * *

2. Subsidies & Countervailing Duties

2-1. OVERVIEW

https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*")

The Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports.

Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a Member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the *SCM Agreement* are satisfied.

Structure of the Agreement

Part I provides that the *SCM Agreement* applies only to subsidies that are specifically provided to an enterprise or industry or group of enterprises or industries, and defines both the term "subsidy" and the concept of "specificity." Parts II and III divide all specific subsidies into one of two categories: prohibited and actionable, and establish certain rules and procedures with respect to each category. Part V establishes the substantive and procedural requirements that must be fulfilled before a Member may apply a countervailing measure against subsidized imports. Parts VI and VII establish the institutional structure and notification/surveillance modalities for implementation of the *SCM Agreement*. Part VIII contains special and differential treatment rules for various categories of developing country Members. Part IX contains transition rules for developed country and former centrally-planned economy Members. Parts X and XI contain dispute settlement and final provisions.

Coverage of the Agreement

Part I of the Agreement defines the coverage of the Agreement. Specifically, it establishes a definition of the term "subsidy" and an explanation of the concept of "specificity". Only a measure which is a "specific subsidy" within the meaning of Part I is subject to multilateral disciplines and can be subject to countervailing measures.

Definition of subsidy Unlike the Tokyo Round Subsidies Code, the WTO *SCM Agreement* contains a definition of the term "subsidy". The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

The concept of "**financial contribution**" was included in the *SCM Agreement* only after a protracted negotiation. Some Members argued that there could be no subsidy unless there was a charge on the public account. Other Members considered that forms of government intervention

that did not involve an expense to the government nevertheless distorted competition and should thus be considered to be subsidies. The *SCM Agreement* basically adopted the former approach. The Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution, e.g., grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods.

In order for a financial contribution to be a subsidy, it must be made **by or at the direction of a government or any public body within the territory of a Member**. Thus, the *SCM Agreement* applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state-owned companies.

A financial contribution by a government is not a subsidy unless it confers a "**benefit**." In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. For example, when does a loan, an equity infusion or the purchase by a government of a good confer a benefit? Although the *SCM Agreement* does not provide complete guidance on these issues, the Appellate Body has ruled (Canada – Aircraft) that the existence of a benefit is to be determined by comparison with the market-place (i.e., on the basis of what the recipient could have received in the market). In the context of countervailing duties, Article 14 of the *SCM Agreement* provides some guidance with respect to determining whether certain types of measures confer a benefit. In the context of multilateral disciplines, however, the issue of the meaning of "benefit" is not fully resolved.

Specificity. Assuming that a measure is a subsidy within the meaning of the *SCM Agreement*, it nevertheless is not subject to the *SCM Agreement* unless it has been specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only "specific" subsidies are subject to the *SCM Agreement* disciplines. There are four types of "specificity" within the meaning of the *SCM Agreement*:

> **Enterprise-specificity**. A government targets a particular company or companies for subsidization;
>
> **Industry-specificity**. A government targets a particular sector or sectors for subsidization.
>
> **Regional specificity**. A government targets producers in specified parts of its territory for subsidization.
>
> **Prohibited subsidies**. A government targets export goods or goods using domestic inputs for subsidization.

Categories of Subsidies

The *SCM Agreement* creates two basic categories of subsidies: those that are prohibited, those that are actionable (i.e., subject to challenge in the WTO or to countervailing measures). All specific subsidies fall into one of these categories.

Prohibited subsidies. Two categories of subsidies are prohibited by Article 3 of the *SCM Agreement*. The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance ("**export subsidies**"). A detailed list of export subsidies is annexed to the *SCM Agreement*. The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods ("**local content subsidies**"). These two categories of subsidies are prohibited because they are designed to directly affect trade and thus are most likely to have adverse effects on the interests of other Members.

The scope of these prohibitions is relatively narrow. Developed countries had already accepted the prohibition on export subsidies under the Tokyo Round *SCM Agreement*, and local content subsidies of the type prohibited by the *SCM Agreement* were already inconsistent with Article III of the GATT 1947. What is most significant about the new Agreement in this area is the extension of the obligations to developing country Members subject to specified transition rules (see section below on special and differential treatment), as well as the creation in Article 4 of the *SCM Agreement* of a rapid (three-month) dispute settlement mechanism for complaints regarding prohibited subsidies.

Actionable subsidies. Most subsidies, such as production subsidies, fall in the "actionable" category. Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. There are three types of adverse effects. First, there is **injury** to a domestic industry caused by subsidized imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is **serious prejudice**. Serious prejudice usually arises as a result of adverse effects (e.g., export displacement) in the market of the subsidizing Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member's export interests. Finally, there is **nullification or impairment** of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidization.

The creation of a system of multilateral remedies that allows Members to challenge subsidies which give rise to adverse effects represents a major advance over the pre-WTO regime. The difficulty, however, will remain the need in most cases for a complaining Member to demonstrate the adverse trade effects arising from subsidization, a fact-intensive analysis that panels may find difficult in some cases.

Agricultural subsidies. Article 13 of the Agreement on Agriculture establishes, during the implementation period specified in that Agreement (until 1 January 2003), special rules regarding subsidies for agricultural products. Export subsidies which are in full conformity with the Agriculture Agreement are not prohibited by the *SCM Agreement*, although they remain countervailable. Domestic supports which are in full conformity with the Agriculture Agreement are not actionable multilaterally, although they also may be subject to countervailing duties. Finally, domestic supports within the "green box" of the Agriculture Agreement are not actionable multilaterally nor are they subject to countervailing measures. After the implementation period, the *SCM Agreement* shall apply to subsidies for agricultural products subject to the provisions of the Agreement on Agriculture, as set forth in its Article 21.

Countervailing Measures

Part V of the *SCM Agreement* sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures. A failure to respect either the substantive or procedural requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

Substantive rules A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury. As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the Agreement. However, the criteria regarding injury and causation are found in Part V. One significant development of the new *SCM Agreement* in this area is the explicit authorization of cumulation of the effects of subsidized imports from more than one Member where specified criteria are fulfilled. In addition, Part V contains rules regarding the determination of the existence and amount of a benefit.

Procedural rules Part V of the *SCM Agreement* contains detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures. A key objective of these rules is to ensure that investigations are conducted in a transparent manner, that all interested parties have a full opportunity to defend their interests, and that investigating authorities adequately explain the bases for their determinations. A few of the more important innovations in the WTO *SCM Agreement* are identified below:

> **Standing**. The Agreement defines in numeric terms the circumstances under which there is sufficient support from a domestic industry to justify initiation of an investigation.
>
> **Preliminary investigation**. The Agreement ensures the conduct of a preliminary investigation before a preliminary measure can be imposed.
>
> **Undertakings**. The Agreement places limitations on the use of undertakings to settle CVD investigations, in order to avoid Voluntary Restraint Agreements or similar measures masquerading as undertakings.
>
> **Sunset**. The Agreement requires that a countervailing measure be terminated after five years unless it is determined that continuation of the measure is necessary to avoid the continuation or recurrence of subsidization and injury.
>
> **Judicial review**. The Agreement requires that Members create an independent tribunal to review the consistency of determinations of the investigating authority with domestic law.

Transition Rules and Special and Differential Treatment

Developed countries. Members not otherwise eligible for special and differential treatment are allowed three years from the date on which for them the *SCM Agreement* enters into force to phase out prohibited subsidies. Such subsidies must be notified within 90 days of the entry into force of the WTO Agreement for the notifying Member.

Developing countries. The *SCM Agreement* recognizes three categories of developing country Members: least-developed Members ("LDCs"), Members with a GNP per capita of less than $1000 per year which are listed in Annex VII to the *SCM Agreement*, and other developing countries. The lower a Member's level of development, the more favourable the treatment it receives with respect to subsidies disciplines. Thus, for example, LDCs and Members with a GNP per capita of less than $1000 per year listed in Annex VII are exempted from the prohibition on export subsidies. Other developing country Members have an eight-year period to phase out their export subsidies (they cannot increase the level of their export subsidies during this period). With respect to import-substitution subsidies, LDCs have eight years and other developing country Members five years, to phase out such subsidies. There is also more favourable treatment with respect to actionable subsidies. For example, certain subsidies related to developing country Members' privatization programmes are not actionable multilaterally.. With respect to countervailing measures, developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations where the level of subsidization or volume of imports is small.

Members in transformation to a market economy. Members in transformation to a market economy are given a seven-year period to phase out prohibited subsidies. These subsidies must, however, have been notified within two years of the date of entry into force of the WTO Agreement (i.e., by 31 December 1996) in order to benefit from the special treatment. Members in transformation also receive preferential treatment with respect to actionable subsidies.

Notifications

Subsidies. Article 25 of the *SCM Agreement* requires that Members notify all specific subsidies (at all levels of government and covering all goods sectors, including agriculture) to the SCM Committee. New and full notifications are due every three years with update notifications in intervening years. The notifications are the subject of extensive review and discussion by the SCM Committee.

Countervailing legislation and measures. All Members are required to notify their countervailing duty laws and regulations to the SCM Committee pursuant to Article 32.6 of the *SCM Agreement*. Members are also required to notify all countervailing actions taken on a semi-annual basis, and preliminary and final countervailing actions at the time they are taken. Members also are required to notify which of their authorities are competent to initiate and conduct countervailing investigations.

Dispute Settlement

The *SCM Agreement* generally relies on the dispute settlement rules of the DSU. However the Agreement contains extensive special or additional dispute settlement rules and procedures providing, inter alia, for expedited procedures, particularly in the case of prohibited subsidy allegations. It also provides special mechanisms for the gathering of information necessary to assess the existence of serious prejudice in actionable subsidy cases.

2-2. TREATY TEXT

GATT 1994

Article VI

Anti-dumping and Countervailing Duties

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to … countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(…)

Article XVI

Subsidies

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any

such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B—Additional Provisions on Export Subsidies

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

(…)

Article III

National Treatment

(…)

8. (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

* * *

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)1;

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

(…)

[*Editors' note: The SCM Agreement incorporates substantial rules about which subsidies are per se prohibited, which are actionable, and what remedies are available under what circumstances—as described above. We omit them here, but note that, with some qualifications, the remedial system of the Agreement on Subsidies and Countervailing Duties bears a family resemblance to that of the Anti-Dumping Agreement.*]

2-3. US—ANTI-DUMPING AND COUNTERVAILING DUTIES (CHINA)

Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11 March 2011

Ramírez-Hernández, Presiding Member; Bautista, Member, Van den Bossche, Member

https://www.wto.org/ENGLISH/tratop_e/dispu_e/cases_e/ds379_e.htm

Editorial Note: most footnotes have been omitted; remaining footnote numbers do not reflect the numeration in the original text.

I. Introduction

1. China appeals certain issues of law and legal interpretations developed in the Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (the "Panel Report"). The Panel was established on 20 January 2009 to consider a complaint by China with respect to definitive anti-dumping duties and countervailing duties imposed by the United States on each of the following four products from China: (i) circular welded carbon quality steel pipe ("CWP"); (ii) light-walled rectangular pipe and tube ("LWR"); (iii) laminated woven sacks ("LWS"); and (iv) certain new pneumatic off-the-road tyres ("OTR").

2. In respect of each of the products, an anti-dumping and a countervailing duty investigation were initiated in tandem in July or August 2007. In each of the four anti-dumping investigations, the United States Department of Commerce (the "USDOC") treated China as a non-market economy ("NME") country for purposes of determining normal value and calculating the margins of dumping. For each product, the USDOC issued its final anti-dumping and countervailing duty determinations on the same day, in either June or July 2008. Pursuant to these determinations, the USDOC imposed definitive anti-dumping and countervailing duties on the four investigated products from China.

3. Among the determinations made by the USDOC in the four countervailing duty determinations were the following. In the CWP and the LWR investigations, the USDOC determined that the government provision of hot-rolled steel ("HRS") to certain producers through State-owned enterprises ("SOE"s) constituted countervailable subsidies, that private prices in China could not be used as benchmarks to determine the existence and amount of benefit conferred by such subsidies and that, as a result, it was necessary to resort to alternative benchmarks in conducting its benefit determination. In the CWP, LWS, and OTR investigations, the USDOC found that the provision of preferential loans by government policy banks and State-owned commercial banks ("SOCB"s) constituted subsidies that were *de jure* specific, that it would not be appropriate to use the interest rates on loans issued by Chinese banks as a benchmark, and that it was necessary, instead, to construct a proxy interest rate to determine the existence and amount of benefit conferred by the loans. In the LWS investigation, the USDOC

found that the government provision of land-use rights was a subsidy that was regionally specific, and used out-of-country benchmarks to determine the existence and amount of the subsidy benefits. In all four investigations, the USDOC determined that various SOEs that supplied goods to investigated companies should be characterized as "public bodies", and it made the same determination in respect of certain SOCBs that provided loans to investigated companies in the OTR investigation.

4. Before the Panel, China claimed that the final USDOC determinations that led to the imposition of the duties, the orders imposing the duties themselves, and certain aspects of the conduct of the underlying countervailing duty investigations were inconsistent with the United States' obligations under the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). …

5. More particularly, with respect to the USDOC's findings of financial contribution, China claimed that the USDOC's determinations that certain SOEs and SOCBs constituted "public bodies" were inconsistent with Articles 1.1 … of the *SCM Agreement* and Article VI:3 of the GATT 1994. …

(…)

9. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 22 October 2010.

10. In respect of China's claims regarding the USDOC's determinations of financial contributions, the Panel found that China had not established that the USDOC had acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the *SCM Agreement* by determining in the relevant investigations at issue that SOEs and SOCBs constituted "public bodies".

(…)

III. Issues Raised in This Appeal

270. The following issues are raised in this appeal: (a) Whether the Panel erred in interpreting the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government", and in failing to find that the USDOC acted inconsistently with that provision, by determining, in the four countervailing duty investigations at issue, that SOE input suppliers constituted "public bodies", and by determining, in the OTR investigation, that SOCBs constituted "public bodies"; …

(…)

III. Article 1.1(a)(1) of the *SCM Agreement*: Public Bodies

A. Introduction

276. China appeals the Panel's finding that China failed to establish that the USDOC had acted inconsistently with the United States' obligations under Article 1.1(a)(1) of the *SCM Agreement* in determining in the CWP, LWR, LWS, and OTR countervailing duty investigations that SOE

input producers were public bodies, and, in the OTR investigation, that SOCBs were public bodies.

277. The USDOC determined in all four investigations at issue that the relevant SOEs were public bodies. In making these findings, the USDOC based itself on a rule of majority ownership, that is, the USDOC's findings that these entities constitute public bodies were "principally" based on the fact that the SOEs are majority government owned. In the OTR investigation, the USDOC also determined that SOCBs were public bodies. This finding was based on the USDOC's analysis of the same issue in its earlier CFS Paper determination.

278. The Panel interpreted the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government". The Panel considered government ownership to be highly relevant and potentially dispositive evidence of government control and, on that basis, upheld the USDOC's determinations in the investigations at issue that the SOEs and SOCBs constituted public bodies.

279. China alleges that the Panel erred in interpreting the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean any government-controlled entity and that this mistaken interpretation of the term "public body" rendered erroneous the Panel's findings upholding the USDOC's determinations. China submits that government ownership or control is insufficient to establish that an entity is a public body. For China, the defining characteristic of a public body is that it exercises authority vested in it by the government for the purpose of performing functions of a governmental character. China therefore requests us to reverse the Panel's finding that a "public body" in Article 1.1(a)(1) means "any government-controlled entity" and to find instead that a public body is an entity that exercises authority vested in it by the government for the purpose of performing functions of a governmental character. China also requests us to reverse the Panel's finding that China did not establish that the United States acted inconsistently with its obligations under Article 1.1(a)(1), and to find instead that the United States did act inconsistently with these obligations in determining that the provision of inputs by SOEs, and the provision of loans by SOCBs, were financial contributions by public bodies. …

280. The United States responds that the Panel appropriately rejected China's argument that the term "public body" must be understood as referring only to entities vested with government authority and performing governmental functions. The United States requests the Appellate Body to uphold the Panel's finding that the term "public body" in the sense of Article 1.1(a)(1) means any entity controlled by a government as well as its finding that China did not establish that the USDOC had acted inconsistently with the United States' obligations under Article 1.1(a)(1) in making its public body determination in the relevant investigations.

281. Before turning to our analysis, we note that, while China and the United States advocate different definitions of the term "public body", their respective conceptions of the entities that may properly be considered "public bodies" are not mutually exclusive, and, in fact overlap significantly. China, while requesting us to find that a public body is an entity that exercises authority vested in it by the government for the purpose of performing functions of a governmental character, does accept that such public bodies may also be entities that are controlled by the government. The United States, in turn, while requesting us to uphold the Panel's finding that "any public body" in Article 1.1(a)(1) necessarily means "any government

controlled entity", accepts that an entity vested with governmental authority may constitute a "public body" provided that it is also "controlled" by the government.

B. *Article 1.1(a)(1) of the SCM Agreement*

1. The Meaning of the Term "Public Body"

282. Article 1.1 of the *SCM Agreement* stipulates that a "subsidy" shall be deemed to exist for the purpose of the *SCM Agreement* if there is a "financial contribution by a government or any public body" and "a benefit is thereby conferred". China's claims relate to the first of the two elements, in particular, to the question of how to define the term "public body" in Article 1.1(a)(1). In addressing China's claims relating to Article 1.1(a)(1), we first set out our understanding of the term "public body" in the phrase "a government or any public body". Thereafter, we address a number of additional allegations raised by China with regard to the Panel's analysis of this interpretative issue. We subsequently address China's requests that we reverse all of the Panel's findings with respect to the USDOC's public body determinations, and that we find those determinations to be inconsistent with Article 1.1(a)(1) ….

283. Article 1.1 of the *SCM Agreement* states as follows:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.
>
> or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

284. With respect to the architecture of Article 1.1 of the *SCM Agreement*, we note that the provision sets out two main elements of a subsidy, namely, a financial contribution and a benefit. Regarding the first element, Article 1.1(a)(1) defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member. Two principal categories of entities are distinguished, those that are "governmental" in the sense of Article 1.1(a)(1): "a government or any public body ... (referred to in this Agreement as 'government')"; and those in the second clause of subparagraph (iv): "private body". If the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution. When, however, the entity is a private body, and its conduct falls within the scope of subparagraphs (i)-(iii), then there is only a financial contribution if, *in addition*, the requisite link between the government and *that conduct* is established by a showing of entrustment or direction. Thus, the second clause of subparagraph (iv) requires an affirmative demonstration of the link between the government and the specific *conduct*, whereas all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

285. This appeal raises the question of the correct interpretation of the term "public body". In keeping with the customary rules of interpretation of public international law, we consider the ordinary meaning of the term "public body" in Article 1.1(a)(1) of the *SCM Agreement*. We note that, while it is not defined as a composite term, the individual words are defined in the dictionary. The word "public" is defined, *inter alia*, as "of or pertaining to the people as a whole; belonging to, affecting or concerning the community or nation", as "carried out or made by or on behalf of the community as a whole", or as "authorized by or representing the community". The word "body" in the sense of an aggregate of individuals is defined as "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society." The composite term "public body" could thus refer to a number of different concepts, depending on the combination of the different definitional elements. As such, dictionary definitions suggest a rather broad range of potential meanings of the term "public body", which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation. We note that dictionary definitions of these words in Spanish and French would accommodate a similarly broad range of potential meanings of the term "public body".

286. The term "government" is used twice in Article 1.1(a)(1). It appears, first, within the phrase "a government or any public body". Second, "government" appears within a parenthetical phrase specifying that, for purposes of the *SCM Agreement*, this word refers collectively to "a government or any public body". Where it is necessary to distinguish between these two uses of

the term "government" for purposes of our analysis, we refer to the first use of the word as "government" in the narrow sense, and to the second use of the word as "government" in the collective sense, or the collective term "government".

287. We recall that the Panel regarded the collective term "government" as "merely a device to simplify the drafting". China disagrees with the Panel's reasoning. China refers to the Appellate Body Report in *Canada – Dairy* in support of its view that a public body is functionally equivalent to a government in the narrow sense. The United States agrees with the Panel's reasoning that the collective term "government" is merely a drafting device. The United States further contends that, because China's interpretation of the term "public body" differs in no significant way from the word "government" in the narrow sense—which includes government agencies—accepting such an interpretation would reduce the term "public body" to redundancy.

288. We note that Article 1.1(a)(1) of the *SCM Agreement* joins "government" in the narrow sense and "public body" under the collective term "government". In contrast, Article 1 clearly juxtaposes the concepts of "government" (including "public body") and "private body". As we see it, the juxtaposition of the collective term "government" on the one side and "private body" on the other side, as well as the joining under the collective term "government" of both a "government" in the narrow sense and "any public body" in Article 1.1(a)(1) of the *SCM Agreement*, suggests certain commonalities in the meaning of the term "government" in the narrow sense and the term "public body" and a nexus between these two concepts. When Article 1.1(a)(1) stipulates that "a government" and "any public body" are referred to in the *SCM Agreement* as "government", the collective term "government" is used as a superordinate, including, inter alia, "any public body" as one hyponym. Joining together the two terms under the collective term "government" thus implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a "financial contribution" for purposes of the *SCM Agreement*.

289. We therefore disagree with the Panel's reasoning that the use of the collective term "government" has no meaning besides facilitating the drafting of the Agreement. We also disagree with the Panel's view that the words "a", "or", and "any" within the phrase "a government or any public body" indicate that "government" and "public body" are separate concepts with distinct meanings. The term "government" as a shorthand for "a government or any public body" may well have been employed as a drafting device. However, speculation that the use of the collective expression was "merely a device to simplify the drafting" and that, therefore, the collective expression has no interpretative significance, is not consonant with the principle of effective treaty interpretation. It ignores that the structure and the wording of the treaty is significant in determining the common intention of the parties.

290. Turning then to the question of what essential characteristics an entity must share with government in the narrow sense in order to be a public body and, thus, part of government in the collective sense, we note, that the term "government" is defined as the "continuous exercise of authority over subjects; authoritative direction or regulation and control". In this vein, the Appellate Body found, in *Canada – Dairy*, that the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority. The Appellate Body further found that this meaning is derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions. As we see it, these defining elements

of the word "government" inform the meaning of the term "public body". This suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.

291. In seeking to refine our understanding of the concept of "public body" in Article 1.1(a)(1) of the *SCM Agreement*, and, in particular, of the core characteristics that such an entity must share with government in the narrow sense, we consider next the context provided by Article 1.1(a)(1)(iv). As noted above, this provision introduces the concept of "private body". The meaning of the term "private body" may be helpful in illuminating the essential characteristics of public bodies, because the term "private body" describes something that is not "a government or any public body". The panel in *US – Export Restraints* made a similar point when it observed that the term "private body" is used in Article 1.1(a)(1)(iv) as a counterpoint to government or any public body, that is, any entity that is neither a government in the narrow sense nor a public body would be a private body.

292. The definition of the word "private" includes "of a service, business, etc: provided or owned by an individual rather than the state or a public body" and "of a person: not holding public office or an official position". We note that both the definition of "public" and of "private" encompass notions of authority as well as of control. The definitions differ, most notably, with regard to the subject exercising authority or control.

293. We also consider that, because the word "government" in Article 1.1(a)(1)(iv) is used in the sense of the collective term "government", that provision covers financial contributions provided by a government or any public body where "a government or any public body" entrusts or directs a private body to carry out one or more of the type of functions or conduct illustrated in subparagraphs (i)-(iii). Accordingly, subparagraph (iv) envisages that a public body may "entrust" or "direct" a private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii).

294. The verb "direct" is defined as to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action. The verb "entrust" means giving a person responsibility for a task. The Appellate Body has interpreted "direction" as referring to situations where a government exercises its authority, including some degree of compulsion, over a private body, and "entrustment" as referring to situations in which a government gives responsibility to a private body. Thus, pursuant to subparagraph (iv), a public body may exercise its authority in order to compel or command a private body, or govern a private body's actions (direction), and may give responsibility for certain tasks to a private body (entrustment). As we see it, for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command. Similarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. If a public body did not itself dispose of the relevant authority or responsibility, it could not effectively control or govern the actions of a private body or delegate such responsibility to a private body. This, in turn, suggests that the requisite attributes to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.

295. This raises the question as to what kind of authority or responsibility an entity must exercise or be vested with to constitute a public body in the sense of the *SCM Agreement*. We note that subparagraph (iv) refers to entrustment or direction to carry out the type of functions illustrated in subparagraphs (i)-(iii) "which would normally be vested in the government". We recall the Panel's statement that the provision of loans and loan guarantees referred to in subparagraph (i), and the provision of goods and services referred to in subparagraph (iii), are "functions that are typically carried out by, indeed in the first instance are the core business of, firms or corporations rather than governments." China disagrees with this statement and contends that the provision of loans and goods or services is not inherently governmental or inherently non-governmental. The United States maintains that the provision of loans and loan guarantees, and the provision of goods and services, are not inherently the functions of governments or entities vested with authority to perform governmental functions, but rather of firms or businesses, including sometimes those owned or controlled by the government.

296. We observe that the Panel identifies no basis for its statement that certain acts listed in subparagraphs (i) and (iii) are "in the first instance [] the core business of [] firms or corporations rather than governments". In any event, we consider that whether a particular means of making a financial contribution is more commonly used by public or private entities has no direct bearing on, nor allows any inference regarding, the constituent elements of a public body in the context of Article 1.1(a)(1) of the *SCM Agreement*. On the contrary, we consider relevant that, while the types of conduct listed in Article 1.1(a)(1)(i) and (iii) can be carried out by a government as well as by private bodies, a decision to forego or not collect government revenue that is otherwise due, which is set out in subparagraph (ii), appears to constitute conduct inherently involving the exercise of governmental authority. Taxation, for instance, is an integral part of the sovereign function. Thus, if anything, the context of Article 1.1(a)(1)(i)-(iii) and in particular subparagraph (ii) lends support to the proposition that a "public body" in the sense of Article 1.1(a)(1) connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority.

(…)

298. We next consider the term "public body" in the light of the object and purpose of the *SCM Agreement*. The Panel was of the view that:

> [t]o read "any public body" in Article 1.1(a)(1) as excusing from a Member government's direct responsibility a wide swathe of government-controlled entities engaging in exactly the sorts of transactions listed in Article 1.1(a)(1)(i)-(iii) of the *SCM Agreement* would fundamentally undermine the Agreement's logic, coherence and effectiveness, and thus would be at odds with its object and purpose.

299. Furthermore, the Panel considered that its reading of the term "public body":

> [E]nsures that whatever form a public entity takes (whether agency, Ministry, board, corporation, etc.) the government that controls it is directly responsible for those of its actions that are relevant under the Agreement.

300. China takes issue with this reasoning and contends, first, that the Panel wrongly believed that China's definition of "public body" was limited to formal arms or organs of government and

could not encompass government-owned or -controlled entities. Second, even if a government-owned or controlled corporation were not regarded as a public body, its conduct could still be captured by the *SCM Agreement* under Article 1.1(a)(1)(iv). The United States submits that interpreting the term "public body" as referring to entities controlled by the government preserves the strength and effectiveness of the *SCM Agreement*'s subsidy disciplines. For the United States, such an interpretation also inhibits circumvention, by ensuring that governments cannot escape those disciplines by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them.

301. We note, first, that the *SCM Agreement* does not contain a preamble or an explicit indication of its object and purpose. However, the Appellate Body has stated that the object and purpose of the *SCM Agreement* is "to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures". Furthermore, in *US – Softwood Lumber IV*, the Appellate Body noted that the object and purpose of the *SCM Agreement* is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions". Finally, we note that, with respect to the object and purpose of the *SCM Agreement*, the Appellate Body stated in *US – Countervailing Duty Investigation on DRAMS* that the *SCM Agreement* "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures".

302. As we see it, considerations of object and purpose are of limited use in delimiting the scope of the term "public body" in Article 1.1(a)(1). This is so because the question of whether an entity constitutes a public body is not tantamount to the question of whether measures taken by that entity fall within the ambit of the *SCM Agreement*. A finding that a particular entity does not constitute a public body does not, without more, exclude that entity's conduct from the scope of the *SCM Agreement*. Such measures may still be attributed to a government and thus fall within the ambit of the *SCM Agreement* pursuant to Article 1.1(a)(1)(iv) if the entity is a private entity entrusted or directed by a government or by a public body.[1]

303. We consider that the Panel's object and purpose analysis did not take full account of the *SCM Agreement*'s disciplines. It is important to keep in mind that entities that are considered not to be public bodies are not, thereby, immediately excluded from the *SCM Agreement*'s disciplines or from the reach of investigating authorities in a countervailing duty investigation. The Panel was concerned with what it saw as the implications of too narrow an interpretation. As we see it, however, too broad an interpretation of the term "public body" could equally risk upsetting the delicate balance embodied in the *SCM Agreement* because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies. Thus, in our view, considerations of the object and purpose of the *SCM Agreement* do not favour either a broad or a narrow interpretation of the term "public body". We therefore disagree with the Panel's finding that interpreting "any public body" to mean any entity that is controlled by the government best serves the object and purpose of the *SCM Agreement*.

[1]Moreover, a finding that an entity is a public body does not, in itself, result in the application of the "disciplines" of the *SCM Agreement*, as the financial contribution by the public body must confer a benefit and the subsidy granted must be specific for such disciplines to apply.

(…)

317. Having completed our analysis of the interpretative elements prescribed by Article 31 of the *Vienna Convention*, we reach the following conclusions. We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body within the meaning of Article 1.1.(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.

318. In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body. We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.

319. In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.

320. We recall that the Panel interpreted the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government". We note that the Panel did not further clarify its notion of control, although it considered government ownership to be "highly relevant (indeed potentially dispositive)". In that context, the Panel relied on the "everyday financial concept of a 'controlling interest' in a company". The above analysis, however, indicates that control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body. We, therefore, disagree with the Panel's interpretation.

321. The Panel may have been led to its interpretation as a consequence of the particular approach to the interpretative exercise it undertook. To us, it appears that, at each step of the interpretative exercise, the Panel tested the interpretation advocated by China, which it characterized as that "any public body" is limited to government agencies or other entities vested with and exercising governmental authority. At each step, the Panel rejected China's proposition. At the end of its interpretative exercise, having consistently rejected China's proposition, the Panel agreed with the United States that the term public body "refers to entities owned or controlled by the government". The Panel did not, however, consider whether any criteria other than those relied upon by the parties could potentially be relevant to the enquiry, or whether any indicia other than State ownership are relevant to government control. Nor did the Panel sufficiently analyze the interpretative elements that served as the basis for its finding that State ownership or control is in itself sufficient to establish that an entity constitutes a public body.

322. For all of the above reasons, we consider that the Panel's interpretation of "public body" lacks a proper legal basis. We therefore reverse the Panel's finding, in paragraph 8.94 of the Panel Report, that the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* means "any entity controlled by a government".

2. Further Allegations of Error

(…)

326. Third, China takes issue with the Panel's statement that if the term "public body" is understood as being limited to entities vested with governmental authority, governments could easily hide behind the presumptively "private" nature of an entity, even while running such entity "so as deliberately to provide trade-distorting subsidies". In this respect, we recall, first, that according to Article 31 of the *Vienna Convention*, a treaty is to be interpreted in good faith. That means, inter alia, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party. Yet, the United States' argument that "a government would be able to hide behind its ownership interest in an entity and engage in entrustment or direction behind closed doors" pleads for an interpretation founded on this very assumption, and the above statement by the Panel reveals an interpretation on this basis. A proper interpretation in accordance with Article 31 of the *Vienna Convention*, however, cannot proceed based on such an assumption. Furthermore, as our analysis above reveals, we do not consider that Article 1.1(a)(1) establishes that entities are either presumptively private or presumptively public bodies. Rather, in order to determine properly that a financial contribution has been made by an entity that is not formally part of government in the narrow sense, an investigating authority must point to positive evidence either establishing that the entity is a public body or demonstrating entrustment or direction.

(…)

3. Application of Article 1.1 of the *SCM Agreement* to the USDOC's Determinations

338. We now turn to China's further claims relating to the application of Article 1.1 of the *SCM Agreement* to the USDOC's determinations. China claims that the Panel's erroneous interpretation of the term "public body" requires reversal of its finding upholding the USDOC's determinations that the SOEs and SOCBs at issue were public bodies in the sense of Article 1.1(a)(1).

339. China submits that, because they are based on an erroneous finding that majority ownership by the government is sufficient on its own to establish that an entity is a public body , the Panel's conclusions on the USDOC's public body findings are equally erroneous. …

340. We have found above that the Panel erred in interpreting the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government". The Panel's further finding that China did not establish that the USDOC had acted inconsistently with the obligations of the United States under the *SCM Agreement* was dependent on, and was made as a consequence of, that erroneous interpretation. Therefore, we must also reverse the Panel's ultimate finding, in paragraph 17.1(a)(i) of its Report, that China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the *SCM Agreement* in determining in the investigations at issue that the relevant SOEs and SOCBs constituted public bodies.

341. China further requests us to find that the USDOC's determinations that the provision of inputs by SOEs and the provision of loans by SOCBs were financial contributions by public bodies were inconsistent with the proper interpretation of the term "public body". …

342. In order to determine whether a finding that the United States acted inconsistently with Article 1.1(a)(1) of the *SCM Agreement* is warranted, we must ourselves examine the USDOC's public body determinations and ascertain whether these determinations are consistent with the requirements of Article 1.1(a)(1), properly interpreted. We are mindful that we may only complete the analysis to the extent that there are sufficient factual findings by the Panel or undisputed facts on the Panel record. We first address the question of whether a reasonable and objective investigating authority could, based on the evidence before the USDOC, have determined that the SOEs at issue are public bodies. Thereafter, we turn to the question of whether a reasonable and objective investigating authority could have made the same determination in respect of the SOCBs at issue.

343. With respect to the SOEs, we recall the Panel's findings that in all of the investigations at issue, the USDOC determined that the relevant SOEs were public bodies based on the fact that the Government of China held the majority ownership of the shares in the respective companies. These companies were producers of steel, rubber and petrochemical inputs sold to the investigated companies or to trading companies. We further recall that China had argued before the USDOC that in order to determine whether the relevant entities were public bodies, the USDOC should conduct the five-factor test that it had applied in prior investigations. The five factors that the USDOC had examined in the past are: (i) government ownership; (ii) government presence on the board of directors; (iii) government control over activities; (iv) pursuit of

governmental policies or interests; and (v) whether the entity was created by statute. In the CWP, LWR, and LWS investigations, the USDOC stated that there was insufficient evidence on the record of these investigations to apply the five-factor test. In the OTR investigation, the USDOC stated that conducting the five-factor test in respect of an SOE that supplied rubber to investigated companies was not necessary absent information calling into question whether government ownership does not mean government control. In the CWP, LWR, and OTR investigations, the USDOC added that it would reconsider the feasibility of applying the five-factor test during an administrative review. Finally, we recall that in all of the investigations at issue, the USDOC expressly declined to undertake an entrustment and direction analysis pursuant to Article 1.1(a)(1)(iv).

344. We note that investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner. The reasoning of the authority must be coherent and internally consistent, and the conclusions reached and the inferences drawn by the authority must be based on positive evidence. Accordingly, in the present case, the USDOC was under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made. This included information relevant to the potential characterization of SOEs as public bodies.

345. It is undisputed that the SOEs at issue are not part of government in the narrow sense. The question is whether they are public bodies or private bodies. We have found above that the determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense. That assessment must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority. As we have pointed out above, determining whether an entity is a public or private body may be a complex exercise, particularly where the same entity exhibits some characteristics that suggest it is a public body, and other characteristics that suggest that it is a private body.

346. We recall the Panel's finding that the USDOC had determined that the SOEs at issue were public bodies "by applying a rule of majority government-ownership". The Panel also stated that the USDOC did not apply a "simple per se majority ownership test", because the USDOC "examined all of the evidence and arguments that were before it in reaching its conclusions that the SOEs were public bodies". In making this statement, however, the Panel did not identify or refer to any particular passages from the USDOC's determinations. The Panel further observed that the determinations concerning SOEs in the CWP, LWR, LWS, and OTR investigations "were principally based on the uncontested fact that these entities were majority government-owned". In response to questioning at the oral hearing in this appeal, the United States explained that the USDOC asked for ownership information but did not ask for other information relating to the elements of the five-factor test. To us, this indicates that the USDOC did not comply with its duty to seek out relevant information and to evaluate it in an objective manner in order to ensure that its determinations were based on a sufficient factual basis. The USDOC relied "principally" on information about ownership. In our view, this is not sufficient because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function. Accordingly, such evidence, alone, cannot support a finding that an entity is a public body.

347. The USDOC's approach was thus inconsistent with a proper understanding of the term "public body" in Article 1.1(a)(1) of the *SCM Agreement*. Accordingly, we find that the USDOC's public body determinations in respect of SOEs in the CWP, LWR, LWS, and OTR investigations are inconsistent with Article 1.1(a)(1).

348. Next, we turn to the USDOC's determination in the OTR investigation that the relevant SOCBs were public bodies. The USDOC explained that:

> [a] complete analysis of the facts and circumstances of the Chinese banking system that have led us to find that Chinese policy banks and SOCBs constitute a government authority is included in [CFS Paper] and [the Issues and Decision Memorandum in that investigation] at Comment 8. Parties in the instant case have not demonstrated that conditions within the Chinese banking sector have changed significantly since that previous decision such that a reconsideration of that decision is warranted. See e.g., the discussion in Tianjin Government Verification Report at 5 (a Tianjin municipal government official confirmed that SOCBs are under [Tianjin State-owned Assets Supervision and Administration Commission] supervision). In addition, there are scholarly publications on the record which report that SOCBs are required to support the [Government of China]'s industrial policies.[*] (original underlining)
>
> [* original footnote 45] See, e.g. IMF Working Paper – China's Banking Sector Reform at 18-19, which states that "it is difficult to find clear evidence that SOCBs have changed their behaviour and became commercially oriented" and that governments should avoid "interference for policy purposes."

349. In CFS Paper, the USDOC's determination that the SOCBs in that investigation constituted public bodies was based on the following considerations: (i) "near complete state-ownership of the banking sector in China"; (ii) Article 34 of the Commercial Banking Law, which states that banks are required to "carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies"; (iii) record evidence indicating that SOCBs still lack adequate risk management and analytical skills; and (iv) the fact that "during [that] investigation the [USDOC] did not receive the evidence necessary to document in a comprehensive manner the process by which loans were requested, granted and evaluated to the paper industry".

350. We note that the USDOC's analysis regarding the public body character of the SOCBs in the OTR investigation—albeit elaborated principally in the earlier investigation in CFS Paper—is broader than its analysis regarding the SOEs in the four investigations at issue. In the former analysis, the USDOC relied on information regarding ownership and control. In addition, however, it considered other factors, such as a provision in China's Commercial Banking Law stipulating that banks are required to "carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies". The USDOC also took into consideration an excerpt from the Bank of China's Global Offering, which states that the "Chinese Commercial Banking Law requires commercial banks to take into

consideration government macroeconomic policies in making lending decisions", and that accordingly "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". The USDOC also considered a 2005 OECD report, stating that "[t]he chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice". In addition, the USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills.

351. We also note that the present OTR determination itself contains some analysis with respect to SOCBs. It refers to the USDOC's determination in CFS Paper and states that the parties in the OTR investigation had not demonstrated that there had been significant changes in conditions in the Chinese banking sector since that determination. In addition, it refers to a statement by a Tianjin municipal government official reproduced in the Tianjin Government Verification Report, and to an International Monetary Fund working paper in support of the proposition that SOCBs are required to support China's industrial policies.

352. As a preliminary matter we wish to clarify that it was for the USDOC to establish, based on positive evidence, that SOCBs in China constitute public bodies. To the extent that the above statement that the parties in the OTR investigation had not demonstrated that the Chinese banking sector had significantly changed since the CFS Paper determination suggests that the initial burden was on China and the investigated OTR producers to adduce evidence that the SOCBs are *not* public bodies, that statement would reflect a misconception of the investigating authority's task.

353. We now turn to the question of whether the USDOC provided a reasoned and adequate explanation of the basis for its determination that the SOCBs were public bodies in the OTR investigation. The Panel considered the "lengthy discussion" in the CFS Paper determination of the evidence that the SOCBs were either wholly or majority government owned during the period of investigation in that case, and of evidence that there was extensive government involvement in and control over their operations, and found that this constituted a sufficient basis for the USDOC's public body determination in respect of the SOCBs in the OTR investigation.

354. In our view, merely incorporating by reference findings from one determination into another determination will normally not suffice as a reasoned and adequate explanation. Nonetheless, where there is close temporal and substantive overlap between the two investigations, such cross reference may, exceptionally, suffice. We do see substantive overlap between the CFS Paper and the OTR determinations, as both investigations were concerned with the nature of SOCBs in China. With respect to the temporal element, we note that there was only one year's difference between the period of investigation in CFS Paper (calendar year 2005) and the period of investigation in OTR (calendar year 2006). We also note that, notwithstanding the USDOC's express acknowledgement in CFS Paper that the "scope and extent of government control over SOCBs is changing", China has not challenged, either before the Panel or before us, the USDOC's reliance in the OTR investigation on its findings in CFS Paper. In the light of these considerations, we do not see that the USDOC's reliance on its finding, in CFS Paper, was inconsistent with the USDOC's obligations to base its public body determination on positive evidence and to provide a reasoned and adequate explanation of how the evidence on the record supported that determination.

355. As we have explained above, the USDOC, in CFS Paper, discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions. Whether or not we would have reached the same conclusion, it seems to us that in its CFS Paper determination, the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions. In the OTR investigation, this analysis was incorporated by reference. In addition, in the OTR investigation, the USDOC also referred to certain other evidence on the record of that investigation demonstrating that SOCBs are required to support China's industrial policies. In our opinion, these considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government.

356. We therefore *find* that China has not established that the USDOC's public body determination in respect of SOCBs in the OTR investigation is inconsistent with Article 1.1(a)(1) of the *SCM Agreement*.

(…)

C. *Conclusion*

359. In the light of the above considerations, we reverse the Panel's finding in paragraph 8.94 that the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* means "any entity controlled by a government". We also reverse the Panel's finding in paragraph 17.1(a)(i) that "China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the *SCM Agreement* in determining in the relevant investigations that the SOEs and SOCBs constituted 'public bodies'". In completing the analysis, first, we find that the USDOC acted inconsistently with Article 1.1(a)(1) and with the United States' obligations under Articles 10 and 32.1 of the *SCM Agreement* by determining, in the CWP, LWR, LWS, and OTR investigations, that SOE input suppliers constituted public bodies; and, second, we find that China did not establish that the USDOC acted inconsistently with Article 1.1(a)(1) of the *SCM Agreement* by determining in the OTR investigation that SOCBs constituted public bodies.

(…)

* * *

3. Safeguards

3-1. TREATY TEXT

The GATT provides several exceptions that permit member states to impose extraordinary measures to combat trade emergencies (Article XIX "Emergency Action on Imports of Particular Products," expanded upon by Article 8 of the Agreement on Safeguards) or other measures justified on national security grounds (Article XXI "Security exceptions"). In 2018 the Trump administration invoked these provisions to justify imposing new trade restrictions on imports from several countries, prompting responsive measures by the European Union. Read carefully the provisions below and consider to what extent they permit members to engage in unilateral action to remedy their trade-related concerns. With these texts in mind, evaluate the actions and justifications offered by the United States, and the responsive measures of the European Union.

3-1(a). SAFEGUARDS

GATT Article XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party 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 contracting party 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.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior

consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Agreement on Safeguards Article 8

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

GATT Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

* * *

3-2. TARIFFS IMPOSED BY THE TRUMP ADMINISTRATION UNDER SECTIONS 201 & 232

3-2(a). Section 201 Tariffs on Washing Machines and Solar Cells (Safeguards)

Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules, White House Fact Sheet (footnotes omitted)

On January 22, 2018, U.S. Trade Representative Robert Lighthizer announced that President Trump has approved recommendations to provide relief to U.S. manufacturers and impose safeguard tariffs on imported residential washing machines and solar cells and modules, based on the investigations, findings, and recommendations of the independent, bipartisan U.S. International Trade Commission (ITC).

SECTION 201 CASE: RELIEF REGARDING IMPORTED LARGE RESIDENTIAL WASHING MACHINES (WASHERS)

- From 2012 to 2016, imports of washers into the United States increased dramatically, causing a substantial loss in market share to domestic producers. By 2016, the domestic producers were running multimillion dollar net operating losses.
- During this time, U.S. manufacturers have sought relief against unfair trade practices:
    - In 2011, Whirlpool filed a petition with the U.S. Department of Commerce (Commerce), contending that washer imports from Korea and Mexico were dumped and subsidized as part of an aggressive downward pricing strategy by the large Korean firms, LG and Samsung.
    - In 2013, Commerce issued antidumping and countervailing duties on imported washers benefitting from unfair trading practices. Korean producers LG and Samsung, which make the vast majority of the washers imported into the United States, subsequently shifted production to China.
    - In 2015, Whirlpool sought relief under trade remedy laws after washer imports from China sharply increased. In early 2017, Commerce issued an antidumping order on washers from China. This led to another shift in production, this time to Thailand and Vietnam.
- On June 5, 2017, at Whirlpool's request, the ITC initiated an investigation under Section 201 of the Trade Act of 1974, covering the years 2012-2016, to determine whether increased imports were a substantial cause of serious injury to domestic producers.
- In 2017, both Samsung and LG announced plans to build large factories in Newberry, South Carolina and Clarksville, Tennessee.

SECTION 201 DETERMINATIONS FOR WASHERS

- The ITC determined that increased washer imports are a substantial cause of serious injury and recommended global safeguard tariffs on large residential washing machines.

- Following the investigation and recommendations of the ITC, an interagency team led by USTR sought, through a Federal Register Notice published on November 30, 2017, the written views of all participants in the washer industry and conducted a public hearing on January 3, 2018.
- After consultation with the interagency Trade Policy Staff Committee (TPSC), USTR recommended and the President chose to take action by applying the following additional duties:

Tariff-Rate Quotas on Washers			
	Year 1	Year 2	Year 3
First 1.2m units of imported finished washers	20%	18%	16%
All subsequent imports of finished washers	50%	45%	40%
Tariff of covered parts	50%	45%	40%
Covered parts excluded from tariff	50,000 units	70,000 units	90,000 units

SECTION 201 CASE: RELIEF REGARDING IMPORTED SOLAR CELLS AND MODULES

- From 2012 to 2016, the volume of solar generation capacity installed annually in the United States more than tripled, spurred on by artificially low-priced solar cells and modules from China.
- China's industrial planning has included a focus on increasing Chinese capacity and production of solar cells and modules, using state incentives, subsidies, and tariffs to dominate the global supply chain:
    - China issued the Renewable Energy Law in 2005 to promote renewable energy including solar, followed by capacity targets in 2007. The State Council listed renewable energy as one of seven strategic emerging industries eligible for special incentives and loans in 2010.
    - China has provided subsidies and financing to its solar companies; has encouraged the development of geographic industrial clusters and components of the supply chain; and has conditioned support on increasing efficiency, R&D expenditures, and manufacturing scale.
    - Following these state-directed initiatives, China's share of global solar cell production skyrocketed from 7 percent in 2005 to 61 percent in 2012. China now dominates global supply chain capacity, accounting for nearly 70 percent of total planned global capacity expansions announced in the first half of 2017. China produces 60 percent of the world's solar cells and 71 percent of solar modules.
- During this time, U.S. manufacturers have sought relief against unfair trade practices:
    - In 2011, Commerce found that China had subsidized its producers, and that those producers were selling their goods in the United States for less than their fair market value, all to the detriment of U.S. manufacturers. The United States

imposed antidumping and countervailing duties in 2012, but Chinese producers evaded the duties through loopholes and relocating production to Taiwan.

  - In 2013, domestic producers filed new petitions to address these loopholes and the shift in sourcing. Chinese producers responded by moving production abroad, primarily to Malaysia, as well as Singapore, Germany, and Korea.

- From 2012 to 2016, imports grew by approximately 500 percent, and prices dropped precipitously. Prices for solar cells and modules fell by 60 percent, to a point where most U.S. producers ceased domestic production, moved their facilities to other countries, or declared bankruptcy.
- By 2017, the U.S. solar industry had almost disappeared, with 25 companies closing since 2012. Only two producers of both solar cells and modules, and eight firms that produced modules using imported cells, remained viable. In 2017, one of the two remaining U.S. producers of solar cells and modules declared bankruptcy and ceased production.
- On May 17, 2017, based on a petition from Suniva and later joined by SolarWorld, the ITC instituted an investigation under Section 201 of the Trade Act of 1974 to determine whether increased imports were a substantial cause of serious injury to the domestic industry.

SECTION 201 DETERMINATIONS FOR SOLAR CELLS AND MODULES

- The ITC determined that increased solar cell and module imports are a substantial cause of serious injury to the domestic industry. Although the Commissioners could not agree on a single remedy to recommend, most of them favored an increase in duties with a carve-out for a specified quantity of imported cells.
- Following the investigation and recommendations of the ITC, an interagency team led by USTR sought via Federal Register Notices on October 25, 2017 and November 14, 2017 the views of all participants in the solar industry and conducted a public hearing on December 6, 2017.
- After consultation with the interagency Trade Policy Staff Committee (TPSC), USTR recommended and the President chose to take action by applying the following additional duties:

Safeguard Tariffs on Imported Solar Cells and Modules				
	Year 1	Year 2	Year 3	Year 4
Tariff increase	30%	25%	20%	15%

BACKGROUND ON SECTION 201 INVESTIGATIONS

- Section 201 of the Trade Act of 1974 authorizes the President to take action, in the form of tariffs, tariff rate quotas, quantitative restrictions or other actions, in response to an ITC determination that increased imports are a substantial cause of serious injury to domestic producers.

- The statute instructs the ITC to conduct an investigation to determine whether increased imports are a substantial cause of serious injury to the domestic producers of the merchandise. Factors supporting a finding of serious injury include idle or shuttered production facilities, layoffs and other termination of employment, and a decrease in the financial performance of domestic producers.
- If a majority of the ITC Commissioners reach an affirmative determination of serious injury, the statute calls upon the Commissioners voting in the affirmative to make a recommendation as to what action the President should take.
- The statute directs the President to decide what action to take in response to the ITC's determination and in light of any recommendations.
- The statute requires that any action taken must facilitate a positive adjustment to import competition and provide greater economic and social benefits than costs.

* * *

3-2(b). Section 232 Tariffs on Steel and Aluminum (National Security)

U.S. Department of Commerce, Bureau of Industry and Security, "The Effect of Imports of Steel on The National Security," Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as amended (January 11, 2018) (footnotes omitted)

I. Executive Summary

Overview

This report summarizes the findings of an investigation conducted by the U.S. Department of Commerce (the "Department") pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. §1862 ("Section 232")), into the effect of imports of steel mill products ("steel") on the national security of the United States.

In conducting this investigation, the Secretary of Commerce (the "Secretary") noted the Department's prior investigations under Section 232. This report incorporates the statutory analysis from the Department's 2001 Report with respect to applying the terms "national defense" and "national security" in a manner that is consistent with the statute and legislative intent. As in the 2001 Report, the Secretary in this investigation determined that "national security" for purposes of Section 232 includes the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."

As required under Section 232, the Secretary examined the effect of imports on national security requirements, including: domestic production needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.

The Secretary also recognized the close relation of the economic welfare of the United States to its national security; the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports, without excluding other factors, in determining whether a weakening of the U.S. economy by such imports may impair national security. In particular, this report assesses whether steel is being imported "in such quantities" and "under such circumstances" as to "threaten to impair the national security."

Findings

In conducting the investigation, the Secretary found:

A. Steel is Important to U.S. National Security

1. National security includes projected national defense requirements for the U.S. Department of Defense.

2. National security also encompasses U.S. critical infrastructure sectors including transportation systems, the electric power grid, water systems, and energy generation systems.

3. Domestic steel production is essential for national security applications. Statutory provisions illustrate that Congress believes domestic production capability is essential for defense requirements and critical infrastructure needs, and ultimately to the national security of the United States. U.S. Government actions on steel across earlier Administrations further demonstrate domestic steel production is vital to national security.

4. Domestic steel production depends on a healthy and competitive U.S. industry. The principal types of mills that produce steel are integrated mills with basic oxygen furnaces (BOFs); mini-mills using electric arc furnaces (EAFs); re-roller/converter; and metal coater facilities. Basic oxygen furnaces convert raw materials into steel, and remain critical for continued innovation in steel technology. Covered in this report are five categories of steel products that are used for national security applications: flat, long, semi-finished, pipe and tube, and stainless.

5. The Department found that demand for steel in critical industries has increased since the Department's last investigation in 2001. The 2001 Report determined that there was 33.68 million tons of finished steel consumed in critical industries per year in the United States based on 1997 data. The Department updated that analysis for this report using 2007 data (the latest available) and determined that domestic consumption in critical industries has increased significantly, with 54 million metric tons of steel now being consumed annually in critical industries.

B. Imports in Such Quantities as are Presently Found Adversely Impact the Economic Welfare of the U.S. Steel Industry

1. The United States is the world's largest steel importer. In the first ten months of 2017 steel imports have increased at a double-digit rate over 2016, accounting for more than 30 percent of U.S. consumption. Notwithstanding numerous anti-dumping and countervailing duty orders, which are limited in scope, imports of most types of steel continue to increase.

2. Import penetration levels for flat, semi-finished, stainless, long, and pipe and tube products continue on an upward trend above 30 percent of domestic consumption.

3. Imports are nearly four times U.S. exports.

4. Imports are priced substantially lower than U.S. produced steel.

5. Excessive steel imports have adversely impacted the steel industry. Numerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies illustrate the decline of the U.S. steel industry.

C. Displacement of Domestic Steel by Excessive Quantities of Imports has the Serious Effect of Weakening our Internal Economy

1. As steel imports have increased, U.S. steel production capacity has been stagnant and production has decreased.

2. Since 2000, foreign competition and the displacement of domestic steel by excessive imports have resulted in the closure of six basic oxygen furnace facilities and the idling of four more (which is more than a 50 percent reduction in the number of such facilities), a 35 percent decrease in employment in the steel industry, and caused the domestic steel industry as a whole to operate on average with negative net income since 2009.

3. The declining steel capacity utilization rate is not economically sustainable. Utilization rates of 80 percent or greater are necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector.

D. Global Excess Steel Capacity is a Circumstance that Contributes to the Weakening of the Domestic Economy

1. In the steel sector, free markets globally are adversely affected by substantial chronic global excess steel production led by China. The world's nominal crude steelmaking capacity reached about 2.4 billion metric tons in 2016, an increase of 127 percent compared to the capacity level in 2000, while steel demand grew at a much smaller rate. In 2016 there was a 737 million metric ton global gap between steelmaking capacity and steel crude demand, which means there is unlikely to be any market-driven reduction in steel exports to the United States in the near future.

2. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined. This overhang of excess capacity means that U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives and offset loss of markets to Chinese steel exports.

Conclusion

Based on these findings, the Secretary of Commerce concludes that the present quantities and circumstance of steel imports are "weakening our internal economy" and threaten to impair the national security as defined in Section 232. The Secretary considered the Department's narrower investigation of iron ore and semifinished steel imports in 2001, which recommended no action be taken, and finds that several important factors – the broader scope of the investigation, the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities since 2001, and the potential impact of further plant closures on capacity needed in a national emergency, support recommending action under Section 232. In light of this conclusion, the Secretary has determined that the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.

Recommendation

Prior significant actions to address steel imports using quotas and/or tariffs were taken under various statutory authorities by President George W. Bush, President William J. Clinton (three times), President George H. W. Bush, President Ronald W. Reagan (three times), President James E. Carter (twice), and President Richard M. Nixon, all at lower levels of import penetration than the present level, which is greater than 30 percent.

Due to the threat, as defined in Section 232, to national security from steel imports, the Secretary recommends that the President take immediate action by adjusting the level of these imports through quotas or tariffs. The quotas or tariffs imposed should be sufficient, even after any exceptions (if granted), to enable U.S. steel producers to operate at an 80 percent or better average capacity utilization rate based on available capacity in 2017 (…).

* * *

3-3. RESPONSE OF THE EUROPEAN UNION

EU Commission Regulation 2018/724 (Retaliation for US Steel Tariffs)

Commission Implementing Regulation (EU) 2018/724 of 16 May 2018, On certain commercial policy measures concerning certain products originating in the United States of America (footnotes omitted)

THE EUROPEAN COMMISSION

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, and in particular Article 4(1) thereof,

Whereas:

(1) On 8 March 2018 the United States of America ('United States') adopted safeguard measures in the form of a tariff increase on imports of certain steel and aluminium products, effective from 23 March 2018 and with an unlimited duration. On 22 March the effective date of the tariff increase with respect to the European Union was deferred to 1 May 2018.

(2) Notwithstanding the United States' characterisation of these measures as security measures, they are in essence safeguard measures. They consist of remedial action that disturbs the balance of concessions and obligations resulting from the World Trade Organisation ('WTO') Agreement and restricts imports for the purpose of protecting domestic industry against foreign competition, for the sake of that industry's commercial prosperity. The security exceptions of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') do not apply to or justify such safeguard measures, and have no bearing on the right of rebalancing under the relevant provisions of the WTO Agreement.

(3) The WTO Agreement on Safeguards provides for the right of any exporting Member affected by a safeguard measure to suspend the application of substantially equivalent concessions or other obligations to the trade of the WTO Member applying the safeguard measure, provided that no satisfactory solution is reached in consultations and the WTO Council for Trade in Goods does not disapprove.

(4) Consultations between the United States and the Union as envisaged in Articles 8 and 12.3 of the WTO Agreement on Safeguards did not reach any satisfactory solution.

(5) The suspension by the Union of substantially equivalent concessions or other obligations should take effect following the expiration of 30 days after its notification to the Council for Trade in Goods, unless the Council for Trade in Goods disapproves. The WTO Agreement allows for the right of suspension to be exercised (a) immediately, provided that the safeguard measure has not been taken as a result of an absolute increase in imports, or does not conform to the relevant provisions of the WTO Agreement; or (b) after the expiry of a period of three years as from the application of the safeguard measure.

(6) The Commission exercises the right to suspend the application of substantially equivalent concessions or other obligations with the intention of rebalancing concessions or other

obligations in the trade relations with third countries, on the basis of Article 4(1) of Regulation (EU) No 654/2014. The appropriate action takes the form of commercial policy measures which may consist of, inter alia, the suspension of tariff concessions and the imposition of new or increased customs duties.

(7) In designing and selecting appropriate commercial policy measures, the Commission applies objective criteria in accordance with Article 4(2)(c) and Article 4(3) of Regulation (EU) No 654/2014, including as relevant the proportionality of any measures, their potential to provide relief to the Union industries affected by the safeguard measures, and the aim of minimising negative economic impact on the Union, including with regard to essential raw materials.

(8) In accordance with Article 9 of Regulation (EU) No 654/2014, the Commission provided an opportunity for stakeholders to express their views and submit information regarding the Union's economic interests in this respect.

(9) The United States' safeguard measures are capable of having a considerable negative economic impact on the Union industries concerned. They would significantly limit Union exports of the steel and aluminium products concerned to the United States. The affected Union imports of the relevant steel and aluminium products into the United States are worth at least EUR 6,41 billion in 2017 (of which EUR 5,30 billion is total steel imports and EUR 1,11 billion is total aluminium imports).

(10) Therefore, a suspension of trade concessions on certain products up to a level which reflects and does not exceed the amount that would result from the application of the United States' duties to the imports of the steel and aluminium products from the Union into the United States represents an appropriate suspension of the application of substantially equivalent trade concessions in line with the WTO Agreement on Safeguards.

(11) Subsequently, with a separate implementing act, the Commission may decide to implement the suspension of the application of trade concessions, if necessary or to the extent necessary, through the application of additional customs duties on certain products originating in the United States imported into the Union. The Commission should decide on the scope of the application, and reflecting the timing requirements described in recital (5), depending on whether the United States excludes certain products or companies from the safeguard measures.

(12) Reflecting the timing requirements described in recital (5), the additional customs duties should apply, if necessary or to the extent necessary, in two stages. At the first stage, *ad valorem* duties of a maximum rate of 25 % on imports of the products listed in Annex I, may be applied immediately and until the United States ceases to apply its safeguard measures to products from the Union.

(13) The total amount of ad valorem duties at the first stage reflects the United States' tariff increase of 25 % on imports of ‘carbon and alloy flat products’ and ‘carbon and alloy long products’ from the Union into the United States (EUR 2,83 billion total value of Union imports into the United States in 2017). These are the steel products for which the United States' safeguard measures have not been taken as a result of an absolute increase in imports.

(14) At the second stage, further additional ad valorem duties of a maximum rate of 10%, 25%, 35% and 50% on imports of the products listed in Annex II, may be applied as from

23 March 2021 or upon the adoption by, or notification to, the WTO Dispute Settlement Body of a ruling that the United States' safeguard measures are inconsistent with the relevant provisions of the WTO Agreement, if that is earlier, until the United States' safeguard measures cease to apply.

(15) The total amount of ad valorem duties at the second stage reflects the United States' tariff increase of 10 % on imports of the aluminium products and of 25 % on imports of 'carbon and alloy pipe and tube products', 'carbon and alloy semi-finished products' and 'stainless steel products' from the Union into the United States (EUR 3,58 billion total value of Union imports into the United States in 2017 of which EUR 2,47 billion is steel imports and EUR 1,11 billion is aluminium imports). These are the products for which there appears to have been an absolute increase in imports.

(16) The commercial policy measures and the products concerned have been selected in accordance with the criteria of Article 4(2)(c) and (3) of Regulation (EU) No 654/2014.

(17) By not exceeding the value of the Union imports affected by the United States' safeguard measures as described in recitals (9) and (10), the commercial policy measures are proportionate to the effect of the United States' safeguard measures and not excessive. It is also noted that only a fraction of the total value available will be initially exercised, as described in recitals (12) and (13).

(18) The commercial policy measures should provide some relief to the steel and aluminium Union industries affected by the United States' safeguard measures.

(19) The commercial policy measures should apply to imports of products originating in the United States on which the Union is not substantially dependent for its supply. The commercial policy measures may also apply with respect to the steel and aluminium sectors. This approach avoids as much as possible a negative impact on the various actors on the Union market, including consumers.

(20) Products for which an import licence with an exemption from or a reduction of duty has been issued prior to the date entry into force of this regulation should not be subject to these additional customs duties.

(21) Products for which the importers can prove that they have been exported from the United States to the Union prior to the date of application of the additional customs duties should not be subject to the additional customs duties.

(22) This Regulation is without prejudice to the question of the consistency of the United States' safeguard measures with the relevant provisions of the WTO Agreement.

(23) In light of the applicable WTO time limits and the preliminary nature of this act, it is appropriate that it should enter into force on the day on which it is published in the *Official Journal of the European Union*.

(24) The measures provided for in this Regulation are in accordance with the opinion of the Trade Barriers Committee, established by Regulation (EU) 2015/1843 of the European Parliament and of the Council,

HAS ADOPTED THIS REGULATION:

Article 1

The Commission shall immediately, and in any event no later than 18 May 2018, give written notice to the WTO Council for Trade in Goods that, absent disapproval by the Council for Trade in Goods, the Union suspends, from 20 June 2018, the application to the trade of the United States of import duty concessions under the GATT 1994 in respect of the products listed in Annex I and Annex II, so as to allow for an application of additional customs duties on the importation of these products originating in the United States.

Article 2

The application of additional customs duties on these products, through a subsequent Commission implementing act, shall be effected within the following parameters, and take into account any subsequent exclusion of certain products or companies from the safeguard measures by the United States:

(a) At the first stage, additional *ad valorem* duty of a maximum rate of 25 % may be applied on imports of products listed in Annex I from 20 June 2018.

(b) At the second stage, further additional *ad valorem* duty of a maximum rate of 10 %, 25 %, 35 % or 50 % may be applied on imports of products listed in Annex II:

— from 23 March 2021, or

— from the fifth day following the date of the adoption by, or notification to, the WTO Dispute Settlement Body of a ruling that the United States' safeguard measures are inconsistent with the relevant provisions of the WTO Agreement, if that is earlier. In the latter event, the Commission shall publish in the *Official Journal of the European Union* a notice indicating the date on which such ruling is adopted or notified.

Article 3

The suspension provided for in Article 1 may be exercised as long as, and to the extent that, the United States applies or re-applies its safeguard measures in a manner that would affect products from the Union. The Commission shall publish in the *Official Journal of the European Union* a notice indicating the date on which the United States has ceased to apply its safeguard measures.

Article 4

1. Products listed in the Annexes for which an import licence with an exemption from or a reduction of duty has been issued prior to the date of entry into force of this regulation shall not be subject to additional duty.

2. Products listed in the Annexes for which the importers can prove that they have been exported from the United States to the Union prior to the date on which an additional duty is applied with respect to that product shall not be subject to the additional duty.

Article 5

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 May 2018.

* * *

4. Unilateral Investigations

4-1. PANEL REPORT, U.S.—SECTIONS 301-310 OF THE TRADE ACT (22 DECEMBER 1999)

Recall from Unit I the Panel Report in U.S.—Sections 301-310 of the Trade Act *(22 December 1999). The excerpt of this Report in Unit I concerned the overall objectives of the WTO in general, and the object and purpose of the Dispute Settlement Understanding (DSU) in particular. Recall that the Panel determined that Sections 301–310 of the Trade Act were inconsistent with the obligations of the DSU—particularly Article 23, which requires that disputes over obligations under the WTO Agreements be resolved exclusively through the procedural provisions of the DSU—insofar as these provisions empower the United States Trade Representative (USTR) to unilaterally investigate and take enforcement action against other WTO member states for alleged violations of the WTO Agreements. In the Panel's view, merely maintaining these provisions "on the books" could constitute a violation of the Dispute Settlement Understanding, whether or not they were actually applied in a concrete case.*

Panel Report, WT/DS152/R, 22 December 1999 (footnotes omitted)
Panel: Hawes, Johannessen, Weiler

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm

(…)

VII. Findings

(…)

7.88. When a Member imposes unilateral measures in violation of [DSU] Article 23 in a specific dispute, serious damage is created both to other Members and the market-place. However, in our view, the creation of damage is not confined to actual conduct in specific cases. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may – as is the case here – constitute an ongoing threat and produce a "chilling effect" causing serious damage in a variety of ways.

7.89. First, there is the damage caused directly to another Member. Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal

protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.

7.90. Second, there is the damage caused to the market-place itself. The mere fact of having legislation the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. The damage thus caused to the market-place may actually increase when national legislation empowers individual economic operators to trigger unilateral State action, as is the case in the US which allows individual petitioners to request the USTR to initiate an investigation under Sections 301-310. This in itself is not illegal. But the ability conferred upon economic operators to threaten their foreign competitors with the triggering of a State procedure which includes the possibility of illegal unilateral action is another matter. It may affect their competitive economic relationship and deny certain commercial advantages that foreign competitors would otherwise have. The threat of unilateral action can be as damaging on the market-place as the action itself.

7.91. In conclusion, the risk of discrimination was found in GATT jurisprudence to constitute a violation of Article III of GATT – because of the "chilling effect" it has on economic operators. The risk of a unilateral determination of inconsistency as found in the statutory language of Section 304 itself has an equally apparent "chilling effect" on both Members and the market-place even if it is not quite certain that such a determination would be made. The point is that neither other Members nor, in particular, individuals can be reasonably certain that it will not be made. Whereas States which are part of the international legal system may expect their treaty partners to assume good faith fulfillment of treaty obligations on their behalf, the same assumption cannot be made as regards individuals.

7.92. It is a circumspect use of the teleological method to choose that interpretation of Article 23 of the DSU that provides this certainty and eliminates the undesired "chilling effects" which run against the object and purpose of the WTO Agreement.

(…)

7.97. Therefore, pursuant to our examination of text, context and object-and-purpose of Article 23.2(a) we find, at least *prima facie*, that the statutory language of Section 304 precludes compliance with Article 23.2(a). This is so because of the nature of the obligations under Article 23. Under Article 23 the US promised to have recourse to and abide by the DSU rules and procedures, specifically not to resort to unilateral measures referred to in Article 23.2(a). In Section 304, in contrast, the US statutorily reserves the right to do so. In our view, because of that, the statutory language of Section 304 constitutes a *prima facie* violation of Article 23.2(a).

(…)

(c) US Statements before this Panel

(…)

7.115. The international legal relevance of the US commitments in the SAA were confirmed and amplified also in the context of the very proceedings before this Panel. In response to our very insistent questions, the US explicitly, officially, repeatedly and unconditionally confirmed the commitment (…) that the USTR would "… base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB".

7.116. The US confirmed this for the record during the first meeting with the parties before the Panel. Subsequently, answering Panel Question 14, the US stated the following:

> "With regard to determinations under Section 304, as noted in paragraphs 12 and 41 of the U.S. First Submission, and as provided at page 365 of the Statement of Administrative Action [SAA] (…), the Trade Representative is required under Section 304(a)(1) to base a determination of whether agreement rights have been denied on the results of WTO dispute settlement proceedings. Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the Trade Representative would not be able to make a determination that U.S. agreement rights have been denied".

7.117. Whilst we have rejected the view that the statutory language of Section 304 itself precludes a determination of inconsistency, we fully accept the power of the US Administration to determine that it is its duty to exercise the discretion given to it by the statutory language in a way consistent with WTO obligations, to make this duty, through the SAA, official US policy for future Administrations, and, in turn, for the USTR, as part of the US Administration, to perceive it as its legal duty to follow such a policy.

7.118. Attributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions. Although the legal effects we are ascribing to the US statements made to the DSB through this Panel are of a more narrow and limited nature and reach compared to other internationally relevant instances in which legal effect was given to unilateral declarations, we have conditioned even these limited effects on the fulfilment of the most stringent criteria. A sovereign State should normally not find itself legally affected on the international plane by the casual statement of any of the numerous representatives speaking on its behalf in today's highly interactive and interdependent world nor by a representation made in the heat of legal argument on a State's behalf. This, however, is very far from the case before us.

(…)

7.121. The statements made by the US before this Panel were a reflection of official US policy, intended to express US understanding of its international obligations as incorporated in domestic US law. The statements did not represent a new US policy or undertaking but the bringing of a pre-existing US policy and undertaking made in a domestic setting into an international forum.

7.122. The representations and statements by the representatives of the US appearing before us were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect.

7.123. We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. Panel proceedings are part of the DSB dispute resolution process. It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could not be presumed.

7.124. We are equally satisfied, as a matter of fact, that the statements made to us were intended to be part of the record in the full knowledge and understanding that they could, as any other official submission, be made part of our Report; that they were made with the intention not only that we rely on them but also that the EC and the third parties to the dispute as well as all Members of the DSB – effectively all WTO Members – place such reliance on them.

7.125. Accordingly, we find that these statements by the US express the unambiguous and official position of the US representing, in a manner that can be relied upon by all Members, an undertaking that the discretion of the USTR has been limited so as to prevent a determination of inconsistency before exhaustion of DSU proceedings. Although this representation does not create a new international legal obligation for the US – after all the US was already bound by Article 23 in becoming a WTO Member – it clarifies and gives an undertaking, at an international level, concerning aspects of domestic US law, in particular, the way the US has implemented its obligations under Article 23.2(a) of the DSU.

7.126. The aggregate effect of the SAA and the US statements made to us is to provide the guarantees, both direct to other Members and indirect to the market place, that Article 23 is intended to secure. Through the SAA and the US statements, as we have construed them, it is now clear that under Section 304, taking account of the different elements that compose it, the USTR is precluded from making a determination of inconsistency contrary to Article 23.2(a). As a matter of international law, the effect of the US undertakings is to anticipate, or discharge, any would-be State responsibility that could have arisen had the national law under consideration in this case consisted of nothing more than the statutory language. It of course follows that should the US repudiate or remove in any way these undertakings, the US would incur State responsibility since its law would be rendered inconsistent with the obligations under Article 23.

* * *

4-2. TRUMP ADMINISTRATION SECTION 301 ACTIONS ON CHINA (2018–2019).

Office of the United States Trade Representative, *Findings of the Investigation into China's Acts, Policies, and Practices related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974,* March 22, 2018 (footnotes omitted)

I. Overview

A. Core Elements of Section 301

This investigation has been brought under Section 301 of the Trade Act of 1974, as amended (the Trade Act). Section 301 is a key enforcement tool that may be used to address a wide variety of unfair acts, policies, and practices of U.S. trading partners. Section 301 sets out three categories of acts, policies, or practices of a foreign country that are potentially actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and that burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce. The third category of conduct is most relevant to this investigation.

Section 301 defines "discriminatory" to "include, when appropriate, any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment." An "unreasonable" act, policy, or practice is one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable." The statute further provides that in determining if a foreign country's practices are unreasonable, reciprocal opportunities to those denied U.S. firms "shall be taken into account, to the extent appropriate."

If the USTR determines that the Section 301 investigation "involves a trade agreement," and if that trade agreement includes formal dispute settlement procedures, USTR may pursue the investigation through consultations and dispute settlement under the trade agreement. Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

Moreover, if the USTR determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the USTR must also determine what action, if any, to take. For example, if the USTR determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce,

> The Trade Representative shall take all appropriate and feasible action authorized under [Section 301(c)], subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.

Actions specifically authorized under Section 301(c) include: (i) suspending, withdrawing or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country for such time as deemed appropriate; (iii) withdrawing or suspending preferential duty treatment under a preference program; (iv) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (v) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States. In addition to

these specifically enumerated actions, the USTR may take any actions that are "within the President's power with respect to trade in goods or services, or with respect to any other area of pertinent relations with the foreign country."

B. Background to the Investigation

On August 14, 2017, the President issued a Memorandum to the Trade Representative stating *inter alia* that:

> China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.

The President instructed USTR to determine under Section 301 whether to investigate China's law, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.

Concerns about a wide range of unfair practices of the Chinese government (and the Chinese Communist Party (CCP)) related to technology transfer, intellectual property, and innovation are longstanding. USTR has pursued these issues multilaterally, for example, through the WTO dispute settlement process and in WTO committees, and bilaterally through the annual Special 301 review. These issues also have been raised in bilateral dialogues with China, including the U.S.-China Joint Commission on Commerce and Trade (JCCT) and U.S.-China Strategic & Economic Dialogue (S&ED), to attempt to address some of the U.S. concerns.

1. Initiation of the Investigation

USTR initiated this investigation on August 18, 2017 after consultation with the interagency Section 301 committee and private sector advisory committees. On that same date, USTR also requested consultations with the Government of China. China's Minister of Commerce responded to this letter on August 28, opposing the initiation of a Section 301 investigation.

The *Federal Register Notice* described the focus of the investigation as follows:

> **First**, the Chinese government reportedly uses a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, and other mechanisms to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies. Moreover, many U.S. companies report facing vague and unwritten rules, as well as local rules that diverge from national ones, which are applied in a selective and non-transparent manner by Chinese government officials to pressure technology transfer.
>
> **Second**, the Chinese government's acts, policies and practices reportedly deprive U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China. For example, the Regulations on Technology Import and Export Administration mandate particular terms for indemnities and ownership of

technology improvements for imported technology, and other measures also impose nonmarket terms in licensing and technology contracts.

Third, the Chinese government reportedly directs and/or unfairly facilitates the systematic investment in, and/or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, the investigation will consider whether the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information, and whether this conduct harms U.S. companies or provides competitive advantages to Chinese companies or commercial sectors.

In addition to these four types of conduct, interested parties could submit for consideration information on other acts, policies and practices of China relating to technology transfer, intellectual property, and innovation for potential inclusion in this investigation or to be addressed through other applicable mechanisms.

The terms "technology" and "technology transfer" are key concepts in this investigation. They are defined in Box I.1.

Box I.1: Technology and Technology Transfer Defined

Technology is defined broadly in this investigation to include knowledge and information needed to produce and deliver goods and services, as well as other methods and processes used to solve practical, technical or scientific problems. In addition to information protected by patents, copyrights, trademarks, trade secrets, and other types of intellectual property (IP) protections, the term also includes "know-how", such as production processes, management techniques, expertise, and the knowledge of personnel.

Technology and innovation are critical factors in maintaining U.S. competitiveness in the global economy. Among all major economies, the United States has the highest concentration of knowledge- and technology-intensive industries as a share of total economic activity. And in high-tech manufacturing, the United States leads the world with a global share of production of 29 percent, followed by China at 27 percent.

Technology transfers made on voluntary and mutually-agreed terms, and without government interference or distortion, are critical to the U.S. economy. In fact, U.S. companies are global leaders in the transfer of technology through legal mechanisms such as trade in high-tech goods and services; the licensing of technology to companies and persons abroad; and foreign direct investment (FDI). (…)

2. China's Bilateral Commitments to End its Technology Transfer Regime and to Refrain from State-Sponsored Cyber Intrusions and Theft

In the bilateral relationship, China repeatedly has committed to eliminate aspects of its technology transfer regime. On at least eight occasions since 2010, the Chinese government has committed not to use technology transfer as a condition for market access and to permit technology transfer decisions to be negotiated independently by businesses. China has further

committed not to pressure the disclosure of trade secrets in regulatory or administrative proceedings. The evidence adduced in this investigation establishes that China's technology transfer regime continues, notwithstanding repeated bilateral commitments and government statements (…).

3. Input from the Public

USTR provided the public and interested persons with opportunities to present their views and perspectives on the issues highlighted in the Federal Register Notice, including through a public hearing on October 10, 2017. Witnesses with varied interests and perspectives testified and responded to questions from the interagency Section 301 committee including representatives of U.S. companies and workers, trade and professional associations, and think tanks, as well as law firms and representatives of trade and professional associations headquartered in China. Interested persons also filed approximately 70 written submissions in the public docket for this investigation.

As U.S. companies have stated for more than a decade, they fear that they will face retaliation or the loss of business opportunities if they come forward to complain about China's unfair trade practices. Concerns about Chinese retaliation arose in this investigation as well. Multiple submissions noted the great reluctance of U.S. companies to share information on China's technology transfer regime, given the importance of the China market to their businesses and the fact that Chinese government officials are "not shy about retaliating against critics."

For example, a representative of the Commission on the Theft of American Intellectual Property testified at the hearing: "American companies are intimidated and reticent over the issue, especially in China. There they risk punishment by a powerful and opaque Chinese regulatory system." In addition, according to the U.S. China Business Council, their member companies do not presently have "reliable channel[s] to report abuses and to appeal adverse decisions…without fear of retaliation." Similarly, a representative of SolarWorld stated that "many other companies face the same issues of cyber-hacking and technology theft that [it] has faced, but are unwilling to come forward publicly due to fear of lost sales or retaliation by China."

Because USTR self-initiated this action, no particular company or group of companies was required to step forward and file a Section 301 petition to initiate this investigation. Moreover, in making this determination, USTR and the interagency Section 301 committee took into account not just investigation submissions and testimony but also public reports, scholarly articles, and other reliable information. In addition, business confidential information has been provided and considered as part of the record in this investigation, so that companies could share sensitive information without the threat of business loss or retaliation.

C. China's Technology Drive

Official publications of the Chinese government and the CCP set out China's ambitious technology-related industrial policies. These policies are driven in large part by China's goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The industrial policies reflect a top-down, state-directed approach to technology development and are founded on concepts such as "indigenous innovation" and "re-innovation" of foreign technologies, among others. The Chinese government regards technology development as integral to its economic development and seeks to attain domestic dominance and global leadership in a wide range of technologies for economic and national security reasons. China accordingly seeks to reduce its dependence on technologies from other countries and move up the value chain, advancing from low-cost manufacturing to become

a "global innovation power in science and technology." In pursuit of this overarching objective, China has issued a large number of industrial policies, including more than 100 five-year plans, science and technology development plans, and sectoral plans over the last decade. (…)

(…)

As detailed in Sections II through VI of this report, a key part of China's technology drive involves the acquisition of foreign technologies through acts, policies, and practices by the Chinese government that are unreasonable or discriminatory and burden or restrict U.S. commerce. These acts, policies, and practices work collectively as part of a multi-faceted strategy to advance China's industrial policy objectives. They are applied across a broad range of sectors, overlap in their use of policy tools (e.g., the issuance of planning documents and guidance catalogues), and are implemented through a diverse set of state and state-backed actors, including state-owned enterprises.

- Section II describes the Chinese government's use of foreign ownership restrictions, such as joint venture (JV) requirements and foreign equity limitations, other foreign investment restrictions, and the administrative licensing and approvals process to require or pressure the transfer of technology from U.S. companies to Chinese entities.
- Section III describes how U.S. companies seeking to license technologies to Chinese entities must do so on non-market-based terms that favor Chinese recipients.
- Section IV describes how the Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese entities, to obtain cutting-edge technologies and intellectual property and generate largescale technology transfer in industries deemed important by state industrial plans.
- Section V describes how the Chinese government has conducted or supported cyber intrusions into U.S. commercial networks targeting confidential business information held by U.S. firms. Through these cyber intrusions, China's government has gained unauthorized access to a wide range of confidential business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.
- Section VI describes other acts, policies, and practices of by the Chinese government to acquire foreign technologies, including measures purportedly related to national security or cybersecurity, inadequate intellectual property protection, the Antimonopoly Law of the People's Republic of China, the Standardization Law of the People's Republic of China, and talent acquisition.

Editorial note: Following the conclusion of the USTR's Section 301 investigation, the Trump administration imposed additional tariffs on a range of Chinese imports. The USTR initially determined that imposing tariffs with an annual trade value of $50 billion would be an appropriate response, which over 2018 and 2019 the Trump administration expanded to trade actions covering several hundred billion dollars. After a four-year review in 2022, the Biden administration extended and expanded these tariffs.

4-3. BIDEN ADMINISTRATION SECTION 301 ACTIONS ON CHINA (2022-2024)

President Joseph R. Biden Jr., *Memorandum for the United States Trade Representative, Actions by the United States Related to the Statutory 4-Year Review of the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, May 14, 2024.

On May 5, 2022, the United States Trade Representative (Trade Representative) initiated the statutory 4-year review of the July 6, 2018, and the August 23, 2018, actions, as modified (two actions), taken under section 301 of the Trade Act of 1974, as amended (19 U.S.C. 2411) (Trade Act), in the investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (section 301 investigation). The July 6, 2018, and the August 23, 2018, actions were subsequently modified by imposing additional duties on supplemental lists of products, as well as by the temporary removal of duties on certain products through product exclusions. The Trade Representative initiated the May 5, 2022, review of the two actions under section 307(c)(3) of the Trade Act (19 U.S.C. 2417(c)(3)).

During its review, the Office of the United States Trade Representative (USTR) sought and received approximately 1,500 written submissions. Pursuant to section 307(c)(3) of the Trade Act (19 U.S.C. 2417(c)(3)), and based on information obtained during the review, including the written submissions, USTR and the section 301 Committee prepared a comprehensive report on the effectiveness of the two actions in achieving the objectives of the investigation, other actions that could be taken, and the effects of such actions on the United States economy, including consumers.

The Trade Representative has advised me on the findings in the review, and taking into consideration these findings, I find as follows:

First, while imposition of tariffs under section 301 of the Trade Act (section 301 tariffs) has been effective in encouraging China to take positive steps in addressing the issues identified in the section 301 investigation, such as certain revisions in its foreign investment and administrative licensing laws, China's actions do not represent a systematic and sustained response to the issues raised in the section 301 investigation.

Second, China has not eliminated many of the technology transfer-related acts, policies, and practices at issue, nor removed their burden or restriction on United States commerce.

Third, although China has taken limited measures to address negative perceptions of its technology transfer-related acts, policies, and practices, it continues to aggressively attempt to acquire and absorb foreign technology and intellectual property, particularly through cyber intrusions and cybertheft, adding to the burden or restriction on United States commerce.

Fourth, the section 301 tariffs have been effective to an extent in reducing the exposure of United States persons and commerce to China's acts, policies, and practices at issue.

Fifth, additional section 301 tariffs would provide incentives for China to eliminate the acts, policies, and practices at issue.

It is hereby directed as follows:

Section 1. Tariffs. (a) The Trade Representative shall maintain, as appropriate and consistent with this memorandum, the ad valorem rates of duty and lists of products subject to the two actions,

taken under the section 301 investigation. To further encourage China to eliminate the acts, policies, and practices at issue, and to counteract the burden or restriction of these acts, policies, and practices, the Trade Representative shall modify the two actions to increase section 301 ad valorem rates of duty for the following products from China:

- Battery parts (non-lithium-ion batteries): Increase rate to 25 percent in 2024;
- Electric vehicles: Increase rate to 100 percent in 2024;
- Lithium-ion electrical vehicle batteries: Increase rate to 25 percent in 2024;
- Lithium-ion non-electrical vehicle batteries: Increase rate to 25 percent in 2026;
- Natural graphite: Increase rate to 25 percent in 2026;
- Other critical minerals: Increase rate to 25 percent in 2024;
- Permanent magnets: Increase rate to 25 percent in 2026;
- Semiconductors: Increase rate to 50 percent in 2025;
- Ship to shore cranes: Increase rate to 25 percent in 2024;
- Solar cells (whether or not assembled into modules): Increase rate to 50 percent in 2024; and
- Steel and aluminum products: Increase rate to 25 percent in 2024.

For personal protective equipment (facemasks, medical gloves, and syringes and needles), the Trade Representative is directed to increase rates of duty to no less than the rates indicated:

- Facemasks: Increase rate to 25 percent in 2024;
- Medical gloves: Increase rate to 25 percent in 2026; and
- Syringes and needles: Increase rate to 50 percent in 2024.

(b) To advance the purposes of subsection (a) of this section, the Trade Representative shall publish a proposed list of products and corresponding tariff increases. After a period of notice and comment in accordance with section 307(a) of the Trade Act (19 U.S.C. 2417(a)), and after consultation with appropriate agencies and committees, the Trade Representative shall, as appropriate and consistent with law, publish a final list of products and tariff increases, if any, and implement any such tariffs.

(c) The Trade Representative shall also establish a process by which interested persons may request that particular machinery used in domestic manufacturing classified within a subheading under chapters 84 and 85 of the Harmonized Tariff Schedule of the United States be temporarily excluded from section 301 tariffs, and shall prioritize, in particular, exclusions for certain solar manufacturing equipment. USTR shall publish a separate notice describing the machinery exclusion process, including the procedures for submitting exclusion requests and for interested persons to oppose any such requests.

Sec. 2. Publication. The Trade Representative is authorized and directed to publish this memorandum in the *Federal Register*.

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